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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LIPING LIN,

Plaintiff and Appellant,

v.

PEPPERDINE UNIVERSITY,

Defendant and Respondent.

B270441

(Los Angeles County
Super. Ct. No. SS025134)

APPEAL from an order of the Superior Court of
Los Angeles County, Richard A. Stone, Judge. Affirmed.

James V. Kosnett for Plaintiff and Appellant.

Anderson, McPharlin & Conners, Paula Tripp Victor and
David J. Billings for Defendant and Respondent.

INTRODUCTION

Appellant Liping Lin was a student at respondent Pepperdine University. Two intoxicated undergraduate students revealed to Pepperdine that there had been a party involving alcohol at the residence where Lin lived. Lin and his housemates were found responsible for violating a section of Pepperdine's student conduct code that forbade students from hosting, promoting, or assisting any gathering involving underage drinking. Lin appealed through Pepperdine's internal appeal process, and the findings were upheld. Lin then petitioned for a writ of administrative mandate in the superior court, and Pepperdine's findings were again upheld. Lin appealed.

We affirm. Lin argues that Pepperdine's findings are not supported by substantial evidence. In the light of the whole record, including Lin's acknowledgment that he knew details about the party beforehand and promoted it on Facebook, and his housemates' statements that all housemates contributed to certain aspects of the party, Lin has not demonstrated that Pepperdine's findings are not supported by substantial evidence.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts about the party and Pepperdine's disciplinary hearing are taken from the amended administrative record.

A. Incident report

According to Pepperdine's incident report, on the evening of November 1 and the morning of November 2, 2014, two intoxicated, underage students returned to campus after a Halloween party. One student was transported to a hospital as a result of excessive intoxication. The students reported that they had been at a Halloween party at "Babylon House," an off-

campus private residence in Malibu. The incident report continued, “This student indicated that shuttles transported students from the Ralphs parking lot to the party, and there were also bouncers at the party. Pepperdine[']s department of Public Safety contacted the Lost Hills Sheriff department and learned that officers were dispatched to the residence because of the party and reports that a camel was running loose. It was reported that over 300 people were at the party and that there was alcohol available to guests free of charge. It was also reported that there was an ice sculpture with alcohol flowing from it, and that marijuana was used.”

Pepperdine interviewed some of the students who rented the residence nicknamed “Babylon House.” Student Ahmed Wahba said in his interview that six Pepperdine students lived in the house, including appellant Lin. Wahba “related that he and the others living there had planned this Halloween party together. He/they were very careful and meticulous in the planning. They did not want to anger the neighbors.” Wahba said they arranged for the shuttles to pick up party attendees from a nearby parking lot to limit traffic near the house. Although Wahba and his housemates had invited only friends, the party “swelled to over 200 in no time.” In anticipation of this possibility, a security company was on standby and Wahba called for bouncers to come. The report stated, “All six of them chipped in to pay for the two bouncers.” Wahba said they did not supply alcohol for the party, but he observed some guests drinking and assumed that attendees brought their own alcohol. Wahba said a camel was at the residence as part of his Halloween costume. A second student who lived at the house also was interviewed, but the name in the record is redacted. We will refer to this student

as “Student A.” Student A told interviewers that he and “the others” decided to have the Halloween party. The report states, “As they did not want anyone to drive drunk, they hired a driver and a limo to transport the invited ones to and from Ralph’s.” Student A said they did not provide alcohol, but he knew there was alcohol at the party, presumably brought by guests. Student A said the police came after someone complained about the truck that transported the camel being parked up the street, but the police did not break up the party.

A third student was interviewed; because this name is also redacted, we will refer to this student as “Student B.” Student B was not specific about which people planned the party, but said that “when they planned on having this Halloween party, they regulated every aspect so as not to have any problems.” They chose to have bouncers at the party in case uninvited guests came. They did not provide alcohol for the party, but they knew some people would bring their own and therefore hired drivers and a limousine to take students to and from the party. Student B knew people at the party were drunk, but he did not see a lot of drinking and assumed that people had consumed alcohol before they came to the party. Student B said a neighbor called the police because she perceived that the camel was on her property, but in fact the camel was not on the neighbor’s property.

