COMMONWEALTH OF MASSACHUSETTS

Superior Court **Suffolk, SS**
Business Litigation Session

BENJAMIN EDELMAN, Plaintiff, v. PRESIDENT AND FELLOWS OF HARVARD COLLEGE, Defendant.	)	Civil Action 2384CV00395-BLS2

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Harvard's motion for summary judgment must be denied because Harvard has not shown that it is entitled to judgment as a matter of law. On the contrary, the law and facts establish that there was an enforceable agreement between the parties that entitled Plaintiff to a fair and transparent review, and that Harvard breached that agreement. Viewing the record in the light most favorable to Plaintiff and drawing all inferences in his favor, and applying the standard of reasonable expectation to the contractual provisions at issue, as the Court must, Harvard is not entitled to summary judgment on any of Plaintiff's claims.

I. FACTS[1]

Plaintiff Benjamin Edelman was a rising star at Harvard Business School ("HBS") whose eligibility for tenure in 2015 was unquestioned based on his research, academic

[1] Plaintiff moved for partial summary judgment. For efficiency, Plaintiff cites facts included in his Statement of Undisputed Facts in support of his motion for summary judgment ("SF"), and relies upon the evidence cited therein. For facts in neither party's statement of facts, this memo cites the record as contemplated by Rule 9A(b)(5)(iii)(B). Plaintiff's Memorandum of Law in Support of Cross-Motion for Partial Summary Judgment ("PSJ Memo.") discusses some facts in greater detail.

accomplishments, and the quality of his teaching. (SF 88-90.) However, during the time frame of his tenure review, HBS convened a Faculty Review Board ("FRB") to review his conduct (SF 6), ultimately resulting in the delay and then denial of tenure. (SF 8-9, 87.) The FRB's review was governed by the Principles and Procedures for Responding to Matters of Faculty Conduct (the "P&P"). (*See* PSJ Memo. 3, JA-366-369.) The review was originally prompted by two incidents in 2014—one involving questions about Plaintiff's disclosures on research about the company Blinkx, and one involving his communications to a restaurant regarding an overcharge. (*See* PSJ Memo. 2.) The FRB also investigated minor conflicts between Plaintiff and certain HBS staff, including regarding a proposed change to classroom screens. (JA-275, 279-280, 287.)

Jurors could infer from the evidence that in 2015 the members of the FRB (Professors Amy Edmondson, Forest Reinhardt, and Leonard Schlesinger, and HBS Executive Dean for Administration Angela Crispi, supported by Associate Dean Jean Cunningham (SF 7)) shared a goal of preventing Plaintiff from obtaining tenure at HBS.[2] (JA-11-12, 391, 472.) In early 2015 meetings, they discussed convincing Plaintiff to leave HBS voluntarily by "put[ting] a structure of resources in place that he would find onerous and leave." (JA-96-97, 391.)

Crispi and Cunningham were personally involved in incidents the FRB reviewed. (JA-150-151, 161, 197-198.) Cunningham considered Plaintiff "a sore spot" for her personally. (JA-908). The FRB made no effort to separate their roles as member and staff of the FRB from their roles as witnesses. (JA-10.) Those roles were quickly confused. Before the 2015 process even began, Crispi created and shared documents presenting her understanding of supposed disagreements between HBS staff and Plaintiff going back to 2007. (JA-153-154, 713-716.) She

[2] Plaintiff's claims of breach of contract and of the duty of good faith and fair dealing both concern the 2017 FRB. Discussions among the 2015 FRB members, 75% of whom participated in the 2017 FRB, are nevertheless relevant to the FRB's, and the School's, good faith.

then provided the FRB with an incomplete set of emails, from her own inbox, regarding Plaintiff's interactions with HBS staff. (JA-161-163, 351-359.) In many cases, Crispi's account of events was incorrect.[3]

Crispi provided emails to the FRB about Plaintiff's objection to a proposed reduction in classroom projection screen size, ending with her scolding Plaintiff: "Perhaps everyone's effort to be polite has led you to believe there remains an opening. There is not, and thus I ask and urge you to put this matter to rest." (JA-162, 358, 723.) The 2015 FRB report correspondingly stated that "the project did move ahead." (JA-280.) This was not true. When the Academic Technology Steering Committee ("ATSC") saw a demonstration of how the project would shrink screens, it decided to keep the screens as they had been, as Plaintiff favored. (JA-275-362, 413-415, 722.) Crispi suppressed emails showing that she was overruled; that she was chagrined and frustrated; and that HBS's Chief Information Officer praised Plaintiff's conduct in the ATSC meeting. (JA-156-159, 717-721.)

Having reached a conclusion about Plaintiff's supposed misconduct as to classroom screen size, based on Crispi's report of supposed facts, the FRB then dug in its heels. FRB members received email correspondence from W14, Senior Associate Dean for the MBA program when the screen issue arose, validating Plaintiff's concerns. Recognizing the inconsistency between W14's message and the claims in FRB's draft report, the FRB chose to

[3] For example, Crispi told the FRB that Plaintiff's request to access his office computer from outside the HBS campus was rejected. (JA-152-153, 711-712.) In fact, Plaintiff and HBS IT staff devised a narrowly-tailored exception. (JA-840-841.) She was also incorrect in her claim that Plaintiff's request for an office projector was rejected as "not something we do." (JA-148.) In fact, Plaintiff and HBS staff identified a way to install an office projector and did so successfully. (JA-838-839, 842, 843). Crispi similarly claimed Plaintiff "wanted to submit case to HBP w/o assigning copyright." (JA-711-712.) Plaintiff's actual objection was that, in violation of Harvard University policy, HBS claimed cases were work product owned from the outset by the university. After consulting counsel, HBS changed its approach. (JA-292, 811-826.)

suppress W14's email; they did not edit their report, include the email in its exhibits, or share the email with Plaintiff.[4] (JA-7-8, 408-412.)

