

FILED  
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JILL E. WHELCHER  
WHITMAN COUNTY CLERK

SUPERIOR COURT OF WASHINGTON  
COUNTY OF WHITMAN

No. 16-2-00085-0

██████████  
  
Petitioner,  
  
vs.  
  
WASHINGTON STATE UNIVERSITY,  
  
Respondent.

MEMORANDUM DECISION  
AND ORDER ON JUDICIAL REVIEW  
OF ADMINISTRATIVE ORDER

This is an action for judicial review of a final decision of the Student Conduct Board (Board) of Washington State University (University) that expelled a student, ██████████ (Petitioner), based on a finding that Petitioner sexually assaulted a female student (Complainant). Oral argument was heard on August 19, 2016. Petitioner was represented by attorney Steve Graham; the University was represented by Assistant Attorney General Nathan E. Deen. At the conclusion of the hearing, the court took its decision under advisement. After further reviewing the briefing and arguments of counsel, the court enters the following decision.

1 **BASIS OF APPEAL**

2 Petitioner bases this administrative appeal on three grounds:

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4 1. That the agency decision expelling Petitioner was arbitrary or capricious.

5 RCW 34.05.570(3)(i).

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7 2. The Board did not follow prescribed procedures and guidelines.

8 RCW 34.05.570(3)(c).

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10 3. The final order of the agency was not based on substantial evidence.

11 RCW 34.05.570(3)(e).

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13 In addition to establishing one or more of the asserted statutory grounds, the superior  
14 court may only grant relief in this administrative appeal if the Petitioner has been substantially  
15 prejudiced by the action complained of. RCW 34.05.570(1)(d). Petitioner bears the burden of  
16 proving substantial prejudice. Densley v. Dep't of Ret. Sys., 162 Wn.2d 210 (2007).

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18 The Petitioner has failed to establish the first and third grounds for his appeal. This  
19 decision will solely address the second ground, whether the Board failed to follow prescribed  
20 procedures and guidelines. RCW 34.05.570(3)(c).

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22 **BACKGROUND**

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24 The University expelled Petitioner after the Board found that Petitioner sexually  
25 assaulted the Complainant during a fraternity party on October 29, 2015. The central disputed  
26 issue before the Board was whether the Complainant consented to the sexual contact by  
27 Petitioner. The Complainant claimed that Petitioner engaged in sexual intercourse with her  
28 without her consent and through forcible compulsion, whereas Petitioner claimed that the  
29 sexual intercourse was voluntary and consensual on the Complainant's part.  
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1 Both the WSU Office for Equal Opportunity (OEO) and the Pullman Police Department  
2 investigated the sexual assault allegations. OEO interviewed numerous witnesses, including the  
3 Complainant, and obtained a written statement from Petitioner. Based on its investigation,  
4 OEO found that Petitioner sexually assaulted Complainant, and the WSU Office of Student  
5 Conduct thereafter commenced the disciplinary proceeding against Petitioner that is the  
6 subject of this appeal. The Pullman Police Department conducted a separate criminal  
7 investigation, which included an interview of Petitioner and the Complainant. This investigation  
8 resulted in the Whitman County Prosecuting Attorney's Office charging Petitioner with Rape in  
9 the Second Degree in Whitman County Superior Court. These criminal charges were later  
10 dismissed on motion of the prosecuting attorney.

11 The Board held a hearing to determine whether Petitioner violated a number of charged  
12 University rules and/or standards on February 17, 2016. Petitioner attended the hearing and  
13 was accompanied by his criminal defense attorney, Steve Graham. Mr. Graham assisted  
14 Petitioner at the hearing as an advisor, but pursuant to Board rules, he was not permitted to  
15 ask witnesses questions, to make objections or arguments on Petitioner's behalf, or to  
16 otherwise actively participant as an attorney in the proceeding. WAC 504-26-401(6). At the  
17 hearing, the Board heard sworn testimony from the OEO investigator and from an investigating  
18 officer from the Pullman Police Department. In addition to these two witnesses, the Board was  
19 provided with the case file from the Office of Student Conduct. This file included the OEO  
20 investigative memorandum, investigator notes, and police reports. Included in the police  
21 reports were text messages the Complainant sent to a friend on the night of the alleged assault.

