

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2026 -P-0649

BENJAMIN EDELMAN,

Plaintiff-Appellant,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Defendant-Appellee.

On Appeal from a Judgment of the Suffolk Superior Court

PRINCIPAL BRIEF OF PLAINTIFF-APPELLANT
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I. INTRODUCTION

In 2015, Harvard Business School (“HBS”) established a new procedure for reviewing faculty conduct. The procedure created a Faculty Review Board (“FRB”) tasked with informing the subject faculty member of the allegation it would investigate, gathering evidence, and providing the faculty member with “the evidence gathered” before creating a report. In 2017, during his candidacy for tenure, HBS reviewed Plaintiff Benjamin Edelman’s conduct using this procedure. But the FRB omitted crucial steps intended to ensure the process’s fairness. Without notice of key allegations or access to the evidence, Edelman was materially hindered in his defense, unable to rebut the anonymous criticisms and misleading claims in the FRB’s report. The supposedly-unbiased FRB sought in bad faith to ensure Edelman’s candidacy was not successful. Despite his otherwise unusually strong qualifications for tenure, they succeeded. A jury should decide whether Harvard breached contractual commitments or the implied covenant of good faith.

II. STATEMENT OF ISSUES

1. Whether a jury could find that, based on the text and context of Harvard's FRB Procedures, Edelman had a reasonable expectation that Harvard would afford the procedural protections promised in that policy in the conduct of his review related to tenure.
2. Whether a jury could find that Harvard breached promised procedural protections.
3. Whether a jury could find that Harvard violated the implied covenant of good faith and fair dealing.
4. Whether a jury could find that Edelman was harmed by HBS's violations of the personnel policy and its breach of the implied covenant.

III. STATEMENT OF THE CASE

Edelman, formerly an Associate Professor at HBS, brought suit against Defendant President and Fellows of Harvard College ("Harvard") on February 14, 2023. Edelman asserted claims of breach of contract, violation of the implied covenant of good faith and fair dealing, and promissory estoppel, all based on an HBS FRB's determination that he failed to satisfy its "community values" for tenure. Edelman claimed that a personnel policy enacted by HBS, "Principles and Procedures for

Responding to Matters of Faculty Conduct” (“FRB Procedures”) (JA 366-369), had the force of contract. He claimed that the FRB violated the FRB Procedures’ protections, including *inter alia* the right to respond to the FRB’s draft report armed with “the evidence gathered.” Edelman claimed that he would have been recommended for tenure, had it not been for the FRB’s breaches.

Harvard filed a Motion to Dismiss (RAI/11) which the Superior Court denied in full (*id.*). On April 22, 2025, Edelman filed an Amended Complaint, adding a claim that HBS further violated the FRB Procedures by permitting its Standing Committee (“SC”) to consider the FRB report. (RAIV/6.)

Following discovery, the parties filed cross-motions for summary judgment. Edelman filed a Motion for Partial Summary Judgment as to breach of contract. (RAI/14.) Harvard filed a Motion for Summary Judgment on all of Edelman’s claims. (*Id.*)

The Superior Court (Salinger, J.) entered its Decision and Order on Cross-Motions for Summary Judgment on February 17, 2026, granting Harvard’s motion and denying Edelman’s cross-motion. (Add.69.) The Superior Court first determined as a matter of law that

the FRB Procedures were not contractually binding. (Add.86.) Second, interpreting the Procedures as inapplicable to Edelman's review, the Superior Court ruled that Edelman's contract claim would fail even if the Procedures were contractually binding. (Add.92.) Third, the Superior Court ruled that Edelman's contract claim would fail even were the FRB Procedures both binding and violated because he could not show that he was harmed. (Add.100.) For essentially the same reasons, the Superior Court held as a matter of law that Edelman could not show HBS breached the implied covenant and could not show harm were a breach established. (Add.102.) Finally, the Superior Court determined that Edelman's claim of promissory estoppel added nothing to his implied covenant claim. (Add.104.) Edelman timely filed a notice of appeal on March 18, 2026. (RAIV/447.)

IV. STATEMENT OF FACTS

A. EDELMAN'S CANDIDACY FOR TENURE

In 2007, Edelman joined the HBS faculty as a tenure-track professor. Edelman held a *summa cum laude* A.B. degree, an A.M. in Statistics, a J.D., and a Ph.D. in Economics, all from Harvard. (RAIII/53.) Joining the HBS faculty at age 26 (*id.*), he was already

known for the first mathematical model of Google's lucrative advertising auction. (RAIII/56.) His research explored competition, policy, and fraud in online market design and networked businesses. (RAIII/65.)

Beyond academic research, Edelman used his unique background to improve the systems he studied, making them better both for companies and consumers. (RAIII/58, RAI/347-355.) For example, he discovered that Google tracked users' browsing even when "private mode" promised not to; demonstrated that Yahoo intentionally ran third-party advertisements that the company itself deemed deceptive; and uncovered a scheme to convert normal web sites into adult material, targeting sites often used by kids. (RAI/354-355.) Edelman did not just write up the problems he uncovered; he made referrals to law enforcement, yielding significant cases by FTC and attorneys general. (*Id.*)

Between 2007 and 2014, Edelman thrived at HBS. His academic work was widely read and highly praised: Reviewers in the tenure process said one paper was a "complete home run," "justifiably famous," "economic theory at its best" and showing "very deep knowledge."

(RAIII/58-59.) His body of work was called “truly exceptional,” with “exceptional impact,” including a single paper taught by two different Nobel laureates to their respective doctoral students. (RAIII/58-60.) His teaching cases were widely used in other schools and repeatedly awarded as best in their categories. (*Id.*, RAIII/67.) In 2010, HBS Dean Nitin Nohria granted him the prestigious Marvin Bower fellowship. (RAIV/11, 42.) As of 2014, Edelman’s publications had more than 2,500 academic citations, including more than 1,100 to a single article. (RAIV/11, RAIII/121.)

Two issues regarding Edelman arose in 2014. When Edelman showed the online advertising company Blinkx engaged in misconduct including nonconsensual installations and overcharging advertisers, the company claimed that the disclosure accompanying the article did not adequately disclose that his report built on work for short sellers, resulting in public controversy. (RAI/362-372.) When Edelman scolded a restaurant that overcharged him and others, the restaurant gave his emails to Boston.com, which presented him as bullying a small business. The exchange went viral and created significant negative publicity for Edelman and for HBS. (RAI/383-392.) On July 16, 2015, as

HBS began to consider Edelman's candidacy for promotion to tenure, Senior Associate Dean Paul Healy, who oversaw tenure processes at HBS, informed Edelman that HBS had convened an FRB to examine concerns about his conduct. (RAI/338.)

B. THE FRB PROCEDURES

In 2015, HBS leaders began planning what became the FRB. One impetus was a recent controversial tenure case which convinced Dean Nohria that the process for evaluating allegations of misconduct “need[ed] to be reexamined.” (RAI/167, 266.) Seeking to dispel mistrust, Nohria envisioned “a new process that would be more fair, ... that would provide a little bit more confidence to the faculty that it was done properly.” (RAI/266.) Dean Healy affirmed that the prior case raised questions about whether HBS was “evaluating situations that might be considered in a promotions case, fairly to the candidate and to the school,” which prompted efforts to create “a better process, a fairer process for dealing with [junior faculty] when they came up in appointments committee meetings.” (RAI/167-168.) To this end, HBS devised the “Principles and Procedures for Responding to Matters of

Faculty Conduct” (“FRB Procedures”) (RAI/422-425) which established procedural protections, as discussed below.

The FRB Procedures were formulated to “respond to the Ben Edelman situation in particular.” (RAIV/269¶5, RAI/236, RAI/320-322.) Edelman “reviewed the [FRB Procedures] carefully,” was “reassured by its procedural provisions,” and believed that those protections would apply to him. (RAIV/269¶5.)

HBS distributed the proposed FRB Procedures to the entire faculty and presented them at a faculty meeting. (RAI/307, RAI/139-147.) The faculty supported the Procedures, and Nohria approved their enactment. (RAIV/269¶4, RAI/257-258.) Nothing in the discussion or slides distinguished between procedures during tenure cases versus otherwise. (RAI/139.) Tenure cases at HBS continued to be governed by the “Green Book,” which applied in all tenure matters whether or not an FRB was invoked. (RAI/161.)

