STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0249

Caleb Wesen,
Relator,

vs.

University of Minnesota,
Respondent.

Filed November 13, 2017
Affirmed
Rodenberg, Judge

University of Minnesota
Office of Executive Vice President and Provost

David R. Lundgren, Adam T. Johnson, Lundgren & Johnson, P.S.C., St. Paul, Minnesota (for relator)

Douglas R. Peterson, General Counsel, Brian J. Slovut, Deputy General Counsel, Carrie Ryan Gallia, Assistant General Counsel, University of Minnesota, Minneapolis, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Rodenberg, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

In this certiorari appeal, relator Caleb Wesen challenges the student-disciplinary decision of respondent University of Minnesota (university), arguing that procedural errors

in the decision-making process and due-process violations require that the university's decision be reversed, or in the alternative, remanded for a new hearing. We affirm.

FACTS

Relator and J.G. were undergraduate students at the University of Minnesota and worked as gallery guards at the Weisman Art Museum. In August 2016, relator began sending Facebook messages to J.G. On August 29, 2016, relator wrote to J.G. that she was "cute" and "beautiful." J.G. replied, in part, "thank you!" J.G. testified that the messages made her feel uncomfortable but that she tried to be polite at first. Over the next four days, relator sent 14 additional Facebook messages to J.G. and received three replies. On September 2, relator wrote to J.G. that he had engaged in stalking behavior "years ago," and asked if she was interested in talking more about it by text message. J.G. replied that they were both working an upcoming event and she would prefer not to text. J.G. testified that this message made her feel very uncomfortable. Over the next week, relator sent several more Facebook messages to J.G. She did not reply.

On September 7, 2016, relator came into the museum unexpectedly while J.G. was working. J.G. believed relator knew that she was scheduled to work and had stalked her. After relator left, J.G. notified her supervisor that relator might be sexually harassing her. J.G. reported that relator made her uncomfortable by frequently following her around the museum on their work shifts, by speaking to her about his sexual activity, including his "poly-relationship," sexual desires, and "kinky sex stuff," and on one occasion, by touching the breast pocket of the shirt she was wearing, explaining that he admired the stitching. According to J.G., relator told J.G. he wanted her to join his polyamorous relationship,

which relator later denied. The supervisor spoke to two other female guards, who corroborated J.G's account of relator's behavior. On September 8, 2016, the supervisor terminated relator's employment and notified the university's Office of Equal Opportunity and Affirmative Action (EOAA) of the alleged harassment.

Relator returned to the museum on the day following his termination. He sent a Facebook message to J.G. to warn her that he would be at the museum. Relator said that he intended to return his work shirt and visit an exhibit. After security personnel observed relator pacing and acting erratically in an exhibit, university police escorted relator from the museum and issued him a no trespassing order, prohibiting him from returning to the museum. Relator sent another Facebook message to J.G.: ". . . and I got kicked out for trespassing. Good bye [J.G.]." On September 10, 2016, relator sent a final Facebook message to J.G. asking whether she had filed a restraining order against him, if there were locations he should avoid, inquiring about what he said that made her uncomfortable, and explaining that he did not intend to make her uncomfortable and would be seeking help. J.G. did not reply.

On October 11, 2016, the EOAA completed an investigation into relator's alleged harassment of J.G. The EOAA concluded that relator sexually harassed and stalked J.G. in violation of the university's Student Conduct Code, section 4, subdivisions 6 (Harm to Person) and 19 (Sexual Harassment). Specifically, the EOAA determined that relator's conduct was sexual in nature, referenced sexual activity, intimate relationships, and J.G.'s physical appearance, and that it was unwelcome and interfered with J.G.'s working environment, in violation of the university's sexual harassment policy. The EOAA also

determined that relator had engaged in a course of conduct toward J.G. that was unwelcome, unreciprocated, and reasonably caused her to feel fear, which constituted stalking under university policy.