1 At the Board hearing, the Petitioner was allowed, pursuant to University regulations, to  
2 suggest cross-examination questions for the witnesses to the Board Chair. Petitioner claims on  
3 appeal that of the "numerous" written questions that he propounded, a majority of the  
4 questions were either not asked by the chair, or were rephrased in such a manner as to change  
5 their meaning. These written questions were not preserved by the Board, however, so they are  
6 not part of the agency record. There is nothing in the record to show the content of these  
7 questions or the basis for the Board Chair's reasoning or rulings as to why whether specific  
8 questions were asked, rejected, or reworded.  
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13 As stated earlier, the central contested issue before the Board at the hearing related to  
14 whether the complainant consented to sexual intercourse with the Petitioner. The  
15 Complainant and the Petitioner had told conflicting versions of this issue to investigators, and  
16 the Board was required to make determinations as to the credibility of the reports and  
17 responses that they provided to the investigators. At the hearing Board members directed  
18 questions to the two testifying investigators as to their opinions as to the credibility of the  
19 Petitioner and the Complainant. Both witnesses provided the Board with an opinion that the  
20 Complainant was credible and that the Petitioner was not credible.  
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24 According to Petitioner, some of the written questions he wanted the Board Chair to ask  
25 the police officer and the OEO investigator related to text messages the Complainant sent to a  
26 friend immediately before and soon after the alleged assault. In a text she sent shortly before  
27 the admitted act of sexual intercourse, the Complainant sent a text to her friend stating:  
28 "Skackin don't leave without me." Petitioner argues that the word "Skackin" was an obvious  
29 misspelling of the word "shacking," which is slang for staying the night at a sexual partner's  
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1 house. AR 46-47. Petitioner’s slang definition of the term “shacking” is essentially consistent  
2 with the definition of the term “shack” that the Complainant gave the police—having sex in a  
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4 guy’s room. AR 73.

5           Almost 25 minutes after the “Skackin” text, the Complainant sent her friend another  
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7 text message asking where the friend was, and stating that she wanted to leave. Approximately  
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9 15 minutes after that, the Complainant sent a text to the friend stating: “Text me I need help.”  
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11 The hearing transcript shows that the police officer and OEO investigator testified as to the  
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13 later text messages, which arguably support the Complainant’s version of a non-consensual  
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15 assault, but they did not testify as to the earlier “Skackin” text, which arguably supports  
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17 Petitioner’s position that the sexual intercourse was consensual. Petition states that he  
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19 submitted written cross-examination questions relating to the Skackin” text to the Board Chair,  
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21 and argues that the chair erred in not presenting these questions to the witnesses. The hearing  
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23 transcript reflects that the Board Chair asked the OEO investigator a general question about  
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25 whether there were text messages between Petitioner and her friend, presumably at the  
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27 request of Petitioner, but the investigator only testified as to the messages sent after the  
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29 “Skackin” text. No specific inquiry was made to the witness by the Board Chair regarding the  
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31 “Skackin” text.  
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**DISCUSSION**

33           In an administrative appeal to superior court, the court reviews *de novo* whether an  
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35 agency has engaged in unlawful procedure or has failed to follow a prescribed procedure.

36 *Spokane County v. Eastern Wash. Growth Mgmt. Hearings Bd.*, 176 Wn.App. 555 (2013).  
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1 A limited right to direct questions to witnesses testifying at University Conduct Board  
2 hearings is provided in WAC 504-26-403(4)(a)(v), which provides in relevant part as follows:  
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4 Witnesses provide information to and answer questions from the  
5 university conduct board, the complainant, and the accused student, as  
6 appropriate. Questions may be suggested by the accused student  
7 and/or complainant to be answered by each other or by other  
8 witnesses. Written questions are directed to the conduct board chair,  
9 rather than to the witness directly. This method is used to preserve the  
10 educational tone of the hearing and to avoid creation of an unduly  
11 adversarial environment, and to allow the board chair to determine the  
12 relevancy of questions. Questions concerning whether potential  
13 information may be received are resolved at the discretion of the chair  
14 of the university conduct board. The chair of the university conduct  
15 board shall have the discretion to determine admissibility of  
16 information.