The FRB Procedures instructed:

- A summary of the allegation, as it is known at the time, will be written by the Chair of the FRB.
- The FRB ... will investigate the allegation. The investigation may require factual inquiry, interviews, and the review of materials (e.g., documents, email exchanges, social media).

- The FRB will prepare a draft report that should include the evidence gathered; comments on the seriousness of the offense, including the FRB's conclusions on whether misconduct has occurred; and potential recommendations for redress or remediation of the incident or behavior, including possible sanctions.

The faculty member ... will have an opportunity to review the allegation, the evidence gathered, and the draft report, and to respond in writing.

(RAI/423.)

C. THE 2015 FRB REVIEW

In 2015, the FRB comprised Professor Amy Edmondson (Chair); Professor Forest Reinhardt; Professor Leonard Schlesinger; and Angela Crispi, Executive Dean for Administration. Associate Dean Jean Cunningham provided administrative support. (RAI/42-43, 137.) The 2015 FRB wrote to Edelman at the outset of its process, informing him that it would investigate allegations that Edelman had violated Community Values in the Blinkx and restaurant matters described above, and in interactions at HBS, including when he persistently objected to reducing classroom projection screen size (RAI/331-332), and when he assisted colleagues with travel planning outside HBS's usual procedures. (RAI/332, 339.)

The FRB sought to block Edelman's candidacy. In internal communications, the FRB proposed to impose requirements to induce Edelman to resign ("we need to put a structure of resources in place that he would find onerous and leave"). (RA/452.) Upon receiving a dean's praise of Edelman's efforts regarding projectors, FRB Chair Edmondson commented "perhaps this was not the right one to pick," meaning she sought an example to portray Edelman badly. (RA/427-428.)

The FRB in 2015 issued a draft report concluding that Edelman had not met HBS's standards for Effective Contributions to the Community and had not upheld HBS Community Values in all three areas that it considered. (RAI/199, 327-414.)

Edelman's 2015 review concluded with an agreement to extend his appointment by two years and revisit his tenure case then.

(RAIV/270¶¶8-9.) In conjunction with the extension, HBS leaders asked Edelman to teach a new course, join a new teaching group, move his office away from his unit to join the new teaching group, and serve on the Academic Technology Steering Committee. (RAIV/270¶10.) He did so, and received positive feedback, including what he understood to be

the highest teaching evaluations of the ten faculty members teaching the new course. (RAIV/129.)

D. THE 2017 FRB REVIEW

In 2017, the FRB convened again to evaluate Edelman, with Professor Stuart Gilson replacing Reinhardt. (RAIV/271¶¶14, 20.)

Unlike in 2015, the FRB did not formulate or provide him notice of an allegation. (RAI/490-491.) Instead, the FRB informed him that it would assess his understanding of his past “problematic” conduct and “whether there is sufficient evidence of changed behavior.” (Id.)

Before gathering a single piece of evidence in 2017, FRB members opposed Edelman’s candidacy. At the group’s first meeting, Edmondson said it was “obvious we shouldn’t have him on the senior faculty.” (RAII/62.) Gilson stated that Edelman should have been fired after the Blinkx incident, said he was “seething,” and called Edelman “irredeemable.” (RAII/61.) When Schlesinger expressed a desire for “affirmative evidence that [Plaintiff] has changed his behavior,” another member responded, “At face value, we don’t see the evidence” — prejudging the question the FRB was supposed to answer. (RAIV/273¶21(b).)

FRB members interviewed 21 witnesses (RAI/482) and took detailed interview notes—but withheld those notes, and the identities of the witnesses they interviewed, from Edelman. (RAIV/275¶29.) The FRB gathered documents, including a memo by Crispi about past staff interactions with Edelman (among other things, criticizing him for assisting faculty with disabilities), emails from faculty, articles, and blogs, but did not share them with Edelman. (RAI/533, RAIV/273¶¶22-26, 36, 38, 42.)

Edmondson again expressed disappointment about evidence favorable to Edelman. After two interviewees strongly supported Edelman, Edmondson summarized their remarks to FRB colleagues: “One of my two interviews wants to canonize our candidate. The other believes him to be such a genius that allowances must be made.” She concluded in frustration: “Sigh.” (RAII/35.)

Weeks after interviewing Edelman, with the deadline for its draft report looming, the FRB received an email from a faculty member concerned about Edelman’s work as a paid consultant for Microsoft. (RAIV/276¶36.) The FRB then expanded the scope of its report to focus on that work and whether Edelman had appropriately disclosed it.

(RAIV/276¶¶36, 39.) The FRB did not inform Edelman of this new allegation. (RAI/508.) Instead, the FRB asked Edelman to list every client and every article and other work product, plus provide reflections on disclosures, approvals for outside activities, and conflicts—granting him just four business days to reply. (*Id.*) Forty percent of the FRB report related to this expansion. (RAI/480-489.)

E. THE 2017 FRB REPORT

The FRB wrote a draft report that it provided to Edelman, granting him six business days to reply. (RAIV/277¶¶40-41.) The report contained two main sections, described below. The FRB’s final report—with minor changes, a new addendum, and its correspondence with Edelman—was provided to Standing Committee (SC) and Appointments Committee (AC) members. (RAIV/276¶¶41, 75.) See [Section IV.F](#). The FRB withheld the evidence that it gathered from Edelman, the SC, the AC, and the Dean. (RAIV/277¶¶42, 75, 80.)

1. Internal Interactions

One section of the report, titled “Respect for others inside the institution,” consisted largely of bullet-points presented as comments from the FRB’s interviews with faculty and staff, expressing opinions

about Edelman. (RAIV/278¶¶44, 46.) These comments were all anonymous and lacked any context that would let readers of the report assess the speakers' basis for knowledge. (RAI/482-485.) For instance, Edelman worked closely with the heads of his two teaching groups and with his faculty support specialist. (RAIV/280¶¶52, 54, 55.) Though their comments were strongly positive, each was quoted only once, and there was no way to tell which comments were theirs. (RAII/21, 25, 161, RAIV/280¶¶52-55.) In contrast, the FRB included three negative comments from a professor with whom Plaintiff interacted in person only twice over two years. (RAIV/89, 121-122, RAIV/282¶56.) This imbalance was intentional: Reading Cunningham's draft report, Schlesinger objected that "the length of the positive comments overwhelms the less than positive feedback"—despite never having seen the underlying interview notes that the report purported to summarize. (RAIV/278¶45, RAI/183.) In response, Cunningham and Crispi added more negative material. (Id.)

The FRB report included comments that did not express the actual views of the speakers. Several examples:

First, two comments removed adjacent words that changed meaning. When a witness reported, “He can have a tendency to threaten to take something to the next level, *but he has taken a step back*,” the FRB included only the first part of the quote (RAIV/86, RAI/26 (emphasis added).) Similarly, when a witness said, “He’s abrupt. He lacks grace. He’s more apt to pressure others—he asks questions the way you might in a seminar. *But he’s intellectually sharp. Asks great questions. He agrees to disagree*,” the FRB included only the criticism, not the praise. (RAIV/86, RAI/29 (emphasis added).)

Second, the FRB quoted a witness to suggest that Edelman was harsh to staff, including as a bullet point, “With his superiors he has more of a filter.” But the witness’s full remarks—preserved in FRB interview notes, but selectively excerpted out of the report—reveal that he disagreed: he had heard this “2nd/3rd hand,” and he thought “we all probably do” have more of a filter with superiors, so he saw no problem. (RAIV/91-92, RAI/22.)

Third, the FRB selected negative remarks from three witnesses who provably supported Edelman’s candidacy. Witnesses called Edelman a “genius” (RAI/35), stated, “I strongly support the case for

tenure” (RAIII/44-47), and “all my interactions were very favorable” (RAI/295). Compare the FRB’s negative remarks from these witnesses. “He’s abrupt...” “He has worked on being less harsh, but his views are still quite clear to those who hear him,” “With his superiors, he has more of a filter.” (RAIV/86-91.)

