

FILED

MAR 20 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 303217

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

HILLARY BUECHLER,

Appellant/Plaintiff,

v.

WENATCHEE VALLEY COLLEGE, a Division of the State of
Washington; JENNIFER CAPELO, individually; and MARCO
AZURDIA, individually,

Respondents/Defendants.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

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III. STANDARD OF REVIEW

Appellate review is de novo where it involves review of a trial court's decision where facts are essentially undisputed and the decision involves only application of law.¹

IV. STATEMENT OF THE CASE

Buechler, a student at WVC, has prescriptions for Flexeril and Ritalin, due to medical conditions associated with rapid onset migraines

¹ Morales v. Westinghouse Hanford Co., 73 Wash.App. 367, 869 P.2d 120 (1994).

and ADHD.²

1. Allegations against Buechler

On two successive days in August, 2009, Buechler provided two Flexeril pills to student Jody Thorn (“Thorn”), and a single Ritalin pill to Philip Payne (“Payne”), to help them with their complaints of similar symptoms.³ Both incidents occurred outside of class time, and outside of any clinical or classroom setting.⁴

Subsequently, Buechler was confronted by Capelo.⁵ “(She) was asking me what had . . . she had had some students tell her (that) I was going out to various students and saying, ‘Hey, here, try this. Hey, here, try this’ just to random students, at which point I told her that, no, that was not the case, [but] that I did give Phil a Ritalin pill.”⁶

2. Disciplinary Policy

In a disciplinary situation, WVC admits it must afford its students due process, as outlined in WAC provisions and in its general Student Handbook. The general student handbook (not specific to nursing

² CP 211, Deposition of Hillary Buechler, p. 47, ll. 12-20.

³ CP 212, Deposition of Hillary Buechler, p. 70, ll. 7-18, p. 71, ll. 1-7; CP 213, Deposition of Hillary Buechler, p. 73, ll. 10-16, p. 74, ll. 3-9.

⁴ CP 216, Deposition of Hillary Buechler, p. 91, ll. 6-15.

⁵ CP 212, Deposition of Hillary Buechler, p. 70, ll. 3-18.

⁶ CP 212, Deposition of Hillary Buechler, p. 70, ll. 3-18.

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students), reads:

“M. RIGHT TO DUE PROCESS

Students subject to disciplinary action by the college are entitled to a hearing, the procedures for which guarantee that the student will receive fair treatment, and which allow the college to take appropriate action. Pending action on college or civil charges, the status of a student will not be altered, or his or her right to be present on the campus and to attend classes suspended, except for reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, staff or college property.”⁷

WVC does not here argue Buechler posed a risk to physical or emotional safety and well-being.

For serious disciplinary violations “where suspension or summary suspension from college can result,” WVC’s Academic Regulations Committee (“ARC”) convenes, with its committee chair ensuring due process by providing the student a time, place, and available seating capacity for a hearing, to insure fairness to all involved parties, including general rules and procedures to ensure a fair hearing.⁸

WVC also has a Nursing Student Handbook, specific to the nursing program. Its Nursing Program policy requires that students meet certain

⁷ CP 100, Wenatchee Valley College Student Handbook, p. 18 (emphasis added).

⁸ CP 102, WVC Student Handbook, p. 27; CP 220, Deposition of Marco Azurdia, p. 14, ll. 8-12.

standards while “involved in the clinical and academic environments.”⁹

WVC does not argue that either of the incidents here occurred in a clinical or an academic environment.

3. Azurdia unilaterally and improperly dismissed Buechler from the nursing program.

On August 31, 2009, Azurdia sent Buechler a letter, charging her with violating ethics standards. His letter described her violations as the failure to:

- “Item #3. Take appropriate action to ensure the safety of clients, self, and others;
- Item #6. Actively promote the highest level of moral and ethical principles and accept responsibility for our actions;
- Item #13. Refrain from any deliberate action or omission of care in the academic and clinical setting that creates unnecessary risk of injury to the client, self, or others;
- Item #15. Abstain from the use of alcoholic beverages or any substance in the academic and clinical setting that might impair judgment.”¹⁰

Azurdia also accused Buechler of “possession, use or distribution of illicit drugs or alcohol.”¹¹

⁹ CP 106, WVC Nursing Student Handbook, p. 16.

