NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2174

FREDERICK F. FAGAL, JR.,
Appellant

v.

MARYWOOD UNIVERSITY

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-14-cv-02404)
District Judge: Hon. A. Richard Caputo

Argued: March 21, 2019

Before: SHWARTZ, KRAUSE, and BIBAS, *Circuit Judges*

(Opinion filed: October 8, 2019)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

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KRAUSE, *Circuit Judge*.

Frederick F. Fagal, a former tenured professor of Marywood University, appeals the District Court's judgment against him on his breach-of-contract claim, which was based on allegations that Marywood failed to provide him with the process required under its disciplinary policy before terminating him. He argues the District Court misinterpreted the policy and wrongly concluded that he received the process he was contractually due. Because we perceive no error in the District Court's interpretation of

the policy, we will affirm.

I. Background

Marywood University terminated Fagal, a tenured professor, after he created and circulated among the Marywood faculty two videos that belittled Marywood University President Anne Munley, mocked Marywood (a Catholic university) as a "fat bureaucratic web and nun casino," App. 455, and depicted Munley and several other Marywood administrators—one of whom was Jewish—as Adolf Hitler and SS Nazi officers. His production of the videos was precipitated by a conflict with the administration over flyers that Fagal posted around campus to advertise an event he had planned for students. Although Fagal had obtained prior approval to hang the flyers, Marywood administrators removed some of them without consulting him. According to Fagal, Marywood did so because the event featured a speaker from a group considered by some in the administration to be highly controversial and politically charged, while Marywood claims that the posters conflicted with its values because they advertised a monetary prize for attendance. This upset Fagal, particularly because he had personally paid for the flyers, and he made the videos to express his discontent.

Before Fagal's termination, President Munley held a meeting with him to discuss disciplinary action. She informed him that he was suspended, effective immediately, but she did not specify any other remedial or punitive action the administration would take. The next day, Munley sent a letter to Fagal notifying him that she was recommending his termination. He responded shortly thereafter requesting that the administration convene faculty committees to review his suspension and termination. Munley obliged by

convening a faculty review committee, which evaluated and ultimately upheld the termination decision.

Fagal then sued Marywood for breach of contract, alleging that Marywood violated the Progressive Discipline Policy incorporated into Fagal's employment contract. The Policy is designed to cover "personal and professional problems that may be rectified by an informal educational process" and also "serious violations of professional responsibilities implicating possible recommendation for suspension or dismissal." App. 46. Marywood considers the Policy to provide two independent tracks, such that run-of-the-mill personal and professional problems are handled through progressive disciplinary steps, while "serious violations of professional responsibilities" permit immediate suspension or dismissal without such prior remedial efforts; Fagal, on the other hand, views it as requiring that all professional misconduct, even "serious violations," like his conduct, be addressed through progressive disciplinary steps before Marywood may consider suspension or dismissal. App. 46. The resolution of Fagal's claim turns on which of these is the proper interpretation of the Policy.

The District Court held a bench trial and granted judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c), concluding that "the informal procedures outlined in the [Policy] are permissive," and not, as Fagal would have it, mandatory. *Fagal v. Marywood Univ.*, No. 3:14-CV-02404, 2018 WL 1993790, at *3 (M.D. Pa. Apr. 27, 2018). While it acknowledged that the Policy appears to "strongly favor the use of 'informal process,'" like the issuance of written warnings, the District Court interpreted the Policy as "not requir[ing] such process for *all* offending conduct."

Id. Rather, "when '[s]erious violations of professional responsibilities' [are] in question"—like Fagal's actions—no "informal process" is due a faculty member before dismissal. *Id*. (alteration in original). Accordingly, the District Court determined that Marywood did not breach its contract with Fagal by firing him without the full panoply of progressive discipline and entered judgment in Marywood's favor. This appeal followed.

II. Jurisdiction and Standard of Review

The District Court exercised jurisdiction pursuant to 28 U.S.C. § 1332(a). We have jurisdiction pursuant to 28 U.S.C. § 1291.