The FRB's 2015 report concluded that Plaintiff had not upheld HBS's Community Values in the Blinkx and restaurant incidents and in dealings with HBS staff. (SF 6.) Based on the report, the Standing Committee evaluating Plaintiff's tenure case recommended, and Dean Nitin Nohria agreed to, a two year-extension of Plaintiff's appointment, with his tenure candidacy to be reevaluated in 2017. (SF 8-9.)

During the two-year extension, Plaintiff was asked to take steps designed to help him demonstrate that he had learned from the FRB's 2015 report. (SF 10-11.) HBS leaders intended for Plaintiff to receive regular feedback on his progress during that period. Nohria, Healy and Crispi discussed and agreed to give Plaintiff this feedback, but did not. (JA-167-169, 172, 678-679.) Crispi gathered feedback regularly from staff but did not share it with Plaintiff. (JA-169-170, 172.) No new questions were raised about Plaintiff's conduct or contributions to the HBS community during the extension period. (SF 15.)

The FRB reconvened in 2017, with Professor Stuart Gilson replacing Reinhardt. (SF 14, 20.) It informed Plaintiff that it would be evaluating his understanding of his past conduct and "whether there is sufficient evidence of changed behavior." (SF 19.) It did not provide Plaintiff with an allegation or summary of an allegation. (SF 17.)

In 2017, the FRB members had their minds made up before undertaking any investigation. At their first meeting, Gilson said that he had "priors" and "thought the Blinkx incident alone should have been enough to fire him." (SF 21.a.) He described himself as

[4] Edmondson also suppressed excerpts from letters in Plaintiff's tenure dossier, which Healy provided for the FRB's use, because only one out of 17 letter-writers expressed any concern about Plaintiff's conduct. (JA-13-14, 275-362, 473-475, 675-676, 677.)

"seething," and viewed Plaintiff as "irredeemable." (*Id.*) Edmondson stated that it was "obvious that we shouldn't have him on the senior faculty." (SF 21.c.) 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." (SF 21.b.)

Again in 2017, Crispi acted as a witness within the FRB. She prepared and circulated documents criticizing Plaintiff's recent interactions with staff on a variety of fronts. (JA-468-471, 965.) She even criticized Plaintiff for working with faculty with sight and hearing disabilities to find technological accommodations for teaching, rather than leaving their problems to HBS staff. (*Id.*, JA-173.) The FRB did not interview these faculty members or try to determine why they had requested Plaintiff's help or whether HBS was meeting their needs. (JA-173.) Later, at Crispi's urging, the FRB refused a request from Plaintiff's unit head to revise its report to reflect these contributions to the community. (JA-927-931.)

The FRB proceeded with an inquiry that included conducting interviews and gathering documents. (*See* PSJ Memo. 5.) The FRB did not share these materials with Plaintiff. (SF 23.) In his single interview, the FRB asked him only three general questions about his past two years; it did not share any feedback from its interviews. (SF 33-35.) After this interview, it began to examine alleged conflicts of interest in his work related to Microsoft and Google. (SF 36-37.) It also began to focus on a lawsuit that he filed, as an attorney, against American Airlines ("AA"). (SF 37.) It asked Plaintiff to submit, on a short timeline, information about his outside activities, but did not notify him of its concern about Microsoft and Google. (SF 36-39, JA-483-484.)

The FRB held Plaintiff to a standard that HBS did not apply to other faculty. When the FRB first considered expanding its scope, Cunningham remarked that writing about companies, while advising others in the same industry, "is [a concern] that could be raised about" other HBS

faculty, citing a specific person "who sits on the board of a number of tech companies and writes about lots of them as well"—which, she pointed out, is not prohibited by HBS policy. (JA-479-482.) In another email the same day, Cunningham noted, "to be fair to Ben, we haven't audited any faculty member for compliance with the [Conflict of Interest] policy." (JA-967.) Professor Ben Esty, who referred to himself as HBS's "de facto co-chief compliance officer" (JA-386), flagged that the FRB was singling Plaintiff out: "one could interpret the selective enforcement of our community standards on a single candidate as discriminatory." (SF 71.)

The FRB gave Plaintiff six business days to respond to its draft report, which was not accompanied by any evidence the FRB gathered. (SF 41-42.) The report was divided into two main sections. The first, titled "Respect for others inside the institution," consisted of anonymous, decontextualized, bullet-point statements purportedly from FRB interviews. (SF 43-44, 50.) The FRB over-represented negative comments in this section. (SF 45, 48.) Crispi added two negative "quotes" that do not exist in her interview notes. (SF 49.) Other quotes were truncated or cherry-picked, giving a misleading impression of speakers' views. (SF 59-62.)

The report's second section, "Outside activities and conflicts of interest," focused on Plaintiff's disclosures of his work for Microsoft in writing that he published about Google, which it claimed were "inconsistent." (SF 65-66.) Plaintiff was never notified, prior to receiving the draft report, of this alleged inconsistency. (JA-476-477, 483-484.) There were numerous errors in the FRB's description of these disclosures. (SF 67.) The FRB did not revise its report to address key facts that Plaintiff provided, including that his work for Microsoft ended before the publication of the work products that FRB criticized. Nor did the FRB engage with his argument that the COI Policy did not require disclosure because the publications were not "directly related" to his work for Microsoft. (JA-421-425, 1261-1262.) This section also discussed

Plaintiff's 2017 lawsuit against AA, speculating that it might create negative publicity for HBS, and criticizing him for failing to seek approval from the dean's office. The FRB erroneously cited a 2015 blog post as a supposed instance of such publicity, and did not correct the error when Plaintiff noted it. (SF 68.) Cunningham had informed Plaintiff in 2008 that no approval from the dean's office was necessary for work as an attorney, yet the FRB failed to revise its report when Plaintiff pointed that out. (JA-452.)