17 Formal rules of procedure and technical rules of evidence, such as are applied in  
18 criminal or civil court, are not used in University Conduct Board proceedings. WAC 504-26-  
19 401(8). "Relevant evidence, including hearsay, is admissible if it is the type of evidence that  
20 reasonable members of the university community would rely upon in the conduct of their  
21 affairs." *Id.* The chair of the Board is vested with the discretion to determine admissibility of  
22 evidence. *Id.*

23 Having the power to exercise discretion does not give a judge or hearing officer the  
24 unfettered right to make decisions in whatever manner or for whatever purpose he or she may  
25 want. When a judge or hearing officer is vested with discretion, the power to exercise such  
26 discretion "is subject to law-oriented reasons, precedence, legal concepts and principles, as  
27 well as traditional legal logic characteristics of the American legal system." *In re Burttis*, 12  
28 Wn.App. 564, review denied, 85 Wn.2d 1014 (1975). On review, an appellate court will likely  
29 find an abuse of discretion if the lower tribunal has failed to consider the required factors in  
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1 making its decision. State v. Scott, 72 Wn.App. 207 (1993), affirmed 126 Wn.2d 388 (1995). A  
2 judge or hearing officer is less likely to be found to have abused his or her discretion where he  
3 or she gives specific reasons for a stated decision. State v. Jackson, 102 Wn.2d 689 (1984). In  
4 exercising discretion, the decision maker must set out objectively assessable reasons or facts.  
5 State v. Williams, 96 Wn.2d 215 (1981). The absence of a record as to why a discretionary  
6 decision was made precludes appellate review. State v. Jones, 101 Wn.2d 113 (1984).  
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10 RCW 34.05.494(1) provides that the agency record in brief adjudicative proceedings,  
11 such as that conducted by the Board here, consists of any documents regarding the matter that  
12 were considered or prepared by the presiding officer for the proceeding or by the reviewing  
13 officer for any review. This statute also requires the agency to maintain these documents as its  
14 official record. *Id.*  
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17 It is undisputed that Petitioner submitted written questions to the Board Chair to be  
18 answered by the two witnesses that testified at the disciplinary hearing. It is also undisputed  
19 that these written questions were not retained by the Board and are not part of the agency  
20 record on judicial review. Petitioner claims that some of these questions related to the  
21 "Skackin" text message, and that other questions related to the credibility of the Complainant  
22 and the testifying witnesses. The Board Chair, in exercising the discretion granted by WAC 504-  
23 26-403(4)(a)(v) to determine whether to ask the suggested questions would necessarily have  
24 been required to give each question her review and consideration. Among other  
25 considerations, WAC 504-26-401(8) required the Board Chair to determine whether each  
26 question might produce the type of evidence that reasonable members of the university  
27 community would rely upon in the conduct of their affairs. Thus, by the terms of RCW  
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1 34.05.494(1), Petitioner's written questions were "considered by the presiding officer for the  
2 hearing," and should have been preserved and maintained as part of the agency record. By  
3 failing to include these questions in the agency record the Board Chair failed to follow  
4 prescribed procedures and she rendered it impossible for the court to determine whether she  
5 erred or abused her discretion in ruling on the admissibility of the evidence that Petitioner  
6 sought to bring before the Board pursuant to the Board's own rule. WAC 504-26-403(4)(a)(v).  
7 This failure also rendered it impossible to determine the full nature and extent of Petitioner's  
8 suggestion questions and the impact a possible exclusion of evidence had on the ultimate  
9 decision that was made.  
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14 Petitioner has established that he was substantially prejudiced by the Board's failure to  
15 preserve his written cross-examination questions. This failure rendered it difficult, if not  
16 impossible, for the University Appeals Board and now the court to determine whether  
17 Petitioner was provided with due process and a fair hearing. The appeals board and this court  
18 are only left to speculate as to whether the evidence that was excluded would have made a  
19 difference in the decision making of the individual Board members.  
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23 Significantly, the question of whether the Complainant consented to sexual intercourse  
24 with Petitioner was the basis of each student conduct code violation that was alleged. The  
25 credibility of the Complainant and the Petitioner was a primary issue that each Board member  
26 had to resolve in answering that question. The existence of the "Shackin" text message, which  
27 was purportedly the subject of some of Petitioner's written cross-examination questions, was  
28 highly relevant to the issue of consent and to the Complainant's credibility. Additionally, the  
29 existence of this text, the fact that both testifying witnesses had knowledge of its existence, and  
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1 the fact that they each failed to disclose this text during direct examination was highly relevant  
2 to their objectivity and credibility as witnesses. This is particularly true given the fact that they  
3 each testified to later text messages the Complainant made that could logically be construed,  
4 when considered in isolation, as consistent with the Complainant being a victim of a sexual  
5 assault.  
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8 The hearing transcript shows that Board members solicited opinion testimony from both  
9 the OEO investigator and the police officer as to the veracity and credibility of the Complainant  
10 and the Petitioner. From the record, it is clear that the Board put a great deal of weight and  
11 significance on this opinion testimony in reaching its decision. Under the Rules of Evidence that  
12 apply to court proceedings, opinion testimony as to the credibility of a witness is improper and  
13 inadmissible. ER 608. While the Rules of Evidence are not applicable in WSU brief adjudicative  
14 proceedings, the reasons for excluding such evidence are still worthy of consideration in an  
15 administrative hearing. Such opinion testimony has been held to violate a criminal defendant's  
16 right to a trial by jury by invading the fact-finding province of the jury. *State v. Thach*, 126  
17 Wn.App. 297 (2005). Additionally, Washington courts have held that "[T]estimony from a law  
18 enforcement officer regarding the veracity of another witness may be especially prejudicial  
19 because an officer's testimony often carries a special aura of reliability." *State v. Kirkman*, 159  
20 Wn.2d 918 (2007); *State v. Rafay*, 168 Wn.App. 734 (2012). Here, it appears that some of the  
21 Board members may have delegated their responsibility to determine the credibility of the  
22 Petitioner and the Complainant to the investigating officers. While the admission of the  
23 witnesses' opinion testimony as to the credibility of the Petitioner and the Complainant may  
24 not have been serious error by itself, particularly since there was no objection to such evidence,  
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1 admitting the evidence without allowing impeachment questioning substantially prejudiced the  
2 Petitioner's opportunity to present his version of the case and to be afforded a fair and  
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4 impartial hearing.

