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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-131**

Noah Berge,
Relator,

vs.

University of Minnesota,
Respondent.

**Filed September 21, 2010
Reversed and remanded
Shumaker, Judge**

University of Minnesota

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Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and
Schellhas, Judge.

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

SHUMAKER, Judge

In this certiorari appeal, relator challenges the decision of the Provost of the
University of Minnesota to reinstate a decision of the Campus Committee on Student
Behavior (CCSB) issued after the CCSB excluded relator's proffered evidence on the

financial and personal effects of sanctions placed on him in a student disciplinary matter. We reverse and remand for a new hearing before the CCSB on the issue of sanctions.

FACTS

The parties agree on the general facts surrounding the incident that served as a basis for student disciplinary proceedings involving relator Noah Berge. In July 2009, Berge was a fourth-year University of Minnesota dental student who was assigned to a practice rotation at a Hibbing clinic. He and other dental students lived in apartments that were rented by the university. Student dental hygienists, including A.H., also participated in the rotation as part of their studies and lived in the same apartment building. The students socialized with each other during their free time.

On the evening of July 15, Berge and A.H. went to a bar with a group of other students, and both became intoxicated. A.H. was unaccustomed to drinking alcohol, and when the group returned to the dental students' apartment building, she felt ill. When she stated that she wanted to go to her apartment, Berge went with her, and she claimed that Berge sexually assaulted her there. Berge claimed that she consented to the sexual encounter. A.H. spoke with Hibbing police, but charges were not filed against Berge.

Berge's conduct became the subject of a university student conduct code complaint in which he was alleged to have "sexually assaulted another student . . . in an apartment complex . . . rented by the University." The regulations Berge was alleged to have violated included "[t]hreatening, harassing, or assaultive conduct," "[v]iolation of university rules," and "[v]iolation of federal or state laws."

After the parties failed to resolve the matter through an informal process, Berge appeared for a hearing before the five-member CCSB, which has authority to determine student conduct code violations and to impose sanctions. Berge attempted to offer evidence that he would lose \$206,000 in tuition and stipends paid for by the United States Air Force if he were suspended. He also attempted to offer evidence on the 2009-2010 tuition and fees for attending the university's school of dentistry.

The CCSB chair excluded Berge's proffered evidence. The CCSB decided that Berge engaged in conduct that constituted "[t]hreatening, harassing, or assaultive conduct" and a "[v]iolation of university rules." As a sanction, the CCSB suspended Berge from the university for two years, required him to complete and follow recommendations of a sexual assessment, and required him to successfully complete counseling for sexual boundary issues. In his brief to this court, Berge claims that the sanction imposed would cost him "in the range of \$750,000" in total by delaying the start of his career for three to four years.

Berge sought further review from the four-person Provost's Appeal Committee (PAC), in accordance with the appeals policy of the student conduct code. Among other aspects of its decision, the PAC unanimously found that the university violated Berge's due-process rights by prohibiting him "from presenting relevant testimony detailing the financial and personal effects of potential sanctions." The PAC reasoned that "[s]ince the order of proceedings for a [CCSB] hearing does not allow for a penalty phase separate from the evidentiary phase, it is proper for a student to be able to present testimony

regarding consequences (even financial consequences) of potential sanctions.” The PAC ultimately recommended the following:

By a split vote of (3-1) this panel of the Provost’s Appeals Committee recommends that [relator] be given the opportunity for a re-hearing of his case through [CCSB], but with a wholly new panel and a new panel chair. At this hearing [relator] should be given the opportunity to fully present the personal and financial consequences of potential sanctions.

The final decision on relator’s case rested with the university provost. The provost decided to reinstate the CCSB decision. With regard to the CCSB chair’s decision to exclude Berge’s proffered evidence on the financial and personal effects of proposed sanctions on him, the provost’s decision letter stated:

There is no indication in the Student Conduct Code or the Student Conduct Code Procedure that special consideration should be given to the impact of a sanction on the particular individual involved. The Student Conduct Code Procedures include among the potential grounds for appeal “inconsistency between the sanction and the severity of the offense” . . . ; the potential grounds for appeal do not include individualized effects of the sanction on the particular student. Rather, the severity of the sanction should be related to the seriousness of the offense and the culpability of the student; a student should not be treated more leniently than a similarly-situated student based simply on personal or financial differences between them. It was appropriate, therefore, and consistent with past practice and precedent of the CCSB, to disallow testimony on the personal and financial circumstances of the student involved.