Fourth, when assessing Edelman’s interactions, the FRB quoted three witnesses who offered negative assessments of specific meetings—but did not mention that six other witnesses observed the same interactions and offered only praise or saw nothing amiss. (RAIV/87-89.)

And fifth, the FRB selected the rare negative remark from multiple interviews that were overall positive. (RAIV/86-92.) Edelman identified eight negative remarks inconsistent with broader interview notes, and found negative remarks overrepresented in the report, relative to their prevalence in interview notes, by at least a factor of two. (RAIV/93.)

In addition to misrepresenting the statements and views expressed in witness interviews, the FRB secretly went beyond those interviews. Crispi inserted into the FRB report two “quotes” (her word) that she told FRB colleagues were drawn from her witness “interviews.”

(RAII/312.) Dean Nohria understood these words to be “quotes” (RAIV/303), as did Edmondson (RAIV/300) and Schlesinger (RAII/183). In deposition, Crispi admitted “they were not direct quotes” (RAI/229-232) and, contrary to Edmondson’s instruction to conduct interviews and follow an “interview protocol,” were not from interviews. (*Id.*, RAIII/151-152, RAIV/279¶ 49.) Parts of these insertions drew from previous emails Crispi received outside the FRB’s investigation (which were not current), but others had no evident source. (RAI/484, RAII/85, 88-89.)

Because the FRB did not share its interview notes with Edelman, he could not uncover these discrepancies. (RAI/517-18.) He was also unable to give his own version of events because he, like all readers of the report, did not know the context or speakers. (RAIV/85-95.)¹

2. Outside Activities

The report’s other main section, titled “Outside activities and conflicts of interest,” identified “potential concerns” about Edelman’s “work, outside activities and disclosures.” (RAI/485-89.) The FRB

¹ In response to an interrogatory, with the benefit of the evidence gathered, Edelman offered an eight-page critique of the FRB’s use of quotes. (RAIV/86-93.)

claimed that Edelman was “inconsistent” in disclosing paid work for Microsoft when writing about Google. (RAI/486, RAIV/286¶¶66.)

Although the HBS Conflict of Interest (“COI”) Policy governed such disclosures, the FRB did not analyze the disclosures for compliance with that policy, or reach conclusions about whether Edelman violated it.

(RAI/485-89, RAIV/286¶¶67, 72.) In his reply to the report, Edelman pointed out that his Microsoft work concluded before the publications the FRB flagged, that he always and prominently disclosed the Microsoft relationship when it was underway (even before any HBS policy so required), and that the work was not “directly related” as defined by the COI Policy. (RAI/515-16.) The FRB made no revision. (RAI/530-31.)

The report got other facts wrong too. The FRB criticized a disclosure on a web page linking to an article, but the article itself contained a more detailed disclosure. (RAIV/123-24.) The FRB criticized a disclosure that was written by an editor of a journal owned by HBS, who did not include all the information Plaintiff provided. (RAIV/125.) A third article mentioned Google at most peripherally, discussing early practices of a company Google acquired years later. (RAIV/126.)

The FRB also expressed concern that a consumer protection lawsuit Edelman brought as an attorney against American Airlines (“AA”) could create “reputational risk” for HBS. (RAI/486-89.) The only evidence the FRB cited for that possibility was a blog post from 2015, which was not about the 2017 lawsuit. (*Id.*) Edelman’s reply pointed out this error, but the FRB made no revision. (RAI/517.) The FRB criticized Edelman for not seeking the Dean’s approval before filing the lawsuit (RAI/486-89), but no policy required such permission, and a tenured HBS professor served as named plaintiff in the same case without sanction or controversy. (RAIV/287¶69, RAI/282.) The FRB did not explain whether or how the lawsuit violated HBS Community Values or policy. (RAI/486-89.)

F. IMPACT OF THE 2017 FRB REPORT ON TENURE DECISION

HBS evaluated candidates for tenure on three dimensions: intellectual contributions, teaching contributions, and contributions to the HBS community. (RAIV/268¶2.) In the relevant period, the HBS promotion process began with a Subcommittee which sought letters from internal and external experts, then synthesized those letters into a Subcommittee Report. (RAIV/268¶3.)

In both the 2015 and 2017 reviews, the Subcommittee considered only Edelman's intellectual contributions and teaching. It concluded unanimously that he met the tenure standard on both measures: "letters from outside experts and from internal colleagues were consistent in their praise of Professor Edelman's research;" "it was clear to us that Professor Edelman's work has been influential with both scholars and practitioners." (RAIII/53.)

Next the Standing Committee ("SC"), consisting of the members of that year's Subcommittees except a candidate's unit colleagues, evaluated Subcommittee Reports and supporting documents. (RAII/203, RAI/180-181.)

The SC concurred that Edelman exceeded HBS's academic standards. (RAIV/291¶88-89, RAI/179.) Although the FRB Procedures stated that the SC's work and vote would not evaluate Community Values when an FRB was involved (RAI/424), Schlesinger presented the FRB's report to the SC. (RAIV/289¶74.) SC members asked who the FRB talked to, but Schlesinger provided no information beyond the

report. (*Id.*) The SC vote was split. Those who voted against Edelman overwhelmingly cited the FRB report. (IRA²/19-23, RAI/289¶74.)

Plaintiff's tenure case proceeded to the Appointments Committee ("AC"), consisting of all tenured faculty and fully-engaged emeritus faculty. (RAI/161.) AC members received the FRB report.

(RAIV/289¶75.) At the AC meeting, the FRB report dominated discussion, and Edmondson spoke more than anyone else. (IRA/9, RAI/185, RAI/289¶76.) AC members voted 59% in favor of granting Plaintiff tenure (41-29 with 2 abstentions). (RAI/353.) When stating the reason for their votes, many members who opposed tenure stated that the FRB report swayed them. (IRA/8-18, RAI/290¶77.)

After the AC vote, Dean Nohria made a recommendation to the President of Harvard. (RAI/260.) Nohria considered faculty input in deciding whether to recommend Edelman for tenure, and the FRB report was an important factor in his decision. (RAIV/290¶¶81, 86.) Nohria testified that Edelman's scholarship was "well above the bar" for tenure, and his teaching met HBS standards. (RAIV/284¶86.)

² Impounded Record Appendix.

Nohria did not recommend Edelman for tenure; therefore, his application was denied and his employment at HBS ended.

(RAIV/285¶87.)

V. SUMMARY OF ARGUMENT

Summary judgment must be reversed because Harvard failed to meet its burden of showing that undisputed evidence entitles it to judgment. Harvard failed to establish that faculty members could not reasonably expect HBS to follow the FRB Procedures. *See* pages 29-31. The Superior Court erred in ignoring the Procedures' plain language, including claiming without evidence that their main section does not apply in tenure cases; in denying the binding effect of the Procedures' firm requirement that the FRB "will provide... the evidence gathered;" and in ignoring evidence of the context of the Procedures' creation. *See* pages 31-44. The jury could find violations of the Procedures. *See* pages 44-56.

Rejecting Edelman's implied covenant claim, the Superior Court overlooked remarkable evidence of bad faith. *See* pages 57-62.

The Superior Court improperly credited Dean Nohria's affidavit claiming he would not have recommended tenure in any event, though

contemporaneous documents indicated he was swayed by the faculty vote which resulted from HBS's non-compliance with the FRB Procedures. *See* pages 62-66.

VI. ARGUMENT

This Court reviews the grant of summary judgment in favor of Harvard *de novo* to “determine whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law.” *Galenski v. Erving*, 471 Mass. 305, 307 (2015). Appellate courts “accord no deference to the decision of the motion judge.” *DeWolfe v. Hingham Ctr., Ltd.*, 464 Mass. 795, 799 (2013). The moving party, Harvard, has “the burden of establishing that there is no genuine issue as to any material fact and that [it is] entitled to judgment as a matter of law.” *Id.*

“[W]here both parties have moved for summary judgment, the evidence is viewed in the light most favorable to the party against whom judgment is to enter.” *Twomey v. Middleborough*, 468 Mass. 260, 267 (2014), *quoting Albahari v. Zoning Bd. of Appeals of Brewster*, 76 Mass. App. Ct. 245, 249 (2010). “[We] ... draw all reasonable inferences

in the light most favorable to the nonmoving party.” *Premier Capital, LLC v. KMZ, Inc.*, 464 Mass. 467, 474-475 (2013).