The EOAA forwarded its investigation and findings to the university's Office for Student Conduct and Academic Integrity (OSCAI). On October 13, 2016, the OSCAI notified relator of its finding that he was responsible for the alleged violations of the Student Conduct Code and offered to informally resolve the matter by imposing an immediate academic suspension until summer term 2017, disciplinary probation for the remainder of his academic program, and a ban from campus for the length of his suspension. Relator declined the proposed resolution and requested a formal hearing before the Student Sexual Misconduct Subcommittee (SSMS). Relator engaged a university law student to represent him at the SSMS hearing.

The SSMS is comprised of members from the EOAA, the OSCAI, the Office of Student Affairs, the Senate Office, and the university's Office of General Counsel. Under the SSMS procedure, a student discipline hearing is conducted before a three- to five-member panel that reviews the case de novo. The SSMS panel is authorized to determine responsibility for violations of the Student Conduct Code, based on a preponderance-of-the-evidence standard, and may change the findings and/or disciplinary sanctions determined by the EOAA and the OSCAI. Panelists receive a copy of the investigation report and an optional rebuttal statement from the accused student. But panelists consider testimony and evidence presented at the hearing anew. The accused student may bring a lay advocate or licensed attorney to represent him at the hearing. An OSCAI staff member

or lawyer from the Office of the General Counsel presents the university's case. After the close of the hearing, the SSMS panel issues its written decision to the parties. Any party may appeal decisions of the SSMS panel to the university provost or her designee.

Relator provided a written statement to the SSMS panel before his hearing. Relator wrote that he did not deny the things that he said to J.G., and admitted that he had made mistakes, but wanted to clarify that his intent was not to make J.G. uncomfortable. Relator asked the panel for leniency and wrote that he "requested a hearing so that I could finish my academic career, not to avoid taking responsibility for my actions." Relator indicated his understanding that he would graduate regardless of the sanction.

On November 17, 2016, relator and his student advocate attended a prehearing meeting at which the SSMS chair reviewed the hearing procedures. She informed relator that, among other things, the hearing would open with a presentation of the complaint and the alleged rules violations. Relator would then have an opportunity to respond and would "need to indicate whether you feel that you're responsible or not responsible." During the meeting, the university officials asked relator on four occasions whether he had any questions about the hearing process. Relator did not ask any questions.

On November 22, 2016, relator appeared before a three-member SSMS panel for his formal disciplinary hearing. The SSMS chair again reviewed the hearing procedure and asked if there were any questions. Receiving no questions, she read the complaint. The SSMS chair then asked relator to state his name and his response of either "responsible or not responsible." Relator replied, "I'm Caleb Wesen. And I am responsible."

Following relator's plea, the university presenter proceeded with her opening statement. The university presenter said, "[a]s the student has pled responsible, [the panel's] responsibility is really to determine what's an appropriate sanction." Relator did not object. Relator's advocate followed with his opening statement. The advocate began by saying:

> Given that Caleb has pled responsible, and I think you may be aware, having looked at the materials, there is no law that's in dispute. Like the very basic facts that are alleged . . . are supported by both sides. What's really at issue here is, first of all, the sanction. And second, the intent—the intent and the interpretation of the actions that occurred.

Relator's advocate asked the panel to view relator's conduct at the museum and the Facebook messages from relator's perspective. The advocate disputed the claim that relator had been outside of J.G.'s apartment. Later in the opening statement, relator's advocate said that relator understood the inappropriateness of his actions, the effect on J.G., and the extent to which his actions violated the Student Conduct Code, but added that some of the allegations went beyond what actually occurred. The advocate ended his opening comments by saying:

> Finally, given that there isn't a lot in contest here, why are we here[?] Caleb was offered an informal resolution of a suspension. Had he taken that, he would have been suspended this semester and would have had to restart his academic career later. He's scheduled to graduate this semester. . . . We were hoping to resolve it favorably so that we didn't have to go to a hearing, we wouldn't have to contest some of these issues, he would just finish and be done with it . . . . Unfortunately, here we are. Basically, regardless of what sanction you all choose, he's still going to graduate. . . . Still, I hope that you choose a sanction . . . that is appropriate. We would ask that you choose—or decide on a sanction involving probation . . . .