¹⁰ CP 259, 8/31/09 letter from Azurdia to Buechler (emphasis added).

¹¹ CP 259, 8/31/09 letter from Azurdia to Buechler.

Azurdia and Capelo now each admit there was never any evidence alcohol was involved; Azurdia does not know why Item #15 was included in the allegations.¹² Azurdia also admits Buechler never possessed or distributed any “illicit” or “illegal” drugs, but only drugs for which she had valid prescriptions.¹³ Finally, Azurdia admits the ethical requirements in the letter should have applied only to allegations from “classroom” and “clinical” situations, which these weren’t.¹⁴ Despite being unable to provide any written support, Azurdia expressed a personal belief the code may also apply outside a clinical and academic environment.¹⁵ When asked whether driving negligently on a roadway would violate the Nursing Code, he responded “Yeah, I don’t . . . I don’t know how to answer that one.”¹⁶ Capelo agrees Buechler’s actions, whether ethical or not, did not occur in a clinical or academic setting.¹⁷ There is now no allegation Buechler did

¹² CP 228, Deposition of Marco Azurdia, p. 47, ll. 7-14; CP 243, Deposition of Jennifer Capelo, p. 39, ll. 6-8.

¹³ CP 225, Deposition of Marco Azurdia, p. 34, ll. 24-25, p. 35, ll. 1-4, p. 35, ll. 11-18.

¹⁴ CP 226, Deposition of Marco Azurdia, p. 38, ll. 10-13.

¹⁵ CP 227, Deposition of Marco Azurdia, p. 41, ll. 15-18.

¹⁶ CP 226, Deposition of Marco Azurdia, p. 40, ll. 1-14.

¹⁷ CP 242, Deposition of Jennifer Capelo, p. 29, ll. 19-25; CP 243, Deposition of Jennifer Capelo, p. 39, ll. 22-25.

anything wrong in a classroom.¹⁸ There is no allegation she did anything wrong in a clinical setting.¹⁹

Azurdia met with Buechler informally, but the meeting did not involve any due process:

“Q You were there face-to-face [with Buechler] --

A Absolutely.

Q Correct?

A Sure, absolutely.

Q You were allowed the opportunity to ask Hillary questions, correct?

A Correct.

Q Hillary was not allowed to see any of these [students'] statements, correct?

A Correct.

Q She was not allowed to confront any of the students writing these statements, correct?

A Correct.

Q She had no ability to determine the truthfulness of the statements, correct?

A Correct.”²⁰

Azurdia then permanently dismissed Buechler from the Nursing Program.

She was never allowed to see the statements or cross-examine any of the students as to their statements.²¹ She was never advised of her civil due

¹⁸ CP 226, Deposition of Marco Azurdia, p. 38, ll. 15-23.

¹⁹ CP 226, Deposition of Marco Azurdia, p. 38, ll. 24-25, p. 39, l. 1.

²⁰ CP 222, Deposition of Marco Azurdia, p. 23, ll. 20-25, p. 24, ll. 1-12.