Under Pennsylvania contract law, which governs here, "ambiguous writings are interpreted by the finder of fact, [while] unambiguous ones are construed by the court as a matter of law." *Trizechahn Gateway LLC v. Titus*, 976 A.2d 474, 483 (Pa. 2009). Where, as here, a trial court determines that a contract is ambiguous and proceeds to make factual findings about the contract's meaning, we review those "findings of fact[] interpreting the contract . . . for clear error."[1] *Dardovitch v. Haltzman*, 190 F.3d 125, 139

[1] Oddly, both parties assume that we are reviewing the District Court's interpretation of the policy de novo, although it is not clear whether that is because they are misapplying the law, *see Dardovitch*, 190 F.3d at 139; *Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm'n*, 894 F.3d 509, 528 (3d Cir. 2018) (describing the difference between contract interpretation, which is reviewed for clear error, and contract construction, which is reviewed de novo), or because, given that the District Court did not explicitly state that the policy was ambiguous, they believe the District Court was making legal conclusions instead of factual findings. If the latter, the parties are simply mistaken. The District Court's "[f]indings," *Fagal*, 2018 WL 1993790, at *4, were based not only on the contract but also on testimony and extrinsic evidence—including an earlier version of the disciplinary policy, *see id.* at *3 (citing both operative and prior versions of policy). That makes apparent the District Court's implicit finding that the

(3d Cir. 1999).

III. Discussion

On this record, we conclude the District Court did not clearly err in finding that informal discipline under the Policy was "permissive," *Fagal*, 2018 WL 1993790, at *3, not mandatory as Fagal would have it, and that the Policy "does not prohibit Marywood from issuing punitive punishment, including termination, for serious misconduct by tenured faculty," *id.* at *10. As set forth below, we reach this conclusion primarily for two reasons: (A) the policy language does not carry an unambiguous contrary meaning, *see Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 430 (Pa. 2001) ("The meaning of an unambiguous written instrument presents a question of law for resolution by the court."), and (B) we see no clear error in the District Court's factual findings, which we could reject only if, having examined "the entire evidence," we were "left with the definite and firm conviction that a mistake has been committed," *United States v. Williams*, 898 F.3d 323, 329 (3d Cir. 2018).

A. The Text of the Policy

For us to set aside the District Court's interpretation—which was based on text, testimony, and extrinsic evidence informing its factual findings—and to conclude that the Policy must be interpreted, as a matter of law, solely on the basis of the text, we would have to conclude that the Policy unambiguously supported Fagal's interpretation of it.

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contract was ambiguous because reliance on extrinsic evidence would only be appropriate after a finding of ambiguity. *See Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 429–30 (Pa. 2001).

Trizechahn Gateway, 976 A.2d at 483; *Murphy*, 777 A.2d at 430. Unfortunately for Fagal, he cannot meet this high standard.

The Policy's plain language provides that, although there are "personal and professional problems that may be rectified by an informal educational process," there may arise more "serious violations of professional responsibilities implicating possible recommendation for suspension or dismissal." App. 46. To address the types of "personal and professional problems" that merely warrant an "informal educational process," the policy provides "a series of gradual steps involving strategies such as personal conferences, oral and written warnings, and opportunities for monitored assistance *where applicable*," App. 46 (emphasis added), covering a range of progressive discipline up to and including suspension or dismissal.

In identifying the individual steps available, the Policy makes clear at several points that the disciplinary action in question is permissive. *See, e.g.*, App. 46 ("A written warning . . . *may* follow . . . ." (emphasis added)); App. 47 ("[T]he Vice President for Academic Affairs *may* require . . . any of the following remedial actions: counseling[,] . . . psychological counseling and/or treatment[,] . . . peer faculty monitoring[,] . . . periodic conferences with the . . . Dean . . . ."). The Policy also expressly reserves Marywood's discretion to resort to suspension "at any time during the proceedings involving [the faculty member]," App. 46, and to "move towards dismissal" as long as any "remedial actions[] taken during the suspension [have] not sufficiently resolve[d] the issues that l[ed] to the suspension," App. 47.

For his part, Fagal highlights other features of the policy that he argues require

progressive discipline regardless of the severity of the professional misconduct at issue. But even aside from the other policy language reflecting the permissive nature of the progressive disciplinary approach, these isolated provisions would not persuade us that the Policy is unambiguous in Fagal's favor. Instead, on close examination, each is itself ambiguous.