Violating the requirement to draw all reasonable inferences in favor of the non-moving party, the Superior Court in seventeen instances drew inferences in Harvard’s favor, making findings of fact about what “all reasonable faculty members would have understood” (Add.73:6); “any reasonable faculty member would realize” (Add.88:16); and a remarkable fifteen similar remarks (Add.88:20, 89:2, 89:12, 89:30, 89:35, 89:33, 90:8, 90:19, 91:19, 95:12, 96:20, 96:31, 98:2, 99:3, 105:9). These findings were not mandated by the undisputed evidence. Drawing almost every possible inference *against* Edelman was contrary to both the record and the summary judgment standard.

A. A JURY COULD FIND THE FRB PROCEDURES WERE CONTRACTUALLY BINDING

Harvard failed to meet its burden to establish the lack of genuine dispute as to any material fact, entitling it to judgment as a matter of law. Harvard needed to establish as undisputed that Edelman had no “reasonable expectancy that [HBS would] adhere to provisions” of the FRB Procedures. *O'Brien v. New England Tel. & Tel. Co.*, 422 Mass. 686, 694 (1996) (hereinafter “*O'Brien*”). *O'Brien* treated the question of

whether an employee's reliance on a personnel manual was reasonable as a question of fact. *Id.*; see also *Ferguson v. Host Int'l, Inc.*, 53 Mass. App. Ct. 96, 103 (2001) (reversing summary judgment for the employer because "[i]t cannot be said as matter of law that the plaintiff could not reasonably believe that the company would adhere to the portions of the manual establishing the system of progressive discipline and the guarantee of fair treatment."). Disregarding the policy's language and context, the Superior Court based summary judgment on its own view of what faculty members expect, usurping the role of the jury.

Assessing whether a personnel policy is contractually binding, the SJC observed in *O'Brien* that the "idea that an employer may ignore promises made in a personnel manual is in increasing disfavor." *O'Brien* at 691. *O'Brien* criticized "permit[ting] management to reap the benefits of a personnel manual and at the same time avoid promises freely made in the manual that employees reasonably believed were part of their arrangement with the employer." *Id.* at 694. Here, Harvard reaped the benefit—assuaging faculty concern about unfairness (see Section IV.B)—and should be held to its word.

Despite judicial chariness to interfere with academic decision-making, personnel policies of colleges and universities may grant faculty enforceable contract rights. The Supreme Judicial Court recently addressed a contract bearing on academic decision-making in *Wortis v. Trustees of Tufts College*, 493 Mass. 648 (2024) (hereinafter “*Wortis*”), involving claims that salary reductions violated the college’s promise of economic security for tenured faculty. The SJC reversed summary judgment for Tufts, holding that the Tufts policy referring to economic security was part of the plaintiffs’ contracts. *Id.* 663-67. Finding “economic security” ambiguous, the SJC held that whether the challenged salary reductions violated the reasonable expectations of faculty was a material dispute of fact. *Id.* 667-68.

1. The FRB Procedures’ Language Supports Enforceability

Interpretation of a contract is a question of law. *See USM Corp. v. Arthur D. Little Systems, Inc.*, 28 Mass. App. Ct. 108, 116 (1989). When the words of a contract are clear, they must be construed in their usual and ordinary sense. *Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund*, 466 Mass. 368, 374 (2013). In interpreting a contract, every word must be given meaning whenever

reasonably practical. *DeWolfe*, 464 Mass. at 806. When interpreting contracts between faculty and universities, Massachusetts courts employ the “standard of reasonable expectation—what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.” *Wortis* at 662 (internal citations omitted). As with all contracts, a university's written manifestation “must be construed according to its plain meaning.” *Balles v. Babcock Power Inc.*, 476 Mass. 565, 571-572 (2017). If a contract is ambiguous, “the intent of the parties is a question of fact to be determined at trial.” *Seaco Ins. Co. v. Barbosa*, 435 Mass. 772, 779 (2002).

O'Brien emphasized that a personnel policy's language is central to determining whether the policy creates enforceable rights: a manual that provides “only guidance ... may not create ... enforceable rights,” but “[o]ther language ... may demonstrate otherwise.” *O'Brien* at 693. The relevant terms of the FRB Procedures are mandatory promises: “a summary of the allegation ... *will* be written,” “The faculty member ... *will* have an opportunity to review the allegation, the evidence gathered, and the draft report, and to respond in writing.” (RAI/423, emphasis added.) The FRB Procedures' clear commitments indicate

enforceability, and would support a jury finding that the university should reasonably expect faculty members to rely on the promised protections.

There is no disclaimer in the FRB Procedures, which would have changed faculty's reasonable expectations. If an employer "does not want [a personnel] manual to be... construed by the court as a binding contract... [a]ll that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual." *Ferguson*, 53 Mass. App. Ct. at 103, quoting *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 309, *modified on other grounds*, 101 N.J. 10 (1985).

The Superior Court attempted to distinguish numerous past cases in which the SJC held employers to their own policies, on the grounds that "tenure is different." See [Add.90](#), citing *Ayash v. Dana-Farber Cancer Institute*, 443 Mass. 367 (2004) (termination of physician's staff privileges), *O'Brien* at 691-694 (progressive discipline) and *LeMaitre v. Mass. Turnpike Auth.*, 452 Mass. 753 (2008) (payment of unused sick leave). In the Superior Court's view, enforcing the FRB Procedures as written would unduly intrude into tenure decisions, so no reasonable

faculty member could take them at face value. (See [Add.89-91](#).) It comes close to holding that no faculty member can expect a school to comply with promises concerning tenure review. The stakes of tenure decisions are indeed high for schools. But they are also high for faculty, who stake years of their lives on the possibility of achieving tenure. It is not inherently unreasonable for faculty to expect universities to comply with their own policies when undertaking life-changing assessments—especially when, as here, a policy’s *purpose* is to assuage faculty concern about unfairness. See Section IV.B.

The Superior Court’s decision ignored contractual language in favor of retrospective skepticism of the choices Harvard made. From the plain language of the FRB Procedures and the context of their adoption, reasonable faculty under FRB investigation would expect the FRB Procedures to apply as written, including a clearly articulated allegation and opportunity to review the evidence gathered.

2. Language about Variances in a Separate Tenure Policy Does Not Negate the Enforceability of the FRB Procedures

Drawing a key inference in favor of Harvard, the Superior Court held that language in HBS’s “Green Book” tenure policy—allowing the

Dean to “initiate or approve variances” to promotion procedures—weighed against finding that the FRB Procedures were contractually binding. (Add.88.) Contrary to the Superior Court’s characterization, the Green Book does not even purport to authorize changes to the FRB Procedures. Nor do the FRB Procedures repeat, incorporate, or even reference the Green Book’s variance authority. Had HBS wanted to allow the Dean to vary the FRB Procedures, it would have explicitly granted that authority, or simply subsumed the FRB Procedures within the Green Book. It did neither.³

The Green Book and FRB Procedures also differ in other ways that justify a reasonable faculty member believing that the FRB Procedures will be followed as written, despite the Green Book remark about variances. The FRB Procedures created a new investigative process to address specific allegations, in which the FRB (not the Subcommittee) prepares a report to which the candidate can respond (unlike the Subcommittee report, which the candidate does not receive).

³ On the Superior Court’s interpretation, the FRB Procedures are contractual *except* in an appointment or promotion case—contrary to both their text and the purpose of the FRB’s creation to ensure fairness in tenure matters. *See* Section IV.B.

(RAI/325, 423.) The FRB Procedures are both more specific and newer, established eight years later. A reasonable faculty member facing an FRB investigation during his tenure candidacy would not expect that because the Dean can vary Green Book procedures, the FRB Procedures lack the force of contract. That is an enormous leap without support in either document.