This appeal follows.

DECISION

Appellate courts generally defer to university decisions in student disciplinary matters. *Bailey v. Univ. of Minn.*, 290 Minn. 359, 360-61, 187 N.W.2d 702, 703-04 (1971); see *Bd. of Regents of Univ. of Minn. v. Reid*, 522 N.W.2d 344, 346-47 (Minn. App. 1994) (noting that as “constitutional arm of Minnesota state government,” university occupies “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). On the merits of a dispute, a reviewing court considers whether a university decision “was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.” *Stephens v. Bd. of Regents of the Univ. of Minn.*, 614 N.W.2d 764, 769 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Sept. 26, 2000); see *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977) (stating that decision is arbitrary and capricious when it represents agency’s will and not its judgment). A university decision may be arbitrary if it violates its own procedures. *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 923 (Minn. App. 1994).

Berge asks this court to hold that the provost’s decision to reinstate the CCSB decision, which was made without consideration of his proffered evidence on the effects of proposed sanctions on him, was arbitrary and capricious. We agree for the following reasons. First, the record reveals that the university has no standards or guidelines for sanctions to be imposed by the provost for violations of the student conduct code, nor could the parties articulate one to this court. The only allusion to a specific procedure

included in the provost's decision is its reference to language that purportedly comes from "Student Conduct Code Procedures," stating that a basis for a disciplinary appeal is "inconsistency between the sanction and the severity of the offense."¹ As interpreted by the provost, this language limits the university in its choice of sanctions for a violation of the student conduct code: the university could consider the severity of a sanction only in relation to the seriousness of the offense and culpability of the student.

However, this language comes from the section on "proof" with regard to student conduct code appeals to the PAC, not appeals to the provost. Arguably, then, this language does not apply to provost decisions. Even if the language did apply, any alleged "inconsistency between the sanction and the severity of the offense" was a proper basis for appealing a CCSB determination, and the comparison of the sanction to the severity of the offense does not necessarily limit the range of sanctions available to the CCSB, or limit its reasons for imposing a particular sanction.

Second, the provost's decision was made, in part, on the ground that no specific university rule or procedure required "special consideration" of the effect of a particular

¹ The Provost's Appeal Committee Procedures for Appeals Under the Student Conduct Code, states in regard to "Proof":

To prevail on an appeal, a student must prove that it is more likely than not that a serious error occurred in the original proceeding and that the error resulted in unfairness. Serious error may include a decision made without important information, lack of fairness in the process (such as lack of notice, opportunity to be heard, and/or opportunity to question), *inconsistency between the sanction and the severity of the offense*, inconsistency between the original decision and the information presented at the hearing, and/or a decision that conflicts with the interests of other affected University constituents." (Emphasis added.)

sanction on a student. However, the CCSB hearing procedures require “a fair hearing” to determine whether a student’s conduct violated the student conduct code and to determine “what, if any, sanction should be imposed.” The CCSB hearing procedures also require the CCSB to permit a party to offer “reliable information relevant to [an] issue.” The provost’s decision to strictly relate the sanction only to the seriousness of the offense is suggestive of the strictures of criminal law, but this is not a criminal case—it is a student disciplinary matter, which is subject to different considerations. Berge’s proffered evidence was relevant to assist the CCSB in making a reasoned decision, and as such it should have been admitted into evidence by the CCSB and considered in reaching its decision. In student disciplinary matters, the welfare of the student and the interests of the university are both important, and the effect of a sanction upon a student is a proper factor for consideration.

Third, the provost’s decision relied on vague statements that were unsupportable and which make meaningful review on appeal virtually illusory. The provost purportedly relied on “past practice and precedent of the CCSB[] to disallow testimony on the personal and financial consequences of the student involved,” but, other than an allusion to a brief summary of various types of other disciplinary matters contained in the record, the provost’s decision provided no factual examples from which this court could evaluate the consistency of such prior practice or precedent. *See Ganguli*, 512 N.W.2d at 923 (“The University’s discretion is not unlimited, and its decisions must be explained.”).

For all of these reasons, we conclude that the provost’s decision to reinstate the CCSB decision was arbitrary and capricious, and that the matter must be remanded for

rehearing on the issue of sanctions. Consistent with the PAC recommendation, the case may be heard before a new CCSB panel and chair. We offer no opinion, however, as to the ultimate sanctions to be imposed after a rehearing, which shall include consideration of the consequences of potential sanctions.

Reversed and remanded.