First, Fagal highlights that the Policy is entitled "Progressive Discipline" and states that it "is designed to accomplish [its goals] by a series of gradual steps." App. 46. While the title might vaguely support the notion that Marywood generally preferred a progressive approach to discipline—as the District Court acknowledged, *Fagal*, 2018 WL 1993790, at *3—it does not establish unambiguously that progressive discipline is required in all circumstances. Nor would we read such a requirement into the body of the Policy solely on the basis of the title when the text counsels otherwise. The Policy's general description of its design also does not create such a requirement, as the context of that description makes clear that the Policy's "gradual steps" are only taken "where applicable," not in *all* cases. App. 46.

Second, Fagal points out that the Policy identifies one progressive disciplinary action as a "[m]eeting with [an] [a]dministrator" and states in mandatory terms that at such a meeting "the administrator *will specify* corrective action to be taken." App. 46 (emphasis added). But he takes that mandatory language out of context. In full, the statement reads: Only "if . . . additional light is not shed on the allegation or an explanation is not satisfactory," then "the administrator will specify corrective action to be taken." App. 46. That conditional phrasing implies that there are circumstances in

which the administrator's specifications are not required or necessary. And, even in isolation, the language on which Fagal relies is ambiguous: It may mean that the administrator will identify a course of progressive discipline, or just as easily that the administrator must give notice of whatever disciplinary action is deemed appropriate—up to and including immediate discharge.

Third, Fagal emphasizes that the dismissal clause of the Policy provides that "[i]f remedial actions[] taken during the suspension does not sufficiently resolve the issues that lead to the suspension, the university may move towards dismissal of the faculty member." App. 47. However, that statement does not by its terms require that remedial action be taken at all but can reasonably be read to mean that, *to the extent* Marywood has taken remedial action and that action proved unsatisfactory, then it may terminate the faculty member. That reading is reinforced when this clause is read in connection with another policy provision that allows Marywood to suspend a faculty member "at any time during the proceedings involving him or her"—that is, even at the very outset of those proceedings and before implementation of progressive remedial action.[2]

In short, the provisions on which Fagal relies are not even unambiguous in and of

[2] The Policy goes on to state that "[s]uspension is justified if immediate harm to the faculty member or others is threatened by the person's continuance in the faculty position." App. 46. As the District Court noted, this provision makes clear that the threat of immediate harm is sufficient to justify suspension, but it does not by its terms limit suspension to that circumstance. *Fagal*, 2018 WL 1993790, at *3. In any event, the District Court determined that the "harm" to which the Policy refers here is not merely "physical harm," but also "psychological or emotional harm," which it found was established on this record. *Id.* at *3; *see also id.* at *10 ("Emotional or reputational harm may meet this standard."). Fagal does not challenge that finding on appeal.

themselves. Moreover, our task is not to assess contract provisions in "isolat[ion]," but to construe the "whole instrument . . . together," *Mathers' Ex'r v. Patterson*, 33 Pa. 485, 488 (1859), and determine if it "unambiguous[ly]" supports Fagal's position, *Trizechahn Gateway*, 976 A.2d at 483. Reading the provisions on which Fagal relies in context of the Policy as a whole, the Policy is at least ambiguous, if not unambiguously supportive of Marywood's reading. In either event, it does not unambiguously support Fagal's, so we review the District Court's findings for clear error.

B. The District Court's Findings Are Not Clearly Erroneous

The District Court considered the language in the policy, as well as extrinsic evidence, including witness testimony and an older version of the policy. It observed that, "[w]hile the [policy] does appear to strongly favor the use of 'informal process,' which includes the warnings now requested by Dr. Fagal, the policy does not require such process for *all* offending conduct." *Fagal*, 2018 WL 1993790, at *3. It then found, based on the record before it, that "Marywood has discretion to take corrective action under the Progressive Discipline Policy for misconduct by tenured faculty" and that "[t]he Progressive Discipline Policy does not prohibit Marywood from issuing punitive punishment, including termination, for serious misconduct by tenured faculty." *Fagal*, 2018 WL 1993790, at *9–10.