Furthermore, the *prospect* of modification does not mean a policy is not contractual. *See Ferguson*, 53 Mass. App. Ct. at 103; *O'Brien* at 693; *LeMaitre v. Mass. Turnpike Auth.*, 70 Mass. App. Ct. 634, 640 (2007) (“mere fact that management can make unilateral changes to a personnel manual would not, standing alone, lead an employee to conclude that rights already obtained would be altered or taken away by such changes”), *S.C.*, 452 Mass. 753 (2008). Even if the Dean had discretion to modify the FRB Procedures, nothing in the record indicates he actually did so; for example, the FRB did not seek his approval for withholding the evidence it gathered. *See Charest v. Pres. & Fellows of Harv. Coll.*, No. 13-11556-DPW, 2016 WL 614368, *18 n.10 (D. Mass. Feb. 16, 2016) (“While the University may have the power to modify the rules, those rules are generally applicable and must be

enforced as they stand—until they are actually modified. What Harvard may not do is alter the rules on the fly and on an *ad hoc* basis to suit its immediate purposes.”) The FRB Procedures give the Dean discretion to invoke their process (“the Dean *may* choose to refer the allegation” to an FRB, [RAI/422](#) (emphasis added)); they do not allow the FRB, itself, to silently override mandatory procedural elements.

3. The Context of FRB Procedures’ Preparation and Implementation Support Enforceability

O’Brien quoted the Supreme Court of New Jersey as if speaking directly to this case:

“Without minimizing the importance of its specific provisions, the *context of the manual’s preparation and distribution* is, to us, the *most persuasive proof* that it would be almost inevitable for an employee to regard it as a binding commitment, legally enforceable, concerning the terms and conditions of his employment.”

O’Brien at 694 (quoting *Woolley*, 99 N.J. at 299) (emphasis added). The Superior Court simply ignored the “most persuasive proof” of the parties’ intent to treat the FRB Procedures as binding. Crucially, the context of the FRB’s creation was HBS’s desire to instill confidence in the fairness of its evaluation of tenure candidates, in the wake of concerns that past allegations against tenure candidates were

mishandled. *See* Section IV.B. The Superior Court not only failed to view the evidence of the FRB Procedures’ context in the light most favorable to Edelman; it failed to consider or even mention the undisputed purpose of their adoption.

The FRB was established after a consultative process, like other significant HBS policies. (*See* Section IV.B, [RAI/162](#), 258.) This is consistent with standard faculty governance in a university, where policies are often written and approved by faculty, not CEOs or HR. ([RAI/307](#)-311, [RAII/139](#)-147.) The Superior Court emphasized the lack of negotiations ([Add.87](#)), but individual negotiations are neither workable with a faculty of 200+, nor legally required. *See O’Brien* at 692. A jury could find that faculty discussion would lead a reasonable faculty member to understand the FRB Procedures to be binding.

The Superior Court also failed even to mention undisputed evidence that the FRB was created knowing that it would be used to review Edelman: contemporaneous notes say the first “objective” of the FRB was Edelman’s “situation,” and Nohria specifically instructed Cunningham to create the FRB for Edelman. ([RAIV/269](#)¶5). With the FRB literally created for him, a jury could easily find that HBS should

have expected that Edelman would believe that the FRB Procedures were part of his contract.

A policy is more likely enforceable if an employer calls “special attention” to it. *See Jackson v. Action for Bos. Comm. Dev., Inc.*, 403 Mass. 8, 15 (1988). Harvard did so: Edmondson sent Edelman the FRB Procedures at the start of the 2015 and 2017 proceedings, indicating that the FRB would follow them. (RAI/339, 490-91.) Healy’s correspondence similarly referenced the FRB Procedures. (RAI/338.) This factor, too, the Superior Court failed even to discuss.

Not only did Edelman believe the FRB Procedures applied (RAIV/269¶5), the FRB members agreed. (RAI/427.) Evidence that FRB members understood themselves bound by the FRB Procedures supports the inference that Edelman reasonably expected the promised protections to be followed.

4. All the FRB Procedures Applied to Edelman’s Reviews.

The Superior Court incorrectly accepted Harvard’s argument that the procedural guarantees of the FRB Procedures document do not apply to FRBs incidental to promotion. The FRB Procedures describe two circumstances in which an FRB may operate: (1) possible discipline

of a faculty member for misconduct, and (2) evaluating the Community Values standard for promotion. *See* Section IV.B.

The FRB Procedures document begins with an extended introduction about purpose (RAI/422), then turns to “Faculty Review Board Procedure” (Procedure Section) which lays out procedural requirements. *See* Section IV.B. A later section entitled, “Notes on Promotions, Review, and Reappointments” (“Promotions Section”), explains in four bullet points how an FRB incidental to promotion interacts with other parts of the promotion process. (RAI/424.)

Properly read, the FRB Procedures document’s Procedure Section presents rules for *all* FRB proceedings, while its Promotions Section presents *additional* remarks about FRBs incidental to promotion, focusing on interactions with other HBS processes. The Superior Court found only the Promotions Section applies to FRBs related to promotion. That interpretation is incorrect, and certainly disputed.

First, the Superior Court misread the language on which it primarily relied. The court held that “reasonable faculty members” would “read footnote 5 as confirming that the quasi-adjudicatory procedures that Edelman claims were breached [those laid out in FRB

Procedure] do not apply in tenure cases.” (Add.89.) But footnote 5 says no such thing:

⁵ See the section on "Notes on Promotions, Reviews, and Reappointments" for a fuller description of how conduct will be assessed when faculty members are under review by an Appointments Subcommittee or Standing Committee.

(RAI/423.) The term “fuller description” does not mean or imply that those steps do not apply, only that there are additional terms in tenure cases. The Promotions Section then clarifies that in tenure cases, the FRB will consider Community Values—a criterion for tenure—in addition to the misconduct discussed elsewhere in the document.

Furthermore, the footnote is not located on the bullet point about the summary of the allegation, which Harvard claims is the only mandatory procedural step in tenure reviews, but follows procedural steps including investigation and production of a draft report including the evidence gathered. (RAI/423.) Contrary to the Superior Court’s belief that no “sanctions” or “remediation” are possible in the context of a tenure review (Add.89), HBS’s approach to Edelman after the 2015 FRB shows that it can take remedial steps. See Section IV.C. Nothing in the footnote or the Promotions Section reduces or nullifies the Procedure Section.

Second, the Promotions Section by its terms incorporates the Procedure Section:

For cases where previous or current conduct raises a question of whether the candidate meets the School's criteria for "Effective Contributions to the HBS Community," the FRB will be asked to undertake a review, beginning with drafting an allegation *as outlined above*.

(RAI/424, emphasis added). Far from superseding the Procedures Section, the Promotions Section directs the reader to the provisions “outlined above,” meaning back to the Procedure Section.

Third, the titles of the sections confirm their functions. The “Faculty Review Board Procedure” section governs the procedure for any FRB, just as it says. Similarly, “Notes on Promotions, Reviews, and Reappointments” addresses subjects that arise only in those cases.

Fourth, everyone at the time understood that the full FRB Procedures applied. Harvard’s communications to faculty when the FRB Procedures were adopted did not distinguish between tenure and non-tenure FRBs. *See* Section IV.B. Edmondson sent the full FRB Procedures to Edelman in 2015 and 2017—nowhere claiming that only a portion of one page applied. (RAI/339, 490-91.) The FRB followed key protections that appear *only* in the Procedure Section, such as providing

the draft report and the opportunity to reply. Edmondson explicitly promised procedures contained in the Procedure Section, including a draft report to which Edelman “of course” could respond (RAI/339, RAI/508) and authorizing an advisor (RAI/491). In private, FRB members complained about the requirement to let Edelman respond to the draft report—a procedural protection promised in the Procedure Section but nowhere mentioned in the Promotions Section—which they called “unfortunate[].” (RAI/427.)

Harvard’s claim that only a fraction of the Procedures applied is newly invented for litigation. Of the seven Harvard witnesses deposed in this case, not one testified that they believed, during the FRB’s review or even at deposition, that the Procedure Section did not apply.