²¹ CP 222, Deposition of Marco Azurdia, p. 24, ll. 24-25; CP 223, Deposition of Marco Azurdia, p. 25, ll. 1-5.

process rights orally or by letter.²² She was never given any meaningful hearing.²³ Buechler was surprised she was unable to review the evidence against her:

“I was told to simply come to a meeting . . . with Mark Azurdia and (Capelo). (Capelo) said . . . ‘You’ll simply be meeting with us this date, you don’t need to bring anything.’ Because of the stuff that was going on, I was a little nervous, I got in touch with Scott Kane. Scott Kane decided to represent me and the meeting was canceled.”²⁴

After Buechler met with Azurdia with Kane present, Buechler was given Azurdia’s letter dismissing her from the program.²⁵ At the time of Capelo’s deposition on July 22, 2010, despite applicable written discovery, the statements still had not been provided to Buechler or her counsel.²⁶

Azurdia admits there was nothing official about the meeting he finally had with Buechler:

“Q So, Hillary did meet with you?
A She did come in. She did come in, but I – I would not classify that as a hearing . . . it was, I guess I’d classify it as a token appearance.
Q As a result of that meeting, did you suspend her?”

²² CP 223, Deposition of Marco Azurdia, p. 25, ll. 15-18.

²³ CP 223, Deposition of Marco Azurdia, p. 25, ll. 6-8.

²⁴ CP 214, Deposition of Hillary Buechler, p. 78, ll. 23-25, p. 79, ll. 1-9.

²⁵ CP 222, Deposition of Marco Azurdia, p. 23, ll. 20-25, p. 24, ll. 1-12.

²⁶ CP 246, Deposition of Jennifer Capelo, p. 54, ll. 5-17, CP 127-130, CP 136, 140, 143, 145, 147, 149. Plaintiff brought a motion to compel the statements, which was denied. CP 161-162.

A Yes.”²⁷

Buechler immediately recognized she had rights that had been violated:

“The college states in their guidelines that I’m allowed to see all of the evidence brought against me. I was never allowed to see the statements that were written by students saying that they had seen me do certain things . . . Be able to at least plead my case, be able to defend myself. I wasn’t given a chance to do that.”²⁸

On December 22, 2009, Buechler filed this civil lawsuit against WVC.

V. ARGUMENT

1. The Superior Court erred by holding Buechler’s due process rights were not violated.

The Superior Court improperly held Buechler’s due process rights were not violated, despite considerable contrary evidence.

A. Azurdia’s decision was void ab initio, as he had no authority to unilaterally remove Buechler from the nursing program.

The WVC handbook provides due process procedures to be followed in the case of alleged disciplinary code violations. The handbook does not allow Azurdia to summarily suspend or expel, except as “summary suspensions” where an “imminent danger” exists.²⁹ This policy

²⁷ CP 221, Deposition of Marco Azurdia, p. 20, ll. 14-21.

²⁸ CP 214, Deposition of Hillary Buechler, p. 79, ll. 20-24, p. 80, ll. 22-24.

²⁹ CP 101, WVC Handbook, p. 25 at paragraphs 5-6.

is backed by WAC 132W-115-110 and WAC 132W-115-140. There is no assertion in this case Buechler posed an imminent danger. Buechler's expulsion was not a summary suspension, or more particularly one based upon the potential for imminent harm.³⁰

Under the handbook, Azurdia's involvement should have been strictly limited to terminating the proceedings, dismissing the case, attempting a mediated settlement, imposing discipline short of suspension, or referring the matter to the ARC.³¹ The ARC must convene for all alleged "serious disciplinary violations" where suspension can result.³² Azurdia agrees that all suspensions are serious, as a rule, under the handbook guidelines.³³ Azurdia admitted there was nothing optional about convening the ARC, under the WAC's and WVC Handbook:

"Q And it says, doesn't it, 'In cases involving serious disciplinary violations where suspension or summary suspension from the college can result, a subcommittee of the ARC will convene,' does it not?

A Yes.

Q And it, 'the ARC will convene,' doesn't mean that it may convene, does it?

A Correct.

³⁰ CP 231, Deposition of Marco Azurdia, p. 59, ll. 6-17, CP 233, p. 65, l. 25, p. 66, ll. 1-3.

³¹ CP 101, WVC Handbook p. 24, Paragraph H4; WAC 132W-115-110.

³² CP 102, WVC Handbook p. 26, Paragraph I; WAC 132W-115-110.