The 2017 FRB report determined the outcome of Plaintiff's candidacy. Schlesinger presented the FRB's report to the Standing Committee, where members inquired what witnesses the FRB had spoken to. Schlesinger did not share any information beyond that in the report. (SF 74.) The 2015 and 2017 FRB reports were provided to the Appointments Committee, and Edmondson dominated the discussion at its meeting. (SF 75-76.) Ultimately, the AC's vote was split, with 58.5% in favor of tenure. (SF 78.) AC members who voted "no" nearly all referenced the FRB report or topics discussed in it to explain their votes. (SF 77.) Nohria considered both the relative support in the AC, and the contents of the FRB's report, in deciding not to recommend that Plaintiff receive tenure. (SF 81, 86.) As a result, Plaintiff's application for tenure was denied, and his employment at HBS ended. (SF 87.)

II. ARGUMENT

Summary judgment must be denied to Harvard because the P&P were a part of the contractual relationship between Plaintiff and Harvard, a jury could reasonably find that Harvard breached its obligations under the P&P and the implied covenant of good faith and fair dealing, and Plaintiff relied to his detriment on Harvard's promises which went unfulfilled.

Summary judgment under Mass. R. Civ. P. 56(c) is only "appropriate where 'the moving party . . . show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law' based on the undisputed facts." *Bulwer v. Mount*

Auburn Hosp. 473 Mass. 672, 680 (2016) (quoting *Premier Capital, LLC v. KMZ, Inc.*, 464 Mass. 467, 474 (2013)). The Court must "view the evidence in the light most favorable to the part[y] opposing summary judgment," and draw "all reasonable inferences in [the non-moving party's] favor." *Bulwer*, 473 Mass. at 680 (internal citations omitted). At the summary judgment stage, the Court does not "resolve issues of material fact, assess credibility, or weigh evidence." *Id.* at 689 (quoting *Kernan v. Morse*, 69 Mass. App. Ct. 378, 382 (2007)).

a. Breach of Contract

Harvard is not entitled to summary judgment on Plaintiff's claim for breach of contract. On the contrary, the undisputed facts establish that there was a contract between Plaintiff and Harvard, that the provisions of the P&P were among its terms, and that Harvard breached those terms. (*See* PSJ Memo. 10-20.)

1. The P&P expressed terms of Plaintiff's contract with Harvard.

Contracts with university faculty very often "comprise[] a collection of documents, such as an offer letter, a faculty handbook, and other rules or policies of the college." *Wortis v. Trs. of Tufts College*, 493 Mass. 648, 663 (2024). Plaintiff reasonably understood that the P&P was one of the documents that made up his contract.

Harvard relies heavily on *Jackson v. Action for Bos. Cmty. Dev. Inc.,* 403 Mass. 8 (1988) to argue that Plaintiff cannot "establish that the [P&P] created an implied contract," and cites *Jackson* for the proposition that summary judgment is proper absent an implied contract. (Def. Memo. 12.)[5] But in fact, in *Jackson* the SJC held that the parties *were* operating under an implied

[5] Notably, although *Jackson* has not been formally overruled, it was "quite explicitly clarified by the later decision of *O'Brien v. New England Tel. & Tel. Co.,* 422 Mass. 686 (1996)," which called "for the provisions of such manuals to be enforced to the extent that they instill a reasonable belief in the employees that management will adhere to the policies therein

contract of employment; the question was whether it was at-will, or whether the personnel manual formed its terms. *Jackson* at 12-13. Here, it is similarly not disputed that Plaintiff had a contract with Harvard; he was not an at-will employee, but had an appointment as a professor for a specific period, which in 2015 was extended for two additional years. (SF 8-9.) The only question is whether the P&P was among the policies that governed his contract with Harvard.

"There is no 'rigid list of prerequisites' for determining if an employment policy is an enforceable contract." *Warren v. Children's Hosp. Corp.*, 652 F.Supp.3d 135 (D. Mass. 2023) (quoting *O'Brien v. New England Tel. & Tel. Co.*, 422 Mass. 686, 692 (1996)). Whether a policy constitutes an enforceable contract turns on a variety of factors "including its content and the circumstances of its distribution." *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 559 (1st Cir. 2005). The key questions are "whether the employee believed that the policy 'constituted the terms or conditions of employment, equally binding on employee and employer' and whether that belief was 'reasonable under the circumstances.'" *Derrig v. Wal-Mart Stores, Inc.*, 942 F. Supp. 49, 55 (D. Mass. 1996) (describing *O'Brien*, 422 Mass. at 694). *Jackson* describes factors relevant to whether a policy is contractually binding, but not exclusive; later, the Supreme Judicial Court was concerned that "[t]he *Jackson* opinion has led to confusion because certain facts that were stated to be present or not present in that case . . . have been viewed as constituting a list of conditions that must exist in order to justify a ruling that the terms of a personnel manual are part of an express or implied employment contract." *O'Brien* at 692.

The P&P contains no disclaimer that it is not a part of a faculty member's contract or that HBS is not bound by its promises. *See Ferguson v. Host Int'l, Inc.*, 53 Mass. App. Ct. 96, 103

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expressed." *Ferguson v. Host Int'l, Inc.*, 53 Mass. App. Ct. 96, 101 (2001). Harvard inexplicably fails to acknowledge the binding precedents of *O'Brien* and *Ferguson*.