The basic structure of the FRB Procedures indicates that the Procedure Section applies to all investigations. If only the Promotions Section applied to FRBs related to promotion, the policy would offer zero guidance on what FRBs do or what procedures they follow in tenure cases. The Promotions Section offers two bullets about deciding to open an FRB, then two bullets about how an FRB report is used in a tenure candidacy, but *no* rules for the FRB itself. If an FRB followed

only the Promotions Section, it would only draft an allegation—not write a report, send a draft to the faculty member, or receive a reply. This reading is contrary to everyone’s understanding at the time, and contrary to the stated purpose of creating an FRB to ensure that tenure candidates are treated fairly.

The Superior Court was wrong to find as a matter of law that only the Promotions Section applied. At a minimum, the contractual terms here—like those in *Wortis*—were ambiguous, making summary judgment inappropriate. See *Wortis* at 650.

B. A JURY COULD FIND VIOLATIONS OF THE FRB PROCEDURES

The Superior Court’s holding that Edelman cannot prove any violation rested on the mistaken view that the FRB Procedures, if binding, do not mean what they say. But the plain language of the FRB Procedures entitled Edelman to the evidence gathered, disallowed the Standing Committee from considering the FRB report, and required an orderly process including an allegation at the outset.

1. A Jury Could Find that the FRB Violated the Requirement to Share “the Evidence Gathered”

The FRB Procedures require that “the faculty member ... will have an opportunity to review the allegation, the evidence gathered, and the draft report, and to respond in writing.” (RAI/423.) The FRB’s draft report, too, “should include the evidence gathered.” (*Id.*) It is undisputed that the FRB did not provide Edelman with notes of the interviews it conducted, nor with other documents it gathered.

(RAIV/273 ¶¶ 22-23.)

The Superior Court did not deny that the interview notes are part of “the evidence gathered.” Rather, it mischaracterized the FRB Procedures to read the requirement to share “the evidence gathered” out of the document. In particular, it quoted the Promotions Section out-of-context as supposedly authorizing the FRB to use “confidential input” in conducting a review so as to negate the promise to share the “evidence gathered.” (Add.90, 98.) But the Promotions Section only authorizes *preliminary* use of “confidential input” in a specific meeting to consider whether an FRB should be convened:

- The Senior Associate Dean for Faculty Development will meet annually or as otherwise needed with the Chair of the FRB and the Executive Dean for Administration to

- discuss whether concerns about conduct have been raised for upcoming candidates for promotion, review, and reappointment.
- In *this meeting*, the FRB Chair and Executive Dean would report on any earlier complaints raised against the candidate and the outcome of local resolution or the FRB investigation. In addition, the FRB and Executive Dean *may seek and report on confidential input*—from faculty colleagues, staff, students, alumni, or others—about concerns about the candidates that were not previously reported.

(RAI/424, emphasis added.) This provision permits “confidential input” only to make the threshold determination “whether concerns about conduct have been raised.” That meeting is separate from, and preliminary to, an FRB proceeding. Only the Superior Court’s out-of-context quotation created the illusion that the FRB could withhold “the evidence gathered” from the subject faculty member during an investigation.

Even if the Superior Court were correct that the FRB may collect “confidential input” during an investigation, that reading still does not authorize withholding evidence from the subject of the investigation. In many otherwise-confidential investigations, evidence is shared with parties for their response—but not with non-parties.

The Superior Court overlooked that the FRB failed to share not only interview notes, but also other documents it gathered, including

Crispi's "record of staff and faculty reflections" about Edelman, emails from other faculty, articles, and blogs. (RAI/533, RAIV/273¶¶23-26, 36, 38, 42.) The Superior Court mistakenly claimed that Edelman only objected in "a single sentence at the end of a footnote" to withholding evidence other than interview notes. (Add.97-98 n.6) But Edelman's briefing highlighted: "The FRB also received a variety of documents ... that likewise were not shared with Plaintiff" (RAIV/321, citing RAIV/273¶24; *see also* RAIV/316-319 & n.8).

The Superior Court suggested that policy rationales override the plain language of the FRB Procedures, claiming, "reasonable faculty members would understand the critical importance of being able to ensure confidentiality in tenure and other promotion cases." (Add.90.) But the text of the FRB Procedures offers no exception, stating that the faculty member "*will* have an opportunity to review ... the evidence gathered" (emphasis added). (By contrast, it calls privacy and confidentiality "important considerations." (RAI/423-424.)) "A contract should be construed in such a way that no word or phrase is made meaningless by interpreting another word or phrase." *Lexington Ins. Co. v. All Regions Chem. Labs, Inc.*, 419 Mass. 712, 713 (1995); *see also*

Wortis at 662 (“we strive ... to give every word meaning”) (internal quotation omitted). The Superior Court committed exactly this error by failing to give meaning to the requirement to share “the evidence gathered.”

The Superior Court ignored the competing interest of a candidate in knowing and responding to the evidence—especially important when seeking “a fairer process” to assess allegations against tenure candidates. *See* Section IV.B. Unlike, say, reviewers’ evaluations of a tenure candidate’s academic work, the FRB’s evidence is not uniquely confidential. *Cf. Doe v. Harvard Univ.*, 462 F. Supp. 3d 51, 65-66 (D. Mass. 2020) (Harvard policy gave student accused of sexual misconduct right to know and respond to evidence). A reasonable faculty member would have no reason to second-guess the FRB Procedures’ plain language.

Though the Superior Court called Edelman “persnickety” (Add.92) for seeking compliance with HBS’s express promise to provide “the evidence gathered,” the withheld material was potentially pivotal to Edelman’s candidacy. Recommending against Edelman’s promotion, six AC members expressed concern about his supposed treatment of staff.

(IRA/8-18.) The only evidence supporting this concern was the “Respect for others” section of the FRB report, where the FRB anonymized and decontextualized witness statements. Indeed, one of the FRB’s most egregious misquotes—removing multiple phrases to reverse the witness’s meaning—was its claim that Edelman mistreated staff. *See* [Section IV.E.1](#) at “Second.” Nor could readers know that the FRB interviewed just four staff, that only two staff offered any negative remarks at all, or that the FRB interviewed only one representative of HBS’s large IT department (with which Edelman worked closely) ([RAII/25](#)-26), contrary to Edmondson’s instruction to Crispi to interview HBS’s Chief Information Officer and “1-2 more from IT” ([RAIII/151](#)-52). The evidence gathered would have allowed Edelman to show decisionmakers these flaws. ([RAIV/85](#)-95.) There is nothing persnickety about Edelman wanting to clear his name, using evidence, as the FRB Procedures promise.

Tellingly, the Superior Court did not engage with evidence that the FRB mischaracterized quotes. The opinion nowhere discussed Edelman’s claim that quotes were misleading or worse. The Superior Court discussed interviews only to report that they occurred and that

notes were not provided to Edelman. Its opinion totally fails to engage with the serious misconduct uncovered through discovery.

The Superior Court argued that because Edelman did not object when certain evidence was not provided to him in 2015, he must not have thought that the FRB Procedures required the FRB to share evidence. The court ignored evidence that Edelman did not complain in 2015 because the withheld information was limited and immaterial—in contrast to 2017, when negative anonymous comments were central. (RAI/110.) Furthermore, the FRB Procedures provide no mechanism for a faculty member to grieve procedural violations, and Edelman’s unit head instructed him not to complain about process. (RAIII/17.) The court’s inference against Edelman, despite disputes of material fact about his reasons for not objecting, violated the summary judgment standard.

The right to receive “the evidence gathered” is a rule of HBS’s own creation, added to the FRB Procedures during consultations with faculty. (RAIV/271¶16.) If HBS intended to withhold evidence in FRBs relating to promotion cases, it could have said so. Instead, it broadly promised to provide “the evidence gathered” in FRB cases, without

exception. “[W]hen the words of a contract are clear, they must be construed in their usual and ordinary sense.” *Wortis* at 663 (internal quotation omitted). The FRB Procedures must be enforced as written.

2. A Jury Could Find the FRB Violated Its Procedures by Failing to Articulate an Allegation and Improperly Expanding the Scope of Its Investigation.