The university presenter distributed information to the SSMS panel, including EOAA witness statements, screenshots of Facebook messages between J.G. and relator, a gallery guard job description, and relator's academic progress report. Four witnesses were called on behalf of the university: relator's museum supervisor, a gallery guard co-worker, J.G., and J.G.'s roommate. Relator's advocate cross-examined each witness. Relator testified and called no other witnesses. On cross-examination, the university presenter asked relator about his plea. Relator answered that he felt he should take responsibility for talking to J.G. about polyamorous relationships and Kinky U,[1] and for sending messages to J.G. Relator added, "They happened. There's evidence of it right there . . . . I don't feel any need to say that those [things] didn't happen. . . . But . . . I wanted to be able to say my intent behind it. [Be]cause it's not nefarious."

During closing statements, relator's advocate reiterated that relator took responsibility for his actions and his inappropriate statements, but that he did not act with malicious intent. The advocate closed with a request that the panel implement a sensible sanction. The essential thrust of relator's case concerned the appropriate sanction and not whether relator was responsible for a violation. At the close of the hearing, the SSMS chair stated that the panel would decide on the appropriate sanction but would not vote on responsible/not responsible because relator already pleaded responsible. Relator made no objection to this course of action.

[1] Relator reported that Kinky U is a student group at the university.

On November 28, 2016, the university notified relator of the SSMS panel's decision to impose disciplinary sanctions. The SSMS decision letter stated, in part, "The Panel met directly following the conclusion of the hearing in a deliberative session. As you pled responsible to the Student Conduct Code subdivisions charged, the Panel did not vote on the subdivisions but moved directly into a discussion of the sanction." The panel sanctioned relator with a suspension through August 7, 2017, a campus ban during the suspension, and an order of no contact with J.G. The panel explained that it found J.G.'s testimony credible. The panel expressed concern that relator seemed not to fully appreciate the impact of his actions.

On December 16, 2016, relator appealed the panel's decision to the university provost. Relator contended that the SSMS panel violated the university hearing procedures, in part, by (1) sanctioning relator without voting or finding relator responsible for the alleged violations of the Student Conduct Code, (2) accepting his plea of "responsible" despite evidence that relator maintained his innocence and sought adjudication of the allegations, and (3) failing to provide relator notice of certain evidence that was introduced at the hearing. Relator requested that the provost set aside the sanctions and order a new hearing, or, in the alternative, that the provost amend the sanctions to reflect probation in lieu of a suspension.

On December 21, 2016, the provost affirmed the SSMS panel's decision. The provost explained that "the Panel did not vote on whether or not [relator] violated Subdivisions 6 and 19 of the Student Conduct Code because there was no need; he pled responsible to those violations." On December 30, 2016, relator requested leave to file for

reconsideration of the provost's decision. On January 31, 2016, the provost denied relator's request.

This certiorari appeal followed.

D E C I S I O N

Appellate courts generally defer to university decisions. *Bailey v. Univ. of Minn.*, 290 Minn. 359, 360-61, 187 N.W.2d 702, 703-04 (1971); *see Bd. of Regents v. Reid*, 522 N.W.2d 344, 346 (Minn. App. 1994) (noting that as a "constitutional arm of Minnesota state government," the university occupies a unique position, and its governing body is "generally free of legislative, executive, or judicial interference as long as it properly executes its duties"), *review denied* (Minn. Oct. 27, 1994). However, a university's discretion is not unlimited, and its decisions must be explained. *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 923 (Minn. App. 1994). Our review of a university decision is limited to

> an inspection of the record of the administrative tribunal, and . . . confined to questions affecting the regularity of the proceedings and, as to the merits of the controversy, whether the determination was arbitrary, oppressive, unreasonable, fraudulent, made under an erroneous theory of law, or without any evidence to support it.