(2001) (internal quotations omitted) (if an employer "does not want the manual to be capable of being 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"). The P&P includes no statement that HBS can unilaterally change the policy.[6] The P&P contemplates future revision, but does not state how such revision will be accomplished or who will have a voice in it. (JA-369.) Changeability does not negate a finding that a policy binds the parties; "one might as easily conclude that given its importance, the employer wanted to keep it up to date." *Id.* at 103. Though the P&P is clear that its four pages do not cover every possible contingency, language indicating flexibility does not render the entire document illusory. The P&P's key procedural provisions are phrased clearly and in mandatory, non-flexible language.

Language in the Green Book authorizing the Dean to approve variances from tenure procedures also does not negate the contractual nature of the P&P. (*See* Def.'s Memo at 13.) First, the Green Book and the P&P are separate documents and govern separate procedures, even if they sometimes operate in tandem. The P&P does not contain or reference the Green Book language that Harvard cites, and does not give the Dean discretion to unilaterally vary mandatory procedures. Second, Nohria never approved any change in or variance from the P&P. Nothing in the record indicates he even knew of the FRB's departures from the P&P. *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

[6] In *O'Brien*, the SJC noted that although *Jackson* treated it as significant that the employer retained the right to unilaterally modify the terms of the manual, such control does not negate the possibility that a contract is formed, "if employees in general would reasonably conclude that the employer was presenting the manual as a statement of the conditions under which employment would continue." *Id.* at 693.

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.").

Harvard also argues that "there is no evidence showing that Plaintiff negotiated the terms of the FRB Principles with HBS or that he was required to 'manifest assent' to them." (Def. Memo. 14.) It cites *Jackson*, which listed an employer's request that an employee sign or assent to a manual as one way in which an employer may call "special attention" to a policy. *Jackson*, 403 Mass. at 14. But in *O'Brien*, the SJC found it insignificant that the employee did not sign the manual; it was enough that "she received a new copy of the manual annually." 422 Mass. at 693. HBS sent the draft P&P electronically to every faculty member, seeking "input and feedback." (JA-257-261.)[7] It was then the lead agenda item at an in-person faculty meeting, with a full presentation including slides. (JA-257-261, 598-606.) Nohria adopted the policy only after positive input from the faculty. (SF 4, JA-211-212.) This is consistent with principles of faculty governance at institutions of higher education, where policies (like the P&P) may be written by faculty, not CEOs or HR. (JA-257-261, 598-606.) "Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is." *Wortis*, 493 Mass. at 663 (quoting *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 848 (D.C. Cir. 1975)). To prevail at summary judgment, Harvard would have to show that a jury could not find that a reasonable faculty member would understand the P&P to be a binding part of his contract. Given the voice that Harvard faculty have in its policies, Harvard could not make this showing.

HBS created the P&P intending to use it to review Plaintiff. (SF 5.) Plaintiff reviewed the

[7] Given this distribution, and HBS then resending the P&P to faculty going through the FRB process (JA-286), it is irrelevant whether the P&P appeared on the HBS intranet.

P&P when it was presented to the faculty (*id.*) and chose to remain at Harvard and seek tenure, knowing that he would be subject to FRB review as part of that process. HBS provided the P&P to Plaintiff again at the beginning of the 2015 FRB. (JA-286.)

Harvard's claim that it was not bound by the P&P is a new invention. HBS purported to follow the P&P in 2015 and 2017, and FRB members expressed the understanding that they were bound by it, even if they would prefer not to be. (JA-370-375.) *See O'Brien*, 422 Mass. at 694 (finding significant that employer "followed the manual's procedures as a regular administrative practice and did so specifically in regard to O'Brien's grievances"); *Charest,* 2016 WL 614368, *12 ("By following the IP Policy, Harvard's conduct demonstrates that it does view the policy as imposing binding obligations upon the university."). Both parties thus manifested their intent to be bound by the process articulated in the P&P. Whether Plaintiff referred to the P&P during his own FRB process (*see* Def.'s Memo. 14) is irrelevant. He had read it carefully previously. (JA-71.) And he reasonably understood at the time that the P&P was part of his contract with HBS. *See Ferguson*, 53 Mass. App. Ct. at 103 (finding that "it cannot be said as a matter of law that the plaintiff could not reasonably believe that the company would adhere to" the manual's provisions, rather than "apply them only when it chose.")

2. Harvard repeatedly violated its contractual commitments to Plaintiff.

Harvard breached its obligations to Plaintiff in several respects. It did not disclose the evidence the FRB gathered. It initiated an FRB review in 2017 when there was no allegation of wrongdoing to support it, proceeded without articulating an allegation as required, expanded the scope of its review to include new topics near the end, and failed to investigate or reach conclusions about whether Plaintiff committed misconduct. The FRB report was then provided to the Standing Committee, which the P&P barred from considering it. These violations

impacted the outcome of the FRB and tenure processes.

In interpreting a university contract, courts are guided by two fundamental principles. First, they 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*, 493 Mass. at 662 (quoting *Berkowitz v. Pres. & Fellows of Harvard Coll.*, 58 Mass. App. Ct. 262, 269 (2003)). The standard of reasonable expectation "allows for a [plaintiff's] reasonable expectations to be different from the interpretation the university places on the same terms," and "can be reasonable even if the precise expectation is not stated explicitly in the contract's language but, instead, when the [party's] expectation, viewed objectively alongside the express terms of the contract, is based on the [party's] fair interpretation of the contract's provisions." *Sonoiki v. Harvard Univ.*, 37 F.4th 691, 709 (1st Cir. 2022). Second, courts are "chary about interfering with academic decisions made by private colleges and universities." *Wortis*, 993 Mass. at 662 (citing *Berkowitz*, 58 Mass. App. Ct. at 269). Nevertheless, university determinations related to tenure processes are not unreviewable, and universities are liable in contract if they fail to comply with their own procedural policies. *See, e.g.*, *Rubinstein v. Pres. & Fellows of Harv. Coll.*, Middlesex Superior Court No. 2020-00609, Paper 22 at 7-13 (Feb. 1, 2023); *Barry v. Trs. Of Emmanuel Coll.*, No. 16-cv-12473-IT, 2019 WL 499744, *6-8 (D. Mass. Feb. 8, 2019). The 2017 FRB repeatedly violated Plaintiff's reasonable expectations.