³³ CP 230, Deposition of Marco Azurdia, p. 54, ll. 14-25, p. 55, ll. 1-12.

- Q And for suspensions, according to your handbook here, the ARC must convene; isn't that true?
- A Correct.
- Q And in Hillary Buechler's situation, the ARC never convened, did they?
- A That's correct."³⁴

Azurdia admittedly had no authority to unilaterally remove Buechler from the nursing program.³⁵ The decision had to be made by the ARC, pursuant to WAC §132W-112-130, WAC §132W-115-130, and WAC § 132W-115-120.

For purposes of his authority, Azurdia may as well have been WVC's janitor. The fact he was the Vice President of Student Development and not the janitor exacerbated matters, because his decision poisoned any potential later proper decision to be made by the ARC. The ARC should have made an objective disciplinary decision in the first instance, and then only after hearing all evidence, after it was provided to Buechler, allowing for cross examination, in a formal recorded hearing.

Azurdia acknowledges he never had the power to expel Buechler.^{36,37} "I meet with the student and then, the student has the

³⁴ CP 230, Deposition of Marco Azurdia, p. 54, ll. 24-25, p. 55, ll. 1-12.

³⁵ CP 221, Deposition of Marco Azurdia, p. 18, ll. 17-21.

³⁶ CP 221, Deposition of Marco Azurdia, p. 18, ll. 17-21.

³⁷ CP 220, Deposition of Marco Azurdia, p. 16, ll. 4-8; CP 221, Deposition of Marco Azurdia, p. 17, ll. 22-25, p. 18, l. 1.

opportunity to present their case to the (ARC). And then (the ARC) makes their decision . . . to suspend or not suspend . . . I don't vote on their decision. I just present the information."³⁸ In Buechler's case, Azurdia admits he suspended her permanently without notifying the ARC.³⁹ Azurdia legally could only suspend her for up to 10 days, and only for an emergency.⁴⁰ He admits there was never an emergency.⁴¹ Furthermore, because Buechler was allowed to remain a student at WVC (although not in the nursing program) no emergency could have existed as a matter of law, because suspension from the nursing program was pursuant to the general handbook, and not the nursing handbook.

Azurdia and Capelo concede Buechler had due process rights.

While confused what due process actually entailed, they admit an accused student at WVC is entitled to a hearing, to present information, and to be heard.⁴² The ARC panel consists of three faculty members and an

³⁸ CP 220, Deposition of Marco Azurdia, p. 16, ll. 4-8; CP 221, Deposition of Marco Azurdia, p. 17, ll. 22-25, p. 18, l. 1.

³⁹ CP 220, Deposition of Marco Azurdia, p. 16, ll. 15-17; CP 221, Deposition of Marco Azurdia, p. 18, ll. 22-24.

⁴⁰ WAC § 132W-115-140.

⁴¹ CP 231, Deposition of Marco Azurdia, p. 59, ll. 6-17; CP 233, Deposition of Marco Azurdia, p. 65, l. 25, p. 66, ll. 1-3.

⁴² CP 219, Deposition of Marco Azurdia, p. 9, ll. 5-17, CP 238, Deposition of Jennifer Capelo, p. 9, ll. 3-4; CP 239, Deposition of Jennifer Capelo, p. 14, ll. 19-25.

administrator.⁴³ An ARC hearing ensures “all information pertaining to the situation (be) available to the student.”⁴⁴

B. Azurdia and Capelo misunderstood and misapplied due process procedures, depriving Buechler of her civil rights.

Disregarding that Azurdia had no authority to suspend Buechler, due process rights were otherwise not afforded her as promised in WVC’s handbook and in applicable WAC provisions.

i. WAC provisions for WVC

WAC § 132W-112-130 lays out due process procedures to be followed for disciplinary actions at WVC:

Students subject to disciplinary action by the college are entitled to a hearing, the procedures for which guarantee that the student will receive fair treatment, and which allow the college to take appropriate action. Pending action on college or civil charges, the status of a student will not be altered, or his or her right to be present on the campus and to attend classes suspended, except for reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, staff or college property.⁴⁵

WAC § 132W-115-130 provides for the following due process procedural guarantees by the Academic Regulations Committee, in the event of potential discipline for an alleged serious disciplinary violation:

⁴³ CP 238, Deposition of Jennifer Capelo, p. 12, ll. 1-4.