Chronopoulos v. Univ. of Minn., 520 N.W.2d 437, 441 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). "A university's decision may be arbitrary if the university violates its own procedures." *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 816 (Minn. App. 2011), *aff'd on other grounds*, 816 N.W.2d 509 (Minn. 2012).

I. The university did not violate its own procedures by accepting relator's plea of "responsible" and making no further finding concerning his responsibility.

Relator argues that the university violated the following procedures: (1) Board of Regents Policy section 7, subdivision 1 ("A finding of responsibility for violation of the Student Conduct Code must be based on a preponderance of the evidence. . . . [If a hearing is requested] a panel will determine responsibility and potential sanctions . . . ."); (2) SSMS Order of Proceedings ("The Panel finds the accused responsible or not responsible for each Student Conduct Code subdivision alleged in the complaint."); and (3) Student Conduct Code Procedure ("[T]he hearing process usually allows for students to . . . be notified in writing of the alleged violation and the underlying factual allegations . . . [and] be found responsible only if the information as a whole shows that it is more likely than not that the student's conduct violated [the Student Conduct Code] . . . ."). Relator argues that the university violated "these" procedures by failing to make factual findings on contested facts and failing to make an ultimate finding that relator violated the Student Conduct Code.

At the conclusion of the SSMS hearing, the chair informed relator that the panel would decide on any sanctions but would "not be voting on responsible/not responsible, because [relator has] already pled that." The university provost later explained, "the Panel did not vote on whether or not relator violated Subdivisions 6 and 19 . . . because there was no need; he pled responsible to those violations."

Contrary to relator's argument, the university's student discipline procedures do not require that the disciplinary panel make specific findings on facts that are not in dispute. The university procedures set forth the evidentiary standard and authorize the SSMS panel

to find an accused student responsible for charged violations. The procedures do not specifically address the precise effect of a student's plea of "responsible," but neither is there any requirement that the panel make findings concerning responsibility when the student pleads "responsible." We see no violation of the university's procedures by accepting relator's plea of responsible as its basis for holding him responsible for the charges. Relator's presentation to the SSMS panel concerned *only* the sanction. He expressly acknowledged responsibility for the claimed violations of the Student Conduct Code. Neither relator nor his student advocate offered evidence or argument that he did not violate the code.

Nonetheless, relator relies on our decision in *Ganguli* that the university decision was arbitrary because it was rendered without specific findings on each charged violation. In *Ganguli*, we held that decisions rendered without findings are characterized as arbitrary and capricious. 512 N.W.2d at 923 (citation omitted). However, this case is readily distinguishable from *Ganguli*. In *Ganguli*, we reversed the decision of a university committee after the committee rejected a complaint arising from a denial of faculty tenure. *Id.* at 923-24. Under the tenure procedures, the committee was required to make findings, conclusions, and recommendations after reviewing the complaint. *Id.* at 921, 923. We determined that the committee acted arbitrarily by failing to make any findings in its decision denying the tenure complaint, thus preventing meaningful appellate review. *Id.* at 923-24.

Here, the SSMS panel relied on relator's plea as the factual basis for its disciplinary decision. The panel so indicated in its decision letter, stating, "[a]s [relator] pled

responsible to the Student Conduct Code subdivisions charged, the Panel did not vote on the subdivisions but moved directly into a discussion of the sanction." The university adequately explained the basis of its decision and did not act arbitrarily. Moreover, relator fails to identify on appeal how the university would have, on this record, found relator not responsible; he readily acknowledged responsibility, and both relator and his student advocate asked only for a limited sanction for relator's admitted violations of the Student Conduct Code.

Relator also argues that the university violated its procedures by failing to provide notice of new factual allegations that were introduced at the hearing. Specifically, relator alleges that the university did not provide notice before the hearing that it would introduce evidence that relator had been seen loitering outside of J.G.'s apartment.