Failure to Disclose Evidence Gathered.[8] The P&P states that a faculty member under FRB review "will have an opportunity to review the allegation, the evidence gathered, and the draft report, and to respond in writing." (JA-368.) The 2017 FRB gathered extensive evidence,

[8] PSJ Memo. 11-14 offers additional argument on how Defendant breached the P&P by failing to provide Plaintiff with the evidence gathered.

including interviews, notes from interviews, and "papers, emails, articles." (SF 22.) Harvard does not claim that the FRB fulfilled its obligation to share the evidence it gathered with Plaintiff. Instead, it claims that "when HBS convenes the FRB in connection with a tenure case, the FRB is not required to provide 'the evidence gathered.'" This is just plain wrong.

An FRB convened in the context of a tenure case must follow the same basic procedure as any other FRB. The P&P's central section is two-and-a-half pages titled "Faculty Review Board Procedure." Nothing in the title or content of that section suggests that it applies only in *some* FRB matters. That section is followed by a half-page "Notes on Promotions, Reviews and Reappointments" which similarly contains exactly what it says—notes on how the FRB process may interact with promotion, review, or reappointment. That section states: "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." (JA-368.) That "review" is clearly intended to follow the process described earlier as the "Faculty Review Board Procedure," which begins with drafting an allegation. The "Notes on Promotions" section exclusively addresses questions *outside* of that general Procedure, including when an FRB review will take place in connection with a promotions process, and how the resulting FRB report will be used. The policy's language and structure make clear that any FRB process will employ the "Faculty Review Board Procedure." Harvard's proposed interpretation—that in the context of a tenure review, the *only* thing the FRB had to do was draft an allegation (Def.'s Memo. 16)—would allow the FRB to reach an outcome without ever informing the faculty member or seeking their input. This reading is inconsistent with principles set forth on the same page ("The faculty member being reviewed by the FRB… should be kept informed

throughout....") and is absurd on its face.[9] *Cf. Wortis*, 493 Mass. at 662-63 (contract must be interpreted to give meaning to entire document).

If there were any ambiguity, the record is replete with evidence that all parties understood at the time that the entire P&P applied to Plaintiff's case. Healy indicated that the P&P would govern the FRB's review, without singling out parts as inapplicable. (JA-286.) Edmondson, too, sent Plaintiff letters referencing the P&P's promises. (JA-287, 426.) The FRB followed key aspects of the P&P's "Faculty Review Board Procedure" including creating a draft report to which Plaintiff could respond. (SF 41.) Its members discussed the need to follow the P&P's requirements. (JA-370-375, 473-475.) And finally, the P&P was created, in part, because of concerns that prior allegations against tenure candidates had been handled haphazardly or unfairly. (JA-124-125.) It was intended to grant faculty rights that would make the FRB's review fair.

Harvard next claims that names of witnesses and notes of their interviews were somehow not part of "the evidence gathered."[10] (Def.'s Memo. 17.) This argument, too, is untethered from the text. "The evidence gathered" means what it says. When the FRB gathered evidence, whether written or oral, any tangible embodiment of that evidence was "evidence gathered." It is

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[9] Harvard's reading also contradicts Edmondson's contemporaneous statements. *See* JA-287, promising a draft report to which Plaintiff may respond; JA-427, authorizing an advisor. The draft report, response, and advisor are all laid out in the "Faculty Review Board Procedure" section of P&P, not in "Notes on Promotions."

[10] Harvard ignores the other documents and evidence that the FRB gathered but did not share with Plaintiff. These include a document that Angela Crispi compiled before the first 2017 FRB meeting and shared with the FRB, which she described as a "record of staff and faculty reflections on and interactions with Associate Professor Ben Edelman between September 2016 through April 2017," and related notes about Plaintiff's interactions with staff. (SF 24-26.) They also include numerous articles about Plaintiff and his outside activities, which feature in correspondence between members of the FRB and appear to have affected the direction and outcome of their review. (SF 36, 38.)

axiomatic that testimony is evidence. *See* Black's Law Dictionary (12th ed. 2024) (evidence is "the collective mass of things, esp. testimony and exhibits, presented before a tribunal in a given dispute"). FRB members and staff understood that interview notes were evidence that they gathered. (SF 22.)

Nothing in the P&P exempts witness statements from the evidence that must be shared. Such an exclusion would be nonsensical here, where most evidence was gathered through interviews. Nor would it make sense to permit the FRB to provide statements while withholding names, since the P&P's stated goal was to give the faculty member a chance to respond to the evidence. *See Sonoiki*, 37 F. 4th at 711-12 (finding that motion to dismiss contract claims should have been denied, because Harvard did not share identities of witnesses, where policy stated that witness statements would be shared but did not explicitly address identities). Harvard's claim that the P&P did not require transcription of interviews (Def.'s Memo. 17) is a red herring; the P&P required the FRB to share "the evidence" that it "gathered," and it *did* take and rely on detailed interview notes. Having prepared such notes, the FRB had to share them with Plaintiff.