Another student who lived at the house, “Student C,” said “they planned the party and were careful to arrange for transportation to and from the party because they did not want to be responsible for anyone driving drunk.” Student C said he was in his room with friends for most of the party. Neither he nor his housemates provided alcohol to party guests. Student C did

smell marijuana at one point during the party, but he did not know who was smoking it.

Karl Lillsunde was also interviewed. He reported that he and five friends rent the house. Lillsunde located the house and dealt with the homeowners and realtor in renting it. He was not initially in favor of having the party, but “it was eventually agreed that a party would be hosted at the home provided conditions were established that ensured the affair was held in such a way that the neighborhood would not be disrupted.” Lillsunde said alcohol was not provided to guests. Although security guards were hired to keep uninvited guests from coming to the party, the guards were ineffective. Lillsunde saw several uninvited guests with alcohol. He eventually got frustrated and left the party because the gathering was out of control and the camel was standing on the neighbor’s freshly laid artificial grass.

Lin also went to the public safety office to be interviewed. He confirmed that he lived at the house, but he declined to answer any questions about the party.

B. The Student Disciplinary Committee proceeding

Pepperdine’s Judicial Affairs Office informed Lin in a letter that he was being charged with violating Pepperdine’s code of conduct. The student handbook declares, “Pepperdine University seeks to foster an alcohol- and drug-free environment.” Lin was charged with violating a portion of the code of conduct that states, “Hosting or in any way assisting or promoting a gathering (on or off campus) that includes underage drinking or drunkenness or drug use may result in suspension or dismissal. Those living at the location where the party is held may be held responsible as hosts regardless of who provides the alcohol.” The

letter included a date for a hearing, and asked Lin to draft a written response to the charges.

Lin submitted a one-page letter denying that he violated the code of conduct. Lin said he was not aware that alcohol would be present at the party, and the others never told him that alcohol would be at the party. He stated, “According to our promotion on FaceBook, we’ve never promoted the use of alcohol in the party. (See Picture 2 for Evidence)[.]” Lin also said, “We’ve organized well enough to ensure the safety and enjoyment of individuals we’ve invited.” Lin referenced the shuttles and security, and stated, “We’ve considered and understand the safety of our community and we’ve taken the responsibility in planning ahead before the party begins.” Lin said that before the party, his parents were “invited to inspect the house and look over the schedule.”

Included in the record is what appears to be a screenshot of a Facebook invitation to a “Halloween Party @ Babylon.” The screenshot appears to be the “Picture 2” referenced in Lin’s written statement. The invitation does not display a date or the name of a sender. The invitation says party buses will drive people to and from the Ralphs parking lot, and that no one will be allowed to park near the party. It also states, “We will be distributing bracelets as we don’t want randoms showing up. It’s better and safer for everyone.” The invitation concluded, “Many surprises to come. Lets [*sic*] Rage!” The record also includes a picture of what may be Lin and his parents at the house.

Also included in the administrative record is a copy of a screenshot with a mostly black picture containing a video play symbol, showing that Lin shared a video on social media days before the party. The record does not reveal the content of the

video or which social media platform the video was posted on. The screenshot includes the message from Lin, “It is near guys. Prepare this for Babylon.” Several names are mentioned in the post, including those of the housemates.

A document titled “Judicial Affairs Hearing Notes,” which appears to be from Lin’s hearing, states that Lin “denied the charges, and said he was only notified of the party, but he didn’t plan or contribute any money to it. He said he was in Temple City until 11:30 PM, and when he arrived home, he asked people to leave.” The hearing notes state that Lin was asked about his use of “we” in his written statement about planning the party, and Lin responded that he did not plan the party and English was not his first language. He said he did not know who created the Facebook invitation, and when Lin was asked if he could bring it up on his phone, Lin started acting nervous and said he did not know how to find it. The notes also state, “The committee asked him if he talked to the other housemates about having them tell the SDC [student disciplinary committee] he was not involved, and he said no.” Pepperdine found Lin responsible for the incident and “concluded that [Lin] should receive the same sanction as the other students involved in hosting the event.” The report states that the SDC did not believe Lin was being honest about his involvement, and “if he wasn’t involved he would have indicated that to [campus security] when first asked about it.” In addition, the other housemates indicated that all housemates were involved in planning the party.