Those findings by the District Court are not clearly erroneous.[3] To the contrary,

[3] Our dissenting colleague reads the policy differently, and his reasonable reading might lead to a different result if we were tasked with *de novo* review. But that is not our role in this case: Interpretation of an ambiguous contract requires "ascertaining the intent of the parties," which is "a question of fact, governed by the clearly erroneous standard."

they are well supported by the record. First, as reviewed earlier, the text of the Policy indicates repeatedly that progressive discipline is permissive—e.g., that Marywood "may" issue a written warning and "may" require counseling—and specifies that "serious violations of professional responsibilities" may be addressed through immediate suspension and dismissal. App. 46–47. It also expressly authorizes Marywood to "suspend[]" a faculty member "at any time."[4] App. 46. And perhaps more to the point is what it does not say: that faculty members are unconditionally entitled to progressive

John F. Harkins Co. v. Waldinger Corp., 796 F.2d 657, 659–60 (3d Cir. 1986); *see Ins. Adjustment Bureau v. Allstate Ins. Co.*, 905 A.2d 462, 468–69 (Pa. 2006) ("The fundamental rule in contract interpretation is to ascertain the intent of the contracting parties. . . . [A]mbiguous writings are interpreted by the finder of fact."). Here, the policy is ambiguous under Pennsylvania law because, as reflected in our differing views of the document's plain language and structure, it is "reasonably susceptible of different constructions and capable of being understood in more than one sense." *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 430 (Pa. 2001) (citation omitted). As such, the District Court properly held a bench trial, considered "extrinsic or parol evidence . . . to determine the intent of the parties," *id.* at 429, and "resolve the ambiguity," *Ins. Adjustment Bureau*, 905 A.2d at 468–69, and found that the parties did not intend the policy to require progressive discipline for serious misconduct, *Fagal*, 2018 WL 1993790, at *10. We may review that determination only for clear error and may not simply adopt another reasonable interpretation.

[4] The dissent makes much of the fact that while the Policy vests the Vice President of Academic Affairs with the responsibility of investigating and suspending a faculty member, the President took on those duties here. But we agree with the District Court that "a superior officer at the University is endowed with the powers of her subordinates. To suggest that the President of the University, the [Vice President of Academic Affairs'] superior, did not have the authority to notify Dr. Fagal of his suspension is simply without merit." *Fagal*, 2018 WL 1993790, at *3. Indeed, the Policy vests the ultimate authority to terminate employment with the President. Moreover, as the Vice President was the target of Fagal's videos and testified that he feared violence might erupt if he were in close proximity to Fagal, the Vice President's impartiality as the investigator would reasonably be subject to question. The President's assumption of these duties thus also enhanced the fairness of the process.

discipline. Thus, the text accords with the District Court's reading.

Second, the testimony of Marywood administrators reflected that Marywood had maintained—and intended to maintain in the new version of the policy—a two-track framework for discipline, as it had in the prior version of the policy. That prior version, too, discussed the "progressive discipline policy" as "consisting of both informal and formal procedures," with "[s]erious violations of professional responsibilities implicating possible suspension or dismissal . . . covered by the formal discipline process" and "personal and professional problems" covered by the "informal educational process." App. 46. The new version, although streamlined, maintains essentially the same structure and much of the same language as the old policy, including the reference to the two tracks: "an informal educational process, as well as serious violations of professional responsibilities implicating possible recommendation for suspension or dismissal." [5] App. 46.

Finally, even setting aside these problems with Fagal's interpretation, his argument proves too much. Under his reading of the policy, in circumstances where the

[5] Fagal posits that the District Court cited the old version of the policy not because it was relying on it as extrinsic evidence, but because it misunderstood that the older version was no longer operative. In context, it is apparent to us that the District Court was simply comparing the two versions, as its opinion cites the operative version as the governing policy multiple times. *See Fagal*, 2018 WL 1993790, at *3–4. But even if there were any error in its reliance on the older policy (which we do not believe to be the case), that error was harmless, both because the District Court clearly relied on the operative version to render its ultimate decision and because the language at issue is essentially the same in both versions. *See Gen. Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 329 (3d Cir. 2001) (explaining an error is harmless "if it is highly probable that the error did not affect the judgment").

University concludes from the outset that no corrective action could be taken to address the problem and that dismissal is necessary, it has no recourse but to breach the contract and take its chances on an affirmative defense like impossibility in litigation. To put a fine point on it, Fagal contends that, although Marywood could immediately suspend a faculty member who assaulted a student, murdered the dean, or burned down a campus building, it is contractually obligated to undertake a series of corrective actions before it may dismiss the faculty member. But creative (and consistent with his argument) as this contention may be, we eschew constructions of contracts that "produce absurd results." *Harrity v. Cont'l-Equitable Title & Tr. Co.*, 124 A. 493, 494 (Pa. 1924). Here, that canon also counsels us to embrace the reasonable interpretation of the Policy adopted by the District Court.