References to confidentiality in the P&P do not negate its plainly-stated requirement that the faculty member "will have an opportunity to review . . .the evidence gathered." (JA-368.) A process can be conducted confidentially from the public while still permitting individuals directly involved to review and respond to the full evidence. This is precisely what the P&P contemplates when it instructs to share information on a "need-to-know basis." It is irrelevant that internal and external letters solicited during the tenure process are not shared with tenure candidates; those letters were not part of the "evidence gathered" by the FRB in 2017.

Harvard bears the heavy burden of demonstrating that no jury could determine that a faculty member's expectation of receiving the evidence gathered during the FRB process,

including the witness statements, was reasonable—or that if a jury did so, the Court would be required to grant judgment notwithstanding the verdict. *See Bulwer*, 473 Mass. at 682 n.8 (summary judgment and JNOV standards are the same). It has not and cannot.

Convening the 2017 FRB. The 2017 FRB was convened without a valid basis, in contravention of the P&P's provisions about when the FRB process, generally for "*egregious*" or "*persistent and pervasive*" conduct issues, may be used. (JA-366.) The Senior Associate Dean for Faculty Development (Healy in the relevant period) is supposed to meet with the Chair of the FRB (Edmondson) and the Executive Dean for Administration (Crispi) to discuss whether "concerns about conduct" have been raised about upcoming candidates for promotion. (*Id.* at 368.) If "no serious questions about conduct" are raised in this meeting, then the case "will proceed to the Subcommittee or Standing Committee" without FRB review. This meeting did not take place in either 2015 or 2017. (SF 14.) In 2017, there were no concerns about Plaintiff's current conduct; no allegation of egregious, persistent, or pervasive misconduct; and questions about his past conduct had already been investigated and a final report prepared.[11] (SF 15.) The P&P does not provide for a second FRB absent a new allegation, and there was no new allegation.

It is irrelevant that Plaintiff did not "raise any concerns . . . about whether an FRB should have been convened in 2015" (Def.'s Memo 18), because he is not challenging the 2015 FRB. Regardless of any discussions that took place among Harvard leaders, administrators, and FRB members, Plaintiff did not know that an FRB would convene in 2017 until Healy told him to prepare a statement to the FRB early that year. (SF 18.) He participated in the FRB's process as

[11] In her deposition, Edmondson could not identify *any* question raised about Plaintiff's conduct in this period (JA-16), let alone a "serious question."

instructed by Healy and his unit head (who also instructed him not to complain about the process (JA-852)); he could hardly have done otherwise. The P&P provides no mechanism for a faculty member to grieve or appeal the commencement of an FRB or its results. (*See* JA-366-369.)

The FRB Failed to Provide an Allegation. The P&P unambiguously required the FRB to begin, in *every* case, by drafting an allegation and providing it to the faculty member. (JA-367-368.) The FRB Chair understood that to be required. (JA-18.) In 2017, it simply did not, as leaders in the process acknowledged at their depositions. (JA-26, 200.)[12] *See also* PSJ Memo. 14-15.

Harvard tries to shift focus, again, to the 2015 FRB (*see* Def. Memo. 19), but Plaintiff does not allege any failure to articulate an allegation in 2015. In 2015 the FRB articulated allegations in its notice letter (JA-287), which let him focus his submissions on specific subjects and discredit some allegations. (JA-50, 52.) By contrast, the 2017 FRB did not provide Plaintiff with a summary of an allegation that it intended to review, violating the P&P and prejudicing his ability to defend himself. (*See* PSJ Memo. 14-15.)

When the FRB expanded its scope to evaluate Plaintiff's disclosures on work relating to Microsoft and Google (SF 36-37), it informed him that it was looking generally at his outside activities, giving him four business days[13] to provide information on all such activities. (SF 36-37.) But although the FRB had, at that point, formulated a specific concern about a few

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[12] Should the Court find any ambiguity in the P&P's plain language, extrinsic evidence indicates that P&P drafters believed that a "statement of allegations" was a "key element" (JA-754) and that an allegation was necessary to state the FRB's "scope of work", determining "which allegations were within or out of bounds." (JA-945).

[13] Although Edmondson's email to Plaintiff asked whether the time frame "feels unreasonable," she contemporaneously wrote to the FRB that they would "soon be bumping up against the deadlines of the promotions process"; Plaintiff knew this and did not believe it was a "serious offer for more time." (*Compare* JA-483-484 *with* JA-56, 379-380.)

disclosures which it understood as "in effect an allegation of wrongdoing" (JA-205, 479-482.), it still did not share a specific allegation with Plaintiff. Its request to Plaintiff did not mention Microsoft or Google, and Plaintiff had to formulate his response while in the dark about its specific concerns. (JA-483-484.) If he had been on notice of this allegation from the beginning—or even from the start of the FRB's inquiry into these disclosures—he would have been able to effectively rebut these concerns. (JA-1144-1145, 1148-1153.)

The FRB's Expansion of Its Scope. The 2017 FRB began to investigate specific aspects of Plaintiff's outside activities late and only after Plaintiff's single FRB interview. (*See* PSJ Memo. 15-16.) Arguing that the expansion was harmless, Harvard points out that Plaintiff spoke about his outside activities at the interview (Def.'s Memo. 20)—but he was not asked to address specific concerns about those activities. (SF 33, 39.) He was responding to the question, "Anything else about the 2 years?"—not addressing any allegation that any activity was in any way improper. (SF 33, JA-622-623.) His March 2017 submission similarly attempted to cover essentially every aspect of his life at HBS, including outside activities—natural where the FRB had not articulated a specific allegation. (JA-428-435.) Plaintiff's general remarks are no substitute for the FRB stating specific concerns to which Plaintiff could respond, which is what the P&P promised. (JA-205.) The FRB's late expansion was prejudicial. See PSJ Memo. at 15-17 (FRB granted Plaintiff just four business days to respond to its expanded inquiry; compressed timetable created actual error).