Pepperdine informed Lin of its findings in a letter. The letter, dated January 22, 2015, stated that effective immediately, Lin was suspended until the end of the fall 2015 semester. The letter also informed Lin that he was placed on probation until

April 22, 2016. The letter outlined the procedures for an appeal to the dean of student affairs.

C. Lin's appeal to Pepperdine

Lin appealed the findings and sanction. In Lin's appeal letter, he said he did not assist in the planning for the party and he did not contribute money for it. He said that on the night of the party, he was with his parents in Temple City until about 11:00 p.m. or midnight, and when he arrived home he went to his room. Lin argued that simply knowing about a party, or being present at a party where someone else got drunk, should not lead to sanctions. Lin also argued that there was no evidence that the housemates provided alcohol to guests. Lin asserted that because Pepperdine never showed him evidence regarding alcohol being consumed at the party or alcohol provided by the housemates, "I am being discriminated [*sic*] and my rights are ignored [*sic*] by Pepperdine University." Lin submitted a document that was signed by several people, including Wahba and Lillsunde, stating, "Liping Lin is not the initiator, planner and participator of the party that was indicated happen on November 1st [*sic*]."

A document titled "Appeal Hearing Notes" states that Lin repeated these arguments at the appeal hearing. Because the drunk student was found on campus and not at the party, Lin "said that he wants a police report that shows that the student was at their home." The committee members discussed with Lin the nature of evidence the university considers in a discipline case, and Lin "said that he was not involved. He said that if he cannot see the police report he does not believe he did anything wrong."

The appeal committee upheld the finding that Lin was responsible for the incident, but shortened the suspension so that

it would end on July 31, 2015. Lin was required to live on campus for the fall 2015 and spring 2016 semesters. The appeal hearing notes state that the committee “did not find any procedural irregularity in the judicial procedures,” and “there was sufficient information to support the decision by the Student Disciplinary Committee that [Lin] violated the Code of Conduct by hosting a gathering that included underage drinking and drunkenness.” Lin was informed of this outcome in a letter.

D. Proceedings in the superior court

Lin petitioned the superior court for a writ of administrative mandamus or mandate. In his petition, Lin alleged in general language that Pepperdine failed to grant him a fair hearing, and Pepperdine committed a prejudicial abuse of discretion by failing to proceed as required by law, making findings that were not supported by evidence, and rendering a decision not supported by the findings. Lin sought an immediate stay of his suspension; the court denied this request.

In his opening brief on the merits, Lin argued that “[i]f administrative mandamus is not proper or does not afford complete relief in this case, then traditional mandamus should issue.” Lin asserted that Pepperdine failed to follow its own procedures because no witnesses were called and no evidence against Lin was presented. He also argued that overwhelming evidence showed that he should not have been held responsible. Lin further contended that on appeal, Pepperdine “wrongfully employed a ‘sufficient information’ standard of proof,” rather than the required preponderance of the evidence standard.

In its opposition, Pepperdine argued that because Lin admitted he knew about the party, received his parents’ permission the day before the party, and promoted the party on

Facebook, the evidence was sufficient to support the findings and suspension. Pepperdine also pointed to statements by Lin's housemates stating that they all planned the party, contributed to pay the security guards, and arranged for transportation. Pepperdine said it followed appropriate procedures, and argued that Lin did not specify any particular procedural requirement that was not met. Pepperdine also asserted that the preponderance of the evidence standard was met.

Lin argued in reply that even if he knew about the party, it was "fundamentally unfair to hold him liable for the acts and omissions of others." Lin's reply continued, "This case comes down to fundamental fairness. . . . Petitioner Lin is the only one who maintains his non-involvement. And all the housemates agree that Petitioner Lin is the only one who is not involved." Lin asserted that Pepperdine had failed to prove that Lin participated in the party or its planning.