In sum, having examined "the entire evidence" on which the District Court relied to make its findings and interpret the Policy, we are not "left with the definite and firm conviction that a mistake has been committed." *Williams*, 898 F.3d at 329. Accordingly, we cannot conclude that the District Court's interpretation of the contract was clearly erroneous. *Id.*

IV. Conclusion

For the foregoing reasons, we will affirm the judgment of the District Court.

BIBAS, *Circuit Judge*, dissenting.

The employment contract is the backbone of a tenured professor's job. Professors trust universities to honor their tenure, as promised by contract. So before they fire professors, universities must follow their own disciplinary and dismissal procedures to the letter. And because universities draft these contracts, Pennsylvania law requires us to construe any ambiguities against the drafter. Marywood University admits that, in firing Fagal, it did not follow all of its own procedures. But the decision below failed to apply either rule, so I respectfully dissent.

I. THE DISCIPLINARY POLICY MANDATES A SINGLE SET OF PROCEDURES FOR ALL OFFENSES

Fagal signed an employment contract with Marywood. That contract incorporated Marywood's faculty handbook. And part of that handbook was Marywood's Progressive Discipline Policy, which sets forth the process that Marywood must follow when punishing its faculty. The process mandates six steps.

Marywood admits that when it fired Fagal, it skipped several steps. For instance, it did not give him an oral warning, nor did it have the Vice President of Academic Affairs conduct an investigation. Yet Marywood says that skipping these steps is fine because the policy creates a two-track system of discipline: one for minor violations that requires these steps, and one for serious violations that does not.

But the policy does not do that. It sets forth a single "series of gradual steps" that applies to all offenses, great and small. App. 46. Its plain language and structure prove this. And

even if it were ambiguous on this point, Pennsylvania law would require us to resolve that ambiguity against Marywood.

A. The text of the policy unambiguously creates a single set of procedures

The Progressive Discipline Policy's structure and plain language prove that it applies one set of procedures to all offenses. The policy sets out "a series of gradual steps." App. 46–47. These steps must be followed whenever Marywood wants to fire a tenured professor. Three aspects of the policy make clear that it applies to all terminations:

1. *The policy is structured as a unified set of procedures.* The policy lists all the procedures in a single section under a single "Procedures" heading. App. 46–48. That section does not differentiate minor violations from serious ones. It does not have separate headings for the two. And it does not have internal guideposts telling readers to skip ahead several steps for more serious violations. It is structured as a single set of procedures.

2. *The introductory Policy Statement supports viewing the policy as having one set of procedures.* Marywood's disciplinary policy is set forth in a single document entitled "Progressive Discipline." App. 46. The policy begins by stating its broad scope: it applies to all "faculty members with tenure." *Id.* And three passages in the introductory Policy Statement weigh strongly against reading two sets of procedures into the single policy.

First, the second paragraph begins by explaining that "[t]he policy is intended to provide *an* effective and flexible means of identifying problem areas, resolving complaints, and preventing repetitive incidents by prompt intervention and assistance." App. 46 (emphasis added). The singular *an* means that the policy creates only one framework for addressing disciplinary issues, not two.

That theme continues in the next sentence. The policy "is designed to accomplish *these ends* by *a* series of gradual steps." *Id.* (emphases added). *These ends* are the goals from the previous sentence. And the policy pursues these goals through *a* (singular) series of gradual steps. So the Procedures section lays out one series of steps for all problems.

Second, the Policy Statement says that Marywood "regards disciplinary action as corrective and not punitive." *Id.* But Marywood's reading would let it skip all the corrective procedures whenever it thinks a violation is serious. Marywood's reading conflicts with this statement. Bypassing oral warnings and remedial actions in favor of immediate suspension and dismissal, as Marywood did here, is not corrective, but punitive.