Harvard claims that the expansion of the FRB's scope was "not impermissible under the FRB Principles" (Def. Memo. 20)—but it identifies no P&P language permitting the FRB to investigate a new allegation without first sharing it with the faculty member. Instead, Harvard cites a stray phrase in a letter Edmondson sent Plaintiff in 2015, claiming the FRB may evaluate

other incidents "that come to our attention over the course of the review." In fact, in 2015 the FRB's scope did *not* expand; its report addressed the same subjects articulated in its notice letter. (*See* JA-275-284, 287.) It is hardly probative that Plaintiff did not object to a hypothetical expansion in 2015 that did not happen.[14] In any case, Edmondson's 2015 letter cannot change the P&P's requirement for the FRB to begin in all cases by articulating an "allegation" and then investigate that same "allegation." *See, e.g. Wortis*, 493 Mass. at 663 (holding that "when the words of a contract are clear, they must be construed in their usual and ordinary sense," and extrinsic evidence may be admitted only where terms are ambiguous).

In August 2017, the FRB finally identified an allegation—that Plaintiff was supposedly deficient in disclosures on work products related to Google. (JA-967.) Despite *having* that allegation, the FRB did not *state it* to Plaintiff. (JA-483-484.) Thus, Plaintiff's September 8, 2017, submission to FRB spoke to disclosures in general, not to the unstated allegation that specific articles allegedly omitted required disclosures. (JA-445.) Plaintiff learned the FRB's actual concern upon receiving the FRB's draft report on October 11, 2017. Had the FRB timely stated the allegation, Plaintiff would have timely discovered that one supposedly-missing disclosure was actually present, two followed journal policy, and a fourth was limited by the IT capabilities of a Harvard publication. (JA-1148-1155.) By failing to state their allegation even in the September 1 letter (JA-483-484.), the FRB ran down the clock, leaving Plaintiff just six business days to respond to the entire FRB report (including many subjects beyond this one).

[14] Harvard cites Plaintiff's testimony that he believed that the 2015 FRB should have been "guided by the evidence," including the "additional evidence" that he provided in his reply to the 2015 draft report. (Def. Memo. 20.) Plaintiff's submission of additional evidence with his reply to the 2015 draft report has nothing to do with the FRB's 2017 expansion of its scope. Plaintiff does not argue that the FRB could not rely on evidence that it gathered at any point when investigating an allegation that was appropriately shared at the outset, as required by the P&P.

Failure to Investigate the Allegation. The FRB did not complete the task that the P&P required: to "investigate the allegation" and reach "conclusions as to whether misconduct has occurred." (JA-367.) To reach conclusions, the FRB would have had to examine specific incidents in light of applicable policies. By instead making broad remarks untethered to specific policies, the FRB was able to resort to implication and innuendo—not what the P&P promised, and not what Plaintiff expected. (*See also* PSJ Memo. at 17-18.)

Submission of FRB Report to the Standing Committee ("SC"). The P&P instructs that in a tenure case where the FRB is involved, the Standing Committee will vote while excluding questions of collegiality and Community Values,[15] but the SC's discussion and vote in Plaintiff's case focused almost exclusively on those topics. (SF 74.)

Harvard now claims that "Standing Committee" in the P&P refers to a *different* Standing Committee, the Standing Committee on Professors of Management Practice and Term Faculty. (JA-1139-1140.) This position is unconvincing. First, the P&P's plain language simply refers to the Standing Committee, not to the Standing Committee on Professors of Management Practice and Term Faculty. Nowhere in the record does *anyone* ever refer to the Standing Committee on Professors of Management Practice and Term Faculty with the short form "Standing Committee." (JA-194.) In contrast, the Standing Committee for tenure-track faculty is routinely referenced in short form, and if it has a longer or more specific name, that appears nowhere in the record.

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[15] The P&P states that when an FRB is involved in a tenure case, "the Subcommittee or Standing Committee will begin its work evaluating the candidate on the criteria *excluding* colleagueship and adherence to Community Values." (JA-369.) The FRB's conclusions "will be provided to the Appointments Subcommittee or Standing Committee, and included with that group's report to the full Appointments Committee. In these cases, the Subcommittee or Standing Committee will prepare its report and recommendation, including its vote, based on the criteria *excluding* colleagueship and adherence to Community Values." (JA-369.)

Second, the evidence around usage of these terms supports Plaintiff's interpretation. Healy used the term "Standing Committee" to describe the tenure SC in a message to all junior faculty including Plaintiff. (JA-607-608.) Nohria, Edmondson, and Plaintiff's unit head used the same term the same way in messages to Plaintiff. (JA-827-829, 833.) HBS faculty understand "Standing Committee" in the P&P to refer to the SC in the tenure review process. (JA-98, 246, 250-252, 254.) Tenure-track faculty do not interact with any other SC. (JA-194.) Healy agreed that it is "a little confusing" that two different committees purportedly share the name. (JA-119.) A reasonable tenure-track faculty member would understand "Standing Committee" to refer to the Standing Committee involved in evaluating tenure cases, not some other Standing Committee they had never heard of. (*See* JA-255-256; *see also* JA-98 (Schlesinger, a practice faculty member, interpreted the term "Standing Committee" to refer to the SC for tenure-track faculty; when asked if there is any other committee called Standing Committee, answered no; and did not think of a SC for term faculty until specifically asked).)

Harvard claims that the SC used in the tenure process did not exist when the P&P was enacted. But HBS leaders were creating a SC for the tenure process *at the same time* they were drafting the P&P. (Pl. Response to Def. SMF 9.) HBS represented to its accrediting body, in the same communication describing the creation of a SC for the tenure process, that the FRB's report was to be provided to the Appointments Committee (not the SC). (JA-122, JA-652-659.)