The record does not include a reporter's transcript. A notice of ruling in the appellant's appendix notes that at a hearing on December 11, 2015, the court adopted its tentative ruling. The tentative ruling states that Code of Civil Procedure section 1094.5¹ is "the administrative mandamus provision which structures the procedure for judicial review of a private university's administrative decisions, including the decision to impose discipline on a student." The court stated that under section 1094.5, "[t]he inquiry for the issuance of a writ of administrative mandamus is whether the agency in question prejudicially abused its discretion; that is, whether Respondent's action was arbitrary, capricious, in excess of its jurisdiction,

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

entirely lacking in evidentiary support, or without reasonable or rational basis as a matter of law.” Because Lin’s discipline does not involve a fundamental vested right, the court said, the question is “whether Respondent’s findings are based on substantial evidence in light of the entire administrative record, and whether the findings support its decision.”

The court also set out the standard for traditional mandate, stating, “Although it is not relevant here (because Petitioner seeks review of an adjudicatory or quasi-judicial decision by an agency after an evidentiary hearing), insofar as Petitioner has requested traditional mandate in the alternative, the Court will discuss same.” For traditional mandate under section 1085, the court said, “it is Petitioner’s burden to establish that Respondent’s challenged actions were arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.”

The court stated, “If this were a de novo review whereby this Court would conduct an independent analysis, this Court would have found Petitioner not guilty. The undisputed facts that Petitioner did not attend the party at all and that all 5 of his other housemates have all exonerated him of any responsibility or planning of the party would be sufficient for this Court to acquit Petitioner of the charges.” The court stated that Pepperdine relied on Lin’s statements that he knew details about the party, showed his parents information about the party, promoted the party on Facebook, and refused to talk to safety officers about the party. The court noted, “[T]he heavy presumption that must be accorded the Respondent University as well as the abuse of discretion standard set forth above leaves this Court with the sole test of whether the Respondent’s decision

was ‘entirely lacking in evidentiary support.’ *Khan [v. Los Angeles City Employees’ Retirement System]* (2010) 187 Cal.App.4th 98,] 106 [(*Khan*)]. Given the above, this Court cannot so find.”

The court did find, however, that Pepperdine abused its discretion as to Lin’s sanction because “[t]he evidence, even when viewed in the light most favorable to the Respondent and according its credibility determinations, clearly evidences that Petitioner’s role in the violation was substantially minor in comparison to that of his roommates.”² The court therefore denied the petition with respect to finding Lin culpable, but granted the petition “with respect to the punishment imposed.” The court ordered Pepperdine to vacate Lin’s suspension and impose a new punishment in accordance with the court’s order.

Lin timely appealed.

STANDARD OF REVIEW

There appears to be some confusion about the standard of review on appeal. Lin argues at length that the trial court applied the wrong standard, because it applied the “entirely lacking in evidentiary support” standard articulated in *Khan*, *supra*, 187 Cal.App.4th 98. Indeed, *Khan* is a case involving a writ of mandate under section 1085, which is not applicable here.

However, “[r]egardless of the nature of the right involved or the standard of judicial review applied in the trial court, an appellate court reviewing the superior court’s administrative mandamus decision always applies a substantial evidence standard.” (*JKH Enterprises, Inc. v. Department of Industrial*

² The trial court referenced Lin’s petition as one of three appeals brought by three of the housemates. There is no information about the other appeals in the record before us.

Relations (2006) 142 Cal.App.4th 1046, 1058 (*JKH Enterprises*).) We therefore “review[] the administrative record to determine whether the agency’s findings were supported by substantial evidence, resolving all conflicts in the evidence and drawing all inferences in support of them.” (*Ibid.*; see also § 1094.5, subd. (c) [“abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.”].)