The FRB Procedures require that any FRB begin with an “allegation.” The FRB’s opening letter in 2017 did not include an allegation. (RAI/57, 245.) Harvard claimed, and the Superior Court agreed, that none was required because the 2017 FRB was a mere continuation of the 2015 FRB. (RAIV/272¶20.) The Superior Court also held that the Promotions Section “does not require a ‘new allegation’” “whenever ‘previous or current conduct raises a question’” of conduct. (Add.94). But the Promotions Section *does* explicitly require “beginning with drafting an allegation.” (RAI/424.). If it is ambiguous whether the FRB Procedures authorize reopening an FRB to address new questions with new evidence, without stating a new allegation, that ambiguity foreclosed summary judgment. *Seaco Ins. Co.*, 435 Mass. at 779.

Moreover, the FRB Procedures authorize “*a* draft report” (RAI/423, emphasis added), nowhere contemplating *one* FRB issuing *two* reports. Material facts are genuinely disputed as to whether there was one FRB or two. Critically, the 2017 FRB considered different questions than the 2015 FRB, using different evidence. (RAI/327-36, 339, 480-91.) Contemporaneous documents called the proceedings “reviews” (plural) (RAIV/310), while deans in deposition called the 2017 proceeding “another review” (RAIV/314) and (twice) “another FRB” (RAI/270-71).

After the FRB provides a faculty member a “summary of the allegation,” the FRB Procedures require the FRB to “investigate *the* allegation.” (RAI/423, emphasis added.) Using the same word, “allegation,” conveys that the investigation should evaluate the allegation stated at the outset. Instead, the FRB began to investigate *new* allegations at the eleventh hour. Even when the 2017 FRB finally formulated an allegation (that Edelman had been “inconsistent” in his disclosure of past work for Microsoft when writing about Google) (RAI/549-51, RAIII/167), the FRB did not tell Edelman (RAI/554), violating the obligation to put the subject faculty member on notice

(RAI/423-24). *See Bulwer v. Mount Auburn Hosp.* 473 Mass. 672, 691 (2016) (triable contract issue whether failure to give written notice was cured by later opportunity to respond).

As to expansion, there is certainly a material dispute of fact. Harvard claims the 2017 FRB's breadth means there was no expansion. (RAIV/272¶17.) But Cunningham contemporaneously remarked that the proposed expansion was "outside the mandate of the current FRB review" (RAIV/276¶36), and the head of Edelman's group echoed this concern (RAIII/17). With both Cunningham (FRB expert and drafter of the FRB Procedures (RAI/236, 238, RAII/324)) and Edelman's manager concerned about expansion, there are disputed facts which should not have been resolved at summary judgment.

Without an allegation at the outset, Edelman had to make his submissions to the 2017 FRB without notice of its specific concerns. (RAIV/118-19, 122-27.) Earlier in the process, Edelman had time to gather information, express his position with care, and respond to the FRB's concerns at his interview. But the late expansion postdated his interview, and the FRB granted Edelman just four business days to reply to its inquiries about outside activities. (RAI/554.) Ultimately

Edelman first learned the FRB’s specific concerns—and the FRB first expressed concern to him about Microsoft, Google, or American Airlines—in the FRB’s draft report. (RAI/485-89, 508.) The late notice and compressed time frame did not permit Edelman to uncover many of the FRB’s errors. See Section IV.E.2. Had the FRB timely provided its allegations, Edelman’s response would have been fuller and more effective. (RAIV/122-27.) This is far from the organized process the FRB Procedures call for.

3. A Jury Could Find that HBS Violated the FRB Procedures’ Prohibition on Consideration of the FRB Report by the Standing Committee

The Superior Court also erred in granting summary judgment to Harvard on Edelman’s claim that HBS violated the FRB Procedures by permitting the SC to consider and vote based on the FRB report and whether Edelman satisfied HBS’s Community Values. The FRB Procedures state that if there is an FRB, the “Standing Committee will prepare its report and recommendation, including its vote, based on the criteria *excluding* collegueship and adherence to Community Values.” (RAI/424.) The Superior Court rejected Harvard’s argument that the

FRB Procedures referred to a different Standing Committee, not the SC involved in tenure decisions. (Add.31)

The Superior Court nonetheless held as a matter of law that the SC's inclusion of Community Values in its report and vote was a "minor deviation," not a breach. The court surmised that, by accepting the Standing Committee's vote knowing that it had considered the FRB report,

the Dean adequately signaled that he approved of this minor deviation from the process contemplated in the FRB Procedures, as he is entitled to do under the Green Book with respect to any and all tenure or promotion review procedures.

(Add.99.⁴)

But there is no evidence that Nohria approved the SC's deviation. Nohria never purported to approve a deviation, either at the time nor during this litigation; on the contrary, he testified that he did not deviate from established procedures. (RAI/261.) The rationale that Nohria signaled approval of the deviation is not merely an inference in Harvard's favor, but a supposition made from whole cloth. A jury could

⁴ As discussed *supra* VI.A.2, Edelman disputes that the Green Book unambiguously gave the Dean the authority to deviate from the FRB Procedures.

find that Nohria accepted the SC's report without notice of the deviation (particularly because Edelman was the first to be reviewed by the then-new FRB).

Characterizing the deviation as “minor” rests on a further impermissible inference in Harvard's favor. A jury could conclude that the deviation was consequential in reducing Edelman's favorable votes in the SC, prejudicing his case before the AC. SC members were particularly likely to be influenced by the FRB report because, by design, the SC excluded Edelman's closest colleagues (“unit” members), who were most likely both to offer contrary perspectives on collegueship and to question the report's use of anonymous and decontextualized remarks. (RAI/180-81, 185.) One SC member remarked that the FRB's presence before the SC (with unit representatives absent) made a big difference. This professor opposed Edelman's candidacy in the SC, but changed to a positive vote after hearing from Edelman's unit in the AC discussion. (IRA/11.) A jury could easily find that HBS violated the FRB Procedures by permitting the SC to consider the FRB report.

C. A JURY COULD FIND THAT HBS VIOLATED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

This Court must also reverse the grant of summary judgment on Edelman's claim that Harvard violated its duty of good faith and fair dealing, because a reasonable jury could infer bad faith and unfair treatment by Harvard.

The FRB's actions undermined Edelman's right to basic fair treatment as respondent to an allegation of misconduct, in the context of the process Harvard represented it would use for such allegations, and violated the implied covenant. *See Ayash*, 443 Mass. at 387 (holding a jury could find that hospital violated the implied covenant by failing to follow its bylaws).

Summary judgment is disfavored when questions of motive or intent are at issue. *Bulwer*, 473 Mass. at 689. A lack of good faith by Harvard suffices to meet Edelman's burden. *See Nile v. Nile*, 432 Mass. 390, 398-99 (2000). Voluminous evidence of bad faith, described below, amply raised a dispute of material fact about whether Harvard violated the implied duty of good faith and fair dealing, which should have precluded summary judgment.

1. Deliberate bias and manipulation of evidence to support pre-determined conclusions

The previously-withheld “evidence gathered,” and internal communications among FRB members and staff, show that the FRB manipulated both evidence and process to stymie Edelman’s candidacy. The FRB misstated evidence (see [Section IV.E.1](#) (concealing witness names, twisting witness remarks beyond recognition, under-representing those who worked most closely with Edelman, deliberately over-representing negative views, and inserting false “quotes”)), and refused even to correct obvious errors that Edelman pointed out ([RAI/489](#), 517, [RAIV/286](#)¶¶67-68).

Waving away Edelman’s complaint about selective excerpting of quotes, the Superior Court said that FRB members can use their judgment to evaluate evidence. ([Add.103](#).) Respectfully, this mischaracterizes the record and ignores the serious misconduct uncovered. Every adjudicative body uses judgment in evaluating evidence, but this was intentional distortion—what Edmondson unapologetically called “our slant.” ([RAI/71](#).) The jury could infer that the FRB cherry-picked negative statements from positive witnesses and

mischaracterized what witnesses said in numerous ways. *See* Section IV.E.1. That is bad faith.

The FRB's process also showed deliberate bias. Members made up their minds before they began, calling it "obvious" that Edelman had to leave. *See* Section IV.D. They expressed disappointment at evidence favorable to Edelman (RAII/35) and criticized procedural protections as "unfortunate[]" (RAI/427).