Before the hearing, relator's advocate contacted the SSMS chair and SSMS secretary and provided a copy of a restraining order that had been issued against relator, prohibiting him from being within two blocks of J.G.'s apartment and within one-quarter mile of the Weisman Art Museum. Relator also submitted a written prehearing statement to the SSMS panel in which he acknowledged the existence of a restraining order that contained a new allegation that he had been near J.G.'s apartment, which he denied. On the same day, relator attended a prehearing meeting at which he and his advocate discussed the restraining order with the SSMS chair, SSMS secretary, and the university presenter. Relator's advocate agreed with the university representatives that the reasons underlying the restraining order would overlap with the allegations presented at the hearing, but that the restraining order itself would not be dispositive of any fact or allegation.

At the hearing, the university briefly mentioned the allegation that relator had been seen near J.G.'s apartment in its opening statement. Relator's advocate responded in greater detail. He provided information about the accusation, questioned the accuracy of the identifications, and denied that relator had been in the area. J.G. and her roommate testified that they saw relator outside of their apartment on two occasions after the conclusion of the EEOA investigation. Relator's advocate cross-examined each witness and directly questioned relator about the allegations. Neither the university nor relator mentioned the restraining order, and relator did not object to the introduction of the factual allegations concerning his presence near J.G.'s residence.

The university procedure provides that accused students will "usually . . . be notified in writing of the alleged violation and the underlying factual allegations . . . ." Before the hearing, relator received notice of the charge of "Harm to Person" for stalking, a copy of the EEOA investigation containing factual allegations related to stalking, and notice of the university's witnesses, including J.G and her roommate. Relator and his advocate conferred with the university and agreed that the reasons for the restraining order would overlap with the allegations presented at the hearing. During the hearing, relator did not object to the introduction of the allegation that he had twice been outside of J.G.'s apartment. He responded fully to the allegation. We conclude that relator received sufficient notice of the factual allegations that were introduced at his hearing and the university did not violate its procedures.

II. The university's acceptance of relator's plea of "responsible" was not arbitrary or otherwise improper.

Relator argues that he did not understand the consequence of pleading responsible and that the university acted arbitrarily by accepting his plea without a full exploration of the evidence supporting it.

First, relator contends that the university never explained that if he pleaded responsible the SSMS panel would forgo making a finding concerning responsibility. He claims to have believed that findings concerning responsibility would be made despite his plea. At the prehearing meeting, relator was informed that the hearing would open with a presentation of the charges, after which relator would have an opportunity to respond and would need to indicate whether he was pleading responsible or not responsible. Relator was asked four times if he had any questions about the hearing process. He asked no questions. During the formal hearing, the SSMS chair asked if anyone had questions about the process before the complaint was read. Relator asked none. After the SSMS chair read the charges and asked for relator's response as to whether he was responsible or not responsible, relator replied, "I'm Caleb Wesen. And I am responsible." To be sure, the university did not explicitly inform relator that the panel would forgo making specific findings based on his plea; neither did the university inform relator that the panel would make specific findings regardless of his plea. The record shows that relator had ample opportunities before and during the hearing to ask questions and seek clarification on his plea and its consequences. He sought no clarification. Relator's contention that the

university led him to believe that the panel would make specific findings irrespective of his plea is without merit.

Second, relator asserts that he pleaded responsible only to affirm that he committed certain actions, but that he intended to contest whether those actions constituted violations of the Student Conduct Code. Relator asserts that his plea of responsible "did not entail the consideration or meaning attributed to it by the University and was not a waiver of his right to a hearing . . . ." Relator's written statement to the SSMS panel before the hearing and his presentation of his case belie his assertions on appeal.

In his written statement to the panel, relator asked for leniency and stated that he "requested a hearing so that I could finish my academic career, not to avoid taking responsibility for my actions."[2] Relator admitted wrongdoing and wrote that he did not intend to harm J.G. During relator's testimony, the university's presenter asked him about his plea and for what he was taking responsibility. Relator testified that he took responsibility for his conversations and messages to J.G. Relator said, "They happened. There's evidence of it right there . . . . I don't feel any need to say that those [things] didn't happen. . . . But . . . I wanted to be able to say my intent behind it. [Be]cause it's not nefarious." In opening and closing statements, relator's advocate told the panel that relator

[2] Relator understood that he would graduate after the fall 2016 semester regardless of the panel's disciplinary decision. Relator's advocate and the university presenter repeated this understanding throughout the disciplinary hearing. However, relator later learned he would not graduate because he had failed a freshman-level course.

accepted responsibility for his actions and asked the panel to impose a reasonable sanction. No argument was made that there should be no sanction.