Third, the Policy Statement says that the policy, with its single set of gradual steps, "recognizes personal and professional problems that may be rectified by an informal educational process, as well as serious violations of professional responsibilities implicating possible recommendation for suspension or dismissal." *Id.* In context, this sentence confirms that the policy's procedures suffice to handle all violations great and small. That is why the procedures include both informal, educational steps that would suffice for small problems, and formal, punitive steps like suspension and dismissal for serious violations that prove to be too much for the earlier steps. The policy's gradual, sequenced procedures form a unified whole, not a two-track system of discipline.

3. *The language of the procedures confirms that they work as a single set.* The policy lists six mandatory procedures, each of which interlocks with the others. So any effort to fire a professor necessarily triggers all of the policy's procedural protections. But how do proceedings unfold?

First, there is a complaint: "Disciplinary action may be initiated by a complaint, oral or written, which alleges violation of institutional policy, practice, procedure or other functions and responsibilities of the faculty member …." App. 46. This Commencement Procedure puts Marywood's administrators on notice that a professor may have violated at least one responsibility or institutional policy.

Second, the faculty member must meet with an administrator: "The administrator receiving the complaint shall discuss the matter with the faculty member in a confidential conference.… If, however, additional light is not shed on the allegation or an explanation is not satisfactory, the administrator will specify corrective action to be taken, and the discussion will constitute an oral warning." *Id.* This Meeting Procedure ensures that the accused have an opportunity to be heard. "Shall" is mandatory, as Marywood concedes. So a meeting (and a plan for corrective action, if the issue is not resolved) must follow a complaint.

Third, the Vice President must conduct an investigation: "If the alleged problem continues or additional complaints are received, the immediate supervisor or dean must notify the Vice President for Academic Affairs, who shall conduct a preliminary investigation …." *Id.* This Written Warning Procedure ensures that the Vice President for Academic Affairs is notified of unresolved complaints and requires him to investigate.

Fourth, the Vice President may suspend the faculty member: "The faculty member may be suspended by the Vice President for Academic Affairs at any time *during the proceedings* involving him or her. Suspension is justified if immediate harm to the faculty member or others is threatened by the person's continuance in the faculty position." *Id.* (emphasis

added). So this Suspension Procedure cannot happen until after proceedings have already begun.

Fifth, after any remedial actions, the faculty member may be fired: "If remedial actions(s) [*sic*] taken during the suspension does not sufficiently resolve the issues that lead to the suspension, the university may move towards dismissal of the faculty member." App. 47. Marywood cannot get to this Dismissal Procedure without first pursuing remedial actions and going through the Suspension Procedure.

And sixth, the faculty member may appeal his suspension or termination to an ad hoc committee: "Faculty members have the right to convene an ad hoc committee in order to appeal either a decision to suspend the faculty member or a decision to dismiss the faculty member." *Id.*

In short, one cannot reach dismissal without going through all the preceding steps, many of which Marywood admits it skipped. Disciplinary actions start with commencement. Commencement automatically triggers a meeting with an administrator. An unsuccessful meeting triggers a preliminary investigation. Once notified, the Vice President of Academic Affairs may suspend a professor. But dismissal is allowed only *after* the Vice President of Academic Affairs pursues remedial actions and suspension.

Given the procedures' logical and linguistic interdependence, I can conclude only that they apply to all offenses, even serious ones.

The majority is troubled that the policy's safeguards might delay firing a faculty member who allegedly committed a serious crime. Maj. Op. 12–13. But the procedures' gradual steps provide for this possibility. They allow suspension "at any time" *after* proceedings

have begun to prevent "immediate harm." App. 46. But they say nothing about immediate dismissal. On the contrary, they require a series of gradual steps first. These gradual steps are not "absurd," but rather quite reasonable: they require adjudicating guilt and assessing blame and danger before imposing the final punishment. *Contra* Maj. Op. 13.

B. Even if the policy is ambiguous, we must resolve any ambiguity in Fagal's favor

Marywood disagrees with my reading of the sentence explaining that the policy contemplates "problems that may be rectified by an informal educational process, as well as serious violations." App. 46. It says that this sentence creates "two alternative, distinct tracks of discipline": an informal one for minor violations and a formal one for serious violations. Appellee's Br. 17.