⁴⁴ CP 238, Deposition of Jennifer Capelo, p. 11, ll. 21-24.

⁴⁵ WAC 132W-112-130 (emphasis added).

- (1) The committee chair shall set the time, place and available seating capacity for a hearing.
- (2) All committee proceedings will be conducted with reasonable dispatch and terminated as soon as fairness to all parties involved permits.
- (3) The committee chair shall enforce general rules of procedures for conducting hearings consistent with these procedural guidelines.
- (4) The student shall be given notice of the date, time and place of the hearing, the charges, a list of witnesses who will appear, and a description of any documentary or other physical evidence that will be presented at the hearing. This notice shall be given to the student in writing and shall be provided in sufficient time to permit him/her to prepare a defense.
- (5) The student or his/her representative shall be entitled to hear and examine the evidence against him or her and be informed of the identity of its sources; and shall be entitled to present evidence in his or her own behalf and question witnesses as to factual matters. The student shall be able to obtain information or request the presence of witnesses or the production of other evidence relevant to the issues at the hearing.
- (8) The failure of a student to cooperate with the hearing procedures, however, shall not preclude the committee from making its findings of fact, reaching conclusions and imposing sanctions. Failure of the student to cooperate may be taken into consideration the committee in recommending penalties.
- (9) The student may be represented by counsel and/or accompanied by an advisor of his/her choice. If counsel is present for the student, the college may also have counsel present to assist the council. If the student intends to use an attorney, he or she must notify the dean of student services five days in advance of the formal hearing.
- (10) An adequate summary of the proceedings will be kept. As a minimum, such summary would include a tape recording of

testimony. Such record will be available for inspections and copying in the office of the dean of student services during regular business hours.

(11) The student will be provided with a copy of the findings of fact and the conclusions of the committee.

(14) The student will also be advised of his/her right to present, within ten calendar days, a written statement of appeal to the president of the college before action is taken on the decision of the committee.

(15) The dean of student services or designee shall notify the student of his or her decision.

(16) The student will also be advised of his/her right to present, within ten calendar days, a written statement of appeal to the president of the college before action is taken on the decision of the committee.

(17) The president of the college or his/her designated representative shall, after reviewing the case, sustain the decision, give directions as to what other disciplinary action shall be taken by modifying its decision, or nullify previous sanctions imposed by reversing the decision. The president or designee shall then notify the dean of student services, the student, and the committee. The president's decision shall be final.⁴⁶

These WAC provisions were clearly violated. They are not optional due process notions that may be ignored by an administrator.

First, the ARC did not convene. If it had, without Azurdia rendering his own decision beforehand, Buechler's due process rights could have been afforded as promised in the handbooks and provided by WAC

⁴⁶ WAC 132W-115-130 (some paragraphs omitted).

§132W-115-130. The Committee could have conducted a reasonable hearing, at a reasonable time, Buechler could have presented her own witnesses, been represented by counsel, and utilized all other due process procedures provided to her.

Second, under §132W-115-130(4), Buechler had no way of even *knowing* the evidence against her, or knowing the identity of witnesses against her, because Azurdia and Capelo refused to tell her who the witnesses were or show her the witnesses' statements. Azurdia's unilateral, ultra vires decision relied upon five confidential, undisclosed written statements of WVC students.⁴⁷ "One was Hillary. One was Philip Payne. One was Jody Thorn and I want to say the other two were Haley - I don't remember her last name - and I think there, it was Kimberly."⁴⁸ Azurdia admits these statements were never provided to Buechler.⁴⁹ Buechler had no way of preparing a defense without the evidence against her.