A reasonable jury could conclude that the FRB report was deliberately biased and presented in bad faith.

2. Dual role as witnesses and adjudicators

The Superior Court discounted Edelman's claim that fairness of the FRB was compromised by Crispi and Cunningham acting "as both witnesses and adjudicators," which it treated as no more than a claim of conflict of interest based on previous acquaintance with Edelman. *Id.* But the court ignored evidence of their misconduct, including twisting quotes, falsifying quotes, and withholding evidence. *See* Sections IV.E.1, IV.D.

Edelman did not claim that Crispi was an "academic adversary" whose input should have been excluded, as in *Berkowitz v. Pres. &*

Fellows of Harvard Coll., 58 Mass. App. Ct. 262, 272 (2003). He alleged that she manipulated the FRB process, suppressing favorable evidence and fabricating supposed negative evidence. (RAI/219-221, RAIV/242, 274¶¶26, 49.)

The Superior Court similarly ignored evidence that Cunningham regarded Edelman as a “sore spot” long before the 2017 FRB process. (RAIII/85). Because Cunningham told Edelman in 2008 that no approval from the Dean’s office was required for work as an attorney, he never sought such approval. (RAI/240-41, 516, RAI/343.) Yet nothing in the record indicates she told the FRB she gave him that instruction. Then she drafted the FRB report criticizing Edelman for not seeking the very approval she had said he didn’t need. (RAI/486-489.)

In providing a distorted record to FRB colleagues and in the FRB’s report, Crispi and Cunningham abused their dual positions as witnesses and adjudicators. Whatever the permissible role of *Berkowitz* academic adversaries, this is plainly something else. *See Barry v. Trs. of Emmanuel Coll.*, No. 16-cv-12473-IT, 2019 WL 499774 at *7-8 (D. Mass. Feb. 8, 2019) (fact-finder could conclude it was reasonable for tenure candidate to expect “individuals formally participating in the review of

her tenure application would be unbiased,” and involvement of people with prior personal conflicts violated expectation of fair process). A jury could easily find a lack of good faith.

3. Standard not applied to other faculty

The FRB held Edelman to a standard not applied to other faculty. Cunningham objected that the FRB’s concerns about outside activities and disclosures “could be raised about” other HBS faculty, noting that “we haven’t audited any faculty member for compliance with the [Conflict of Interest] policy.” (RAI/549-51, RAI/167.) Professor Ben Esty, who called himself HBS’s “de facto co-chief compliance officer” (RAI/447), said the FRB singled Edelman out, telling Dean Healy, “one could interpret the selective enforcement of our community standards on a single candidate as discriminatory.” (RAI/288¶71.) In conjunction with the other evidence of bad faith, a jury could conclude that unequal application of standards violated the implied covenant.

4. FRB Procedures violations

Violations of the FRB Procedures were also violations of the implied covenant of good faith and fair dealing. *See, e.g., Ayash*, 443 Mass. at 387; *Wortis* at 671. The FRB was only able to distort the evidence because, contrary to the FRB Procedures, it failed to provide

“the evidence gathered.” Therefore, a jury should decide both Counts I and II.

D. THE JURY COULD FIND HARM TO EDELMAN

The Superior Court held that Edelman could not prove he was harmed by HBS’s violation of the FRB Procedures or breach of the implied covenant, based exclusively on Nohria’s post-deposition affidavit. (Add.99-104.) Ignoring contrary evidence and failing to draw reasonable inferences in Edelman’s favor, the court determined that Edelman could not counter Nohria’s affidavit claiming that “he would have come out the same way even if the FRB’s 2017 report had not addressed any ... issues about Edelman’s respect for others within HBS.” (Add.101 (paraphrasing Nohria Aff.).)

Nohria’s reasoning was a significantly disputed factual question. Nohria’s affidavit contradicted his deposition testimony and contemporaneous statements regarding the reasons for his negative recommendation. In deposition, Nohria did not attribute his recommendation to limited parts of the FRB report; he said he relied on “all of the information that I had available,” and considered a “holistic picture” based on “all of the evidence in its totality.” (RAI/260, 285-86)

The jury could find a conflict with his later affidavit speculating that certain evidence was enough on its own to deny tenure. (RAIV/221.)

Nohria did not claim that his decision would have been the same if Edelman received a 65% AC vote; he declined to say. (RAI/285.)

Meanwhile, Nohria acknowledged that in only one instance had he *not* recommended a candidate with at least 65% approval. (RAII/345-46, RAI/261.)

Nohria's contemporaneous explanations of his reasoning all focused on the AC vote. His email to Harvard President Drew Faust cited no "clear mandate" from the AC vote. (RAII/364, RAI/283.) Nohria asked Healy for information on past AC votes, which revealed that all candidates with a 75% vote had been promoted, as had all but one candidate with 65%. (RAIV/290¶82.) In notes preparing to announce his decision to the faculty, he similarly invoked the AC vote, writing "Tenure requires a super majority," describing a "zone of discretion for the Dean" when the AC vote fell between 80%-65%, and concluding "[T]his case fell outside my zone of discretion." (RAI/420, 285.) Nohria told Edelman at the time that "there wasn't enough of a faculty vote." (RAII/75, RAI/92, 287.) In deposition, Nohria similarly identified the

faculty vote as crucial, calling it “very difficult... to move forward” with a 59% vote, which was “not a clear mandate.” (RAI/284.)⁵ Nohria’s contemporaneous statements and deposition are more probative than his subsequent affidavit. *See, e.g., Hanover Ins. Co. v. Leeds*, 42 Mass. App. Ct. 54, 59 (1997) (dismissing “an affidavit contradicting his own prior testimony”). The conflicting statements create a dispute of material fact preventing summary judgment.

Even if, as Nohria’s affidavit newly claims, he could have considered only the AA and disclosure issues (and no other part of the FRB’s report), Nohria’s perception of those incidents was based entirely on the FRB’s flawed report, on which he relied without checking underlying sources. (RAI/273, 278-79, 281-83, 286, 289-90.) The portion of the report about AA and disclosures (RAI/485-89) was tainted by failure to articulate an allegation, expansion, and failure to provide the evidence gathered. *See* Section VI.B.3.

⁵ Harvard’s interrogatory response similarly described “substantial division among HBS’s tenured faculty about Edelman’s candidacy” and noted that “in at least the previous ten years, no candidate had been promoted where there had been as many negative views expressed by the [AC]”. (RAIV/107.)

Even if Nohria did not rely on the part of the FRB report about Edelman's interactions with others at HBS (the part most impacted by failure to provide "the evidence gathered"), his decision was still affected. AC members who opposed Edelman's promotion specifically mentioned his supposed treatment of staff as portrayed by the FRB report. (IRA/8-18, [RAIV/86-95](#).) A higher vote from the AC would have influenced Nohria, according to both his contemporaneous remarks and Harvard's interrogatory response. See [Section IV.F](#). By Nohria's own admission, the totality of the FRB report influenced his decision. *Id.*

Rather than accept Nohria's self-serving post-deposition affidavit at face value, this Court must draw reasonable inferences in Edelman's favor. Among those inferences is that if Edelman had been afforded the protections in the FRB Procedures, including receiving the evidence gathered (especially as to his interactions with others at HBS) and a timely summary of the allegations (especially about the Microsoft/Google disclosures) he would have been able to convincingly rebut the FRB's concerns. Such a rebuttal would have resulted in an improved AC vote, allayed Nohria's own concerns, and changed the

outcome of his tenure case. A reasonable jury could find that the FRB's breaches made the difference in Edelman's tenure case.

VII. CONCLUSION

For the reasons stated, the judgment of the Superior Court should be reversed as to Counts I and II, and the case should be remanded for trial.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I, David A. Russcol, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). I further certify that this brief complies with Rule 20's length limit in that it was prepared in 14-point Century Schoolbook font using Microsoft Word and, according to Microsoft's wordcount tool, contains 10,975 words.

/s/ David A. Russcol

David A. Russcol

CERTIFICATE OF SERVICE

I, David A. Russcol, hereby certify that I will cause the foregoing brief to be served through the Massachusetts e-filing system and by email on:

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ADDENDUM