In his reply brief, Lin asserts that the standard of review is *de novo*. This standard is not applicable here. A challenge to the procedural fairness of an administrative hearing is reviewed *de novo* on appeal, “because the ultimate determination of procedural fairness amounts to a question of law.” (*Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482.) Lin has not challenged any aspect of Pepperdine’s procedure, however. Lin contends the evidence was not sufficient to meet Pepperdine’s standard of a preponderance of the evidence, but this is a “claim [] that the findings are not supported by the evidence” (§ 1094.5, subd. (c)), not a claim that Pepperdine’s process failed to amount a fair hearing. We therefore apply the substantial evidence standard of review.

DISCUSSION

Lin argues, “Applying the correct standard, the finding of guilt must be reversed” because “the so-called ‘evidence’ did not support the finding, which was therefore entirely lacking in evidentiary support.” According to Lin, the evidence relied upon by Pepperdine does not support the finding that Lin violated the student conduct code.

“‘Substantial evidence’ is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid

value.” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) “Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence.” (*Ibid.*) “Credibility is an issue of fact for the finder of fact to resolve.” (*Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1074.) “The testimony of one witness may provide substantial evidence.” (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767-768.)

Pepperdine found that Lin violated a student conduct code section that prohibited “[h]osting or in any way assisting or promoting a gathering (on or off campus) that includes underage drinking or drunkenness or drug use. . . . Those living at the location where the party is held may be held responsible as hosts regardless of who provides the alcohol.” The question for us, therefore, is whether a finding that Lin violated this provision is supported by substantial evidence in the administrative record.

Lin does not dispute that a Halloween party was held at his residence, Babylon House. Lin himself provided evidence that the party was promoted in advance on Facebook, and several of the housemates confirmed this. Lin provided the Facebook invitation to Pepperdine to show them that the party was well-planned. The Facebook invitation discussed the shuttle service. Student A, Student B, and Student C all justified the shuttle service, in part, to avoid having people driving to and from the party while drunk, thus acknowledging the assumption that alcohol would be consumed at the party. Lin said that the day before the party, he invited his parents “to inspect the house and look over the schedule,” showing that Lin knew about the party the day before it happened. Wahba said all six housemates

chipped in to pay for the two security guards. Wahba, Student A, Student B, and Lillsunde all acknowledged that people were drinking at the party. The incident report by Pepperdine security stated that two underage students were on campus, intoxicated, after attending the party.

This evidence is sufficient to support Pepperdine's conclusion that Lin hosted, assisted, or promoted the gathering at which underage students were drinking. Lin points out several conflicts in the evidence that he argues weigh in his favor, such as his housemates' statements, submitted with Lin's appeal to Pepperdine, that Lin did not initiate or plan the party. However, on appeal we consider only whether there is evidence to support Pepperdine's decision. "On substantial evidence review, we do not 'weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence or in the reasonable inferences that may be drawn from it.' [Citation.]" (*Do v. Regents of the University of California* (2013) 216 Cal.App.4th 1474, 1492.)

Lin points to four different pieces of evidence, arguing that these "four items of evidence, identified by the court as the only evidence relied on by [Pepperdine] relevant to [Lin], do not constitute 'substantial evidence.'" We address Lin's arguments about this evidence below, but note first that an abuse of discretion occurs where "the findings are not supported by substantial evidence *in the light of the whole record*." (§ 1094.5, subd. (c), [emphasis added].)³ We therefore do not consider only

³ Where an administrative decision affects a fundamental, vested right, "the trial court not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) In such

the portions of the record Lin challenges, but instead look to the entire administrative record in determining that Pepperdine's decision was supported by substantial evidence.

The four pieces of evidence Lin challenges are (1) Lin's admission that he knew several details about the party, (2) Lin's statement that he told his parents about the party, (3) emails or texts showing Lin's encouragement or promotion of the party, and (4) Lin's refusal to answer security officer questions during the initial investigation. Lin is correct that the trial court identified these things as "the only evidence" Pepperdine relied upon with respect to Lin's involvement with the party, but the record does not reveal the basis for this statement. The initial hearing notes cited Lin's written response, the Facebook invitation, and the other housemates' initial indications that all housemates were involved in planning the party. The appeal hearing notes referenced Lin's written response and stated that sufficient evidence supported the previous finding. Thus, the origin of the court's conclusion that Pepperdine relied on "only" these four pieces of evidence is unclear. Nevertheless, we will address Lin's arguments about this evidence.