5         The decision of the Board finding that Petitioner sexually assaulted the Complainant and  
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7 the decision expelling him from the University must be reversed and remanded for a new  
8 hearing. To ensure a fair hearing for Petitioner on remand and to avoid the dangers of  
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10 predisposed biases in this case, the new hearing should be held before a board of entirely  
11 different members than were involved in the original hearing.


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13         Petitioner made a request for an award of attorney fees if he were to prevail in this  
14 appeal. Under the Washington Equal Access to Justice Act, RCW 4.84.350, attorney fees may  
15 be awarded to a qualifying prevailing party in an administrative appeal. The statute provides  
16 that "[a] qualified party shall be considered to have prevailed in the qualified party obtained  
17 relief on a significant issue that achieves some benefit that the qualified party sought."  
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19 RCW 4.84.350(1). While Petitioner prevailed in this appeal on procedural grounds so as to  
20 obtaining a reversal of the Board's decision and a remand for a new hearing, the court is not  
21 finding that the Petitioner did not sexually assault the Complainant and it is not entering a final  
22 decision on the merits of the case. Washington courts have held that a party awarded a  
23 remand or other relief on procedural grounds is not a prevailing party for purposes of RCW  
24 4.84.350 because the party has not yet prevailed on the merits. Ryan v. Dep't of Soc. & Health  
25 Servs., 171 Wn.App. 454 (2012); Brotherton v. Jefferson County, 160 Wn.App. 699 (2011).  
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2 **CONCLUSION & ORDER**

3 The court finds that the Board erred as a matter of law by not following prescribed rules  
4 for maintaining Petitioner's cross-examination questions as part of the agency record.  
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6 Additionally, the court finds that Petitioner was substantially prejudiced by this error. BASED  
7 on these findings, it is hereby ORDERED as follows:  
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- 9 1. The decision of the Board finding that Petitioner violated the WSU Student Conduct  
10 Code and the University sanction of expulsion is reversed in its entirety.  
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12 2. The case is remanded to the WSU Student Conduct Board for a new hearing on the  
13 allegations.  
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15 3. The new hearing shall be held before a Student Conduct Board of entirely different  
16 members than were involved in the original hearing.  
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18 4. Petitioner's request for attorney fees on appeal is denied.

19 DATED this 12<sup>th</sup> day of October, 2016.

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23 JUDGE  
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