At the close of the hearing, relator was told that the panel would move to determine sanctions because he had pleaded responsible. Relator did not object. The record demonstrates that relator understood the consequence of pleading responsible. He put on a case to explain his intent and to seek a lesser sanction from the panel. The university did not act arbitrarily by accepting relator's plea.

III. Relator's due-process rights were not violated.

Relator argues that he was denied due process of law because the panel accepted his plea without analyzing and weighing the evidence to reach its decision. Relator also reasserts, as claims of due-process violations, his arguments that the university acted arbitrarily by (1) failing to make specific findings that relator violated the Student Conduct Code, apart from his plea, and (2) failing to provide notice of all of the underlying factual allegations that were introduced at the hearing.

The United States and Minnesota Constitutions guarantee the right to due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. A student's interest in attending a public university is protected by the due-process clause. *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 112 (Minn. 1977). Due-process requirements are flexible and "var[y] with the circumstances of the case . . . [and] involve[] a balancing of the interests involved in the specific case under consideration." *In re Welfare of H.G.B.*, 306 N.W.2d 821, 825 (Minn. 1981) (citing *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748 (1961)). Whether procedural due-

process rights have been violated is a question of law reviewed de novo. *Plocher v. Comm'r of Pub. Safety*, 681 N.W.2d 698, 702 (Minn. App. 2004).

Due process requires that students facing suspension receive notice and a hearing. *Goss v. Lopez*, 419 U.S. 565, 579, 95 S. Ct. 729, 738 (1975). "When the sanction is for misconduct, a student must be given notice and some opportunity to be heard." *Shuman v. Univ. of Minn. Law Sch.*, 451 N.W.2d 71, 74 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990). If the school acts in bad faith or is arbitrary or capricious in imposing a sanction, courts may intervene. *Id.* (citing *Abbariao*, 258 N.W.2d at 112). In *Dixon v. Alabama State Bd. of Ed.*, the Fifth Circuit concluded that public college students facing expulsion should receive notice of the charges, the names of witnesses and a report on the facts to which each will testify, and an opportunity to present a defense against the charges through testimony or written affidavits of witnesses. 294 F.2d 150, 158-59 (5th Cir. 1961). Here, the university provided relator with notice of the specific charges, the names of the witnesses, the underlying factual allegations included in the investigation report, the opportunity to testify, call witnesses, and cross-examine the university's witnesses, and the opportunity to be represented by a lay advocate or attorney at the hearing. The university also conducted a full hearing even after relator pleaded responsible to the charges.

Relator relies on *Juster Bros., Inc. v. Christgau* to argue that an administrative hearing violates due process unless the decision-maker analyzes and weighs the evidence to reach a determination. 214 Minn. 108, 120, 7 N.W.2d 501, 508 (1943) (citing *Morgan v. United States*, 304 U.S. 1, 23, 58 S. Ct. 999, 1000 (1938)). This case is unlike *Juster*. *Juster* involved a contested appeal from an administrative agency decision to set an

employer's contribution rate for unemployment compensation. *Id.* at 109, 112, 7 N.W.2d at 503. Here, relator pleaded responsible to the charges. Relator cites no authority for reversing an agency decision where the decision-maker failed to analyze and weigh the evidence after a party has accepted responsibility. Relator admitted the violations of the Student Conduct Code and did not request that the university determine whether there was a violation. The disciplinary panel considered only the appropriate sanction for the admitted violations, exactly as relator requested.

Relator was not deprived of due process of law by the university's student disciplinary process.

Affirmed.