First, Lin contends that his knowledge about the details of the party beforehand "would serve to reassure Lin that the matter would be handled properly, not cause him undue concern that underage drinking would occur." He also asserts that "mere

a case, we would review the record to determine whether the trial court's factual findings were supported by substantial evidence. (See *Cassidy v. California Board of Accountancy* (2013) 220 Cal.App.4th 620, 627.) Here, Lin does not argue that Pepperdine's decision affected a fundamental vested right, and he does not argue that the trial court should have applied the independent judgment standard.

knowledge does not equate with active wrongdoing.” However, the student conduct code does not include a knowledge element with respect to underage drinking. Instead, the code prohibits “assisting or promoting a gathering . . . that includes underage drinking or drunkenness.” The Facebook invitation, Lin’s knowledge of the party, and the other housemates’ statements that all housemates were involved in planning the party and paying for the security support Pepperdine’s finding that Lin was responsible for hosting, assisting, or promoting the party. Whether Lin knew ahead of time that underage guests might drink alcohol at the party does not undermine the evidence that he assisted or promoted the party.

Second, Lin points to evidence that he showed his parents the party plans before the party, and argues, “The fact that they did not object is entirely irrelevant to the charges. . . . They had no duty to their son, to [Pepperdine], or to anyone, to object, and their failure to do so, is evidence of nothing.” Lin himself provided this evidence to Pepperdine, stating that if his party plans “had been unacceptable because of our organization and planning for the party, it would’ve been stopped in the first place.” We agree that Lin’s parents’ approval is irrelevant to whether Lin’s conduct was sanctionable under Pepperdine’s student conduct code. However, as with the other evidence of planning, Lin’s prior knowledge about party details, along with the initial statements by the other housemates that they all planned the party, supports Pepperdine’s finding that Lin violated the student conduct code by “assisting or promoting” the gathering.

Third, Lin challenges the “email/text evidence showing [Lin’s] encouragement and promotion of the party.” He points to

the video he shared on social media days before the party, with a message stating, “It is near guys. Prepare this for Babylon.” Lin argues the video “shows neither encouragement nor promotion of the party.” He also asserts that Pepperdine mentioned this video at the trial court for the first time, and did not rely on it during the initial hearing or the appeal. We consider whether the administrative record—not the arguments in the trial court—supports Pepperdine’s findings. (*JKH Enterprises, supra*, 142 Cal.App.4th at p. 1058.) The Facebook invitation Lin provided to Pepperdine, which Lin referred to in his written statement as “our promotion on Facebook,” shows that extensive plans had been made before the party began. Even without the October 28 video, therefore, there is evidence in the record that Lin promoted or encouraged the party on social media.

Lin later contradicted his statements about the Facebook invitation by arguing that he did not mean to say that *he* was involved in promoting the party, but only that his housemates promoted the party. Lin also contradicted his housemates’ initial statements that all housemates were involved in planning the party, by submitting later statements from the housemates saying Lin was not involved. Contradictions in the evidence, however, do not support a reversal. “When reviewing a university’s disciplinary actions, “[t]he power of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, that will support the finding.” [Citation.]’ [Citation.]” (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 248-249.) Therefore, even if Lin contradicted his earlier statements or submitted statements from his housemates during

his campus appeal, there was substantial evidence to support Pepperdine's finding that Lin assisted or promoted the gathering.

Fourth, Lin contends that his refusal to talk to university security officers about the party does not constitute evidence that he violated the student conduct code. Indeed, it does not. But as noted above, abuse of discretion occurs only where the findings are not supported by substantial evidence in light of the whole record. Pepperdine was free to assess Lin's credibility by considering his initial refusal to talk about the party with campus security, his later statements that the party was well-planned and responsibly promoted, and his even later statements that he was not involved in planning or promoting the party. As stated above, Pepperdine's findings are supported by substantial evidence in the administrative record.

DISPOSITION

The judgment is affirmed. Pepperdine is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.