Marywood wants to read a whole set of unwritten procedures into a single, arguably cryptic sentence. As the Supreme Court has noted, when interpreting statutes, we should not look for "elephants in mouseholes." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Likewise, the Pennsylvania Supreme Court instructs us to avoid coming up with an "interpretation, which is based exclusively on the way one sentence in the [policy] was written. Simply put, the parties' contractual intent cannot be gleaned by ignoring all but one sentence in the [policy], and then reading that sentence out of context." *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 432 (Pa. 2001). And all the context here cuts against Marywood's reading: the policy's text, structure, interlocking provisions, and the Policy Statement's repeated emphasis on creating a single set of "corrective and not punitive" procedures. App. 46.

The parties do not treat the policy as ambiguous and agree that de novo review is appropriate. Likewise, the District Court never held that the policy was ambiguous, yet it proceeded to consider extrinsic evidence. Still, the majority reviews only for clear error, reasoning that the admission of extrinsic evidence signals an "implicit finding" of ambiguity. Maj. Op. 6 n.1. I see no ambiguity nor any finding of ambiguity.

But even if the policy were ambiguous, the District Court should have resolved that ambiguity in favor of Fagal, as a matter of law. Pennsylvania law deals with contract ambiguities in two steps. First, we look to "the circumstances surrounding the execution of the document" to see if they resolve the ambiguity. *Burns Mfg. Co. v. Boehm*, 356 A.2d 763, 766 n.3 (Pa. 1976). Here, they do not. Second, we follow Pennsylvania's "well settled" instruction to resolve the ambiguity against the policy's drafter. *Id.* Here, that is Marywood.

1. *The policy's background and history favor Fagal*. The parties tell us little about the circumstances surrounding the policy's execution. The best that we have is the previous version of the policy. But that version does not help Marywood's case.

The current version has a single Procedures section. And the Policy Statement has a single sentence saying that the policy covers both minor and serious violations. The previous version has neither.

Unlike the current version, the previous version divided the procedures into two distinct sections: an "Informal Process" for minor problems and "Formal Proceedings" for serious violations. App. 524–27. Each process has its own set of detailed procedures. And the previous version's introduction reinforced that distinction. It had two sentences: one saying

that "the formal discipline process" was for "[s]erious violations"; the other saying that the "informal educational process" was for minor problems. App. 524.

The current policy eliminated those two separate tracks, merging them into one to cover both minor and serious violations. It streamlined the proceedings into a unified set of procedures for all offenses. It makes no sense to read these structural changes as keeping the old two-track system in place. So the policy's history favors Fagal.

2. *Pennsylvania law requires us to resolve any ambiguity in Fagal's favor*. But even if the policy's history did not resolve the ambiguity, the *contra proferentem* canon would require resolving it in favor of Fagal. *See Burns Mfg. Co.*, 356 A.2d at 766 n.3. Under that canon, any remaining ambiguity must be construed "against th[e] party responsible for the ambiguity, the drafter of the document." *Id.*; *accord* Restatement (Second) of Contracts §206 Am. Law Inst. (1981); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 243 (2012).

Marywood drafted the policy. So the District Court should have applied *contra proferentem* and resolved any ambiguity against Marywood by reading the policy as creating a single set of procedures for all violations. It did not. That alone is reversible error.

II. MARYWOOD DID NOT FOLLOW THE POLICY WHEN IT FIRED FAGAL

Because the policy creates a single set of procedures, Marywood cannot win unless it followed those procedures. This is an exacting standard: under Pennsylvania law, "[a]ll of the participants in [a university's disciplinary] process, including [the faculty member], [a]re required to follow the Contract's process to the letter." *Murphy*, 777 A.2d at 434.

But when Marywood fired Fagal, it failed to follow most of its own procedures: First, it never gave him a confidential meeting with his immediate supervisor or a dean, or an oral warning. Second, the Vice President of Academic Affairs did not investigate his behavior. Third, this Vice President was not the person who suspended him. And fourth, Marywood fired him without proposing any remedial actions or explaining why none would be fitting. Marywood itself concedes that it never complied with these steps.

Marywood and its administrators needed to follow the policy "to the letter." *Murphy*, 777 A.2d at 434. They did not. That is enough for Fagal to win his case.

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Marywood was free to pursue firing Fagal. But before it could do so, it had to follow its contractually required procedures. Its contract unambiguously mandated a series of gradual steps that it chose to ignore. And even if the contract were ambiguous, we would have to construe any ambiguities against Marywood and in favor of Fagal. Marywood did not follow its own procedures to the letter. So I respectfully dissent.