If summary judgment is not granted to Plaintiff on his contract claim, then there is a dispute of material fact about whether the SC's vote should have been based upon the FRB's report, precluding summary judgment in Harvard's favor.

Harm to Plaintiff from Breaches of Contract. Harvard relies on Nohria's affidavit claiming that he recommended against Plaintiff's promotion because he was not confident that

Plaintiff "would meet collegiality standards and community standards over the long run." (SF 106.) But Nohria's opinions about Plaintiff's compliance with community standards and likely future behavior were based on the FRB's flawed report. (JA-227, 232-233, 235, 237, 240, 243-244.) Harvard persistently pretends that the FRB's defects were confined to the first half of the report and did not extend to the section "Outside activities and conflict of interest," on which Nohria claims he primarily relied. (Def.'s Memo. 22.) In fact, the FRB's failure to articulate an allegation, expansion of scope, and failure to investigate and reach conclusions, all concerned *primarily* that section of the report.

Nor was Nohria's decision unaffected by the FRB withholding evidence about witnesses. Nohria found it significant that the Appointments Committee vote was not stronger in favor. (SF 81-83.) That vote was negatively affected by the FRB's discussion of witness testimony; numerous faculty cited Plaintiff's supposed "treatment of staff," which Plaintiff could have fully rebutted if the evidence were shared with him. (*See* JA-694-710; PSJ Memo. 11-14.)

b. Breach of Duty of Good Faith and Fair Dealing

Harvard argues, first, that there was no breach of the duty of good faith and fair dealing, because there was no contract. (Def. Memo. 23.) As discussed *supra*, the P&P was an enforceable contract. The SJC has upheld a jury's verdict that an employer "violated its own bylaws, and in doing so, violated the implied covenant of good faith and fair dealing in its employment contract with the plaintiff." *Ayash v. Dana-Farber Cancer Inst.,* 443 Mass. 367, 387 (2005); *see also Wortis*, 493 Mass. at 671. In the related context of student discipline, good faith and fair dealing requires universities to provide basic fairness. *See Sonoiki*, 37 F. 4th at 715; *cf. Berkowitz*, 58 Mass. App. Ct. at 269. The FRB's entire purpose was to provide a fair process to investigate allegations against faculty. The FRB's actions undermined Plaintiff's right to receive

the fruits of the contract, *i.e.* fair treatment as a respondent to an allegation under P&P.

Discovery has borne out Plaintiff's claim that the FRB suffered from a basic conflict of interest that compromised its fairness. Structurally, Crispi and Cunningham acted as both witnesses and adjudicators. (*See supra* 2-3, 5, 7.) Evidence unearthed in discovery shows that Crispi repeatedly fabricated or suppressed evidence that the rest of the FRB was relying on her to provide. (SF 26, 49.) Crispi was not an "academic adversary," as in *Berkowitz*, 58 Mass. App. Ct. at 272—she had a personal interest in ensuring that Plaintiff did not receive tenure, and she manipulated the FRB process to achieve that goal. (JA 175-177, JA-1264.) For Cunningham, too, Plaintiff was a "sore spot" long before the 2017 FRB process. (JA-908.) She, too, acted as a factual witness regarding Plaintiff's interactions with the Dean's office—but failed to report relevant interactions including Plaintiff's 2008 inquiry about what approval he should seek for work as an attorney. (JA-195-196, 198, 452, 489-491, 766.) These circumstances are similar to *Barry v. Trs. of Emmanuel Coll.*, 2019 WL 499774 at *7-8 (D. Mass. Feb. 8, 2019) (holding that a fact-finder could conclude it was reasonable for a tenure candidate to expect that "individuals formally participating in the review of her tenure application would be unbiased," and that involvement of people with prior personal conflicts violated expectation of fair process).

Harvard fails even to address several other violations of the implied covenant. Crispi's fabrication and suppression of evidence is evidence of bad faith (SF 26, 49), whether or not it stemmed from her conflict of interest. The FRB misstated evidence and refused even to correct errors that Plaintiff pointed out. (JA-1068; SF 67-68.) The FRB also misrepresented the results of its inquiry insofar as it over-represented negative remarks about Plaintiff, all anonymized and decontextualized so they were impossible to rebut. (SF 45, 47-48.) Discovery revealed that the FRB singled Plaintiff out for scrutiny it did not apply to other faculty. (*See supra* 5-6.) The

FRB's notes say they made up their minds prior to undertaking any investigation (SF 21), making the entire process a sham and the epitome of bad faith.

Summary judgment is disfavored when questions of motive or intent are at issue. *Bulwer*, 473 Mass. at 689. A lack of good faith on Harvard's part is sufficient to meet Plaintiff's burden. *See Nile v. Nile*, 432 Mass. 390, 398-99 (2000). At a minimum, the evidence raises a dispute of material fact about whether Harvard violated the implied duty of good faith and fair dealing.

c. Promissory Estoppel

Harvard mischaracterizes Plaintiff's promissory estoppel claim. Plaintiff does not argue that he was promised tenure; rather, he was promised a fair opportunity in 2017 to seek tenure. Harvard also represented to him that any FRB process would follow the P&P. (*See* JA-286-287, 426.) As discussed *supra* (p.10), general language around flexibility in that document did not negate his reasonable reliance on its specific guarantees.

III. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court deny the Defendant's motion for summary judgment on all counts.

Respectfully submitted,
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Dated: December 5, 2025

CERTIFICATE OF SERVICE

I, David A. Russcol, hereby certify that I have caused a true and correct copy of the foregoing document to be served on counsel of record for Defendant by email on December 5, 2025.

David A. Russcol