Amazingly, Azurdia testified he believes due process does not even include the right to know witnesses against oneself or the right to confront or cross-examine witnesses.⁵⁰ This specific due process right will be explained later

⁴⁷ CP 222, Deposition of Marco Azurdia, p. 22, ll. 2-4, 9.

⁴⁸ CP 222, Deposition of Marco Azurdia, p. 22, ll. 15-18.

⁴⁹ CP 222, Deposition of Marco Azurdia, p. 22, ll. 24-25, p. 23, l. 1.

⁵⁰ CP 219, Deposition of Marco Azurdia, p. 10, ll. 15-25.

in this brief, under Stone v. Prosser. Without knowing the evidence or witnesses against her, Buechler had no way of defending herself.

ii. Federal due process requirements at WVC.

Even if the WAC provisions *could* be somehow properly ignored by Azurdia and Capelo, Buechler is entitled to federal due process rights pursuant to 42 U.S.C.A. §1983:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”⁵¹

Section 1983 is derived from Section 1 of the Civil Rights Act of 1871, and “was intended to create ‘a species of tort liability’ in favor of persons deprived of federally secured rights.”⁵² §1983 is to be “construed generously to further its primary purpose.”⁵³ State courts as well as federal courts have concurrent jurisdiction to enforce violations of 42 U.S.C.A.

⁵¹ 42 U.S.C.A. §1983.

⁵² Nieshe v. Concrete School District, 129 Wash.App. 632, 127 P.3d 713 (2005) (quoting Smith v. Wade, 461 U.S. 30, 34, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983)).

⁵³ Staats v. Brown, 139 Wash.2d 757, 991 P.2d 615 (2000) (quoting Gomez v. Toledo, 446 U.S. 635, 639, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980)).

§1983.⁵⁴

For cases involving violations of procedural due process rights, the U.S. Supreme Court identified three distinct factors for consideration:

“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁵⁵

All three factors favor Buechler. Her reputation, college achievements, and right to a continued education were destroyed by WVC’s failure to enforce procedural due process. The erroneous deprivation here is *determinative*, as Azurdia had many of the related facts wrong. Finally, WVC cannot argue it had any interest in refusing to afford due process - it affirmed this by building federal due process rights right into its own college handbook.

Even if it hadn’t been a federal due process violation, by building due process rights into its handbook, WVC conveyed a property interest in such right. Where a public employer affords such rights, and in the process limits its own discretion in regard to its treatment of a public employee, an employee obtains a protected property interest in such right. WVC was not

⁵⁴ Staats v. Brown, 139 Wash.2d 757, 991 P.2d 615 (2000) (quoting Gomez v. Toledo, 446 U.S. 635, 639, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980)).

⁵⁵ Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976).

an employer, but the reasoning is the same. She relied on WVC's procedure promises, to the detriment of her property interest. "A due process property interest exists if there are such rules or mutually explicit understandings that support an individual's claim of entitlement to the benefit."⁵⁶

Procedural due process by definition refers to those procedures a governmental entity must follow before it deprives a person of life, liberty, or property.⁵⁷ An administrative agency's failure to follow its own procedural process violates the constitution where it fails to comply with minimal constitutional requirements.⁵⁸

Violation of one's civil rights pursuant to 42 U.S.C.A. §1983 requires proof of two elements: (1) that the complainant was deprived of a right secured by the Constitution or laws of the United States; and (2) that the deprivation was committed by a person acting under color of state law.⁵⁹

⁵⁶ Ritter v. Board of Commissioners, 96 Wn.2d 503, 509 (1981) (citing Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577-78, 92 S.Ct. 2701, 2709-2710, 33 L.Ed.2d 548 (1972)).

⁵⁷ Nieshe v. Concrete School District, 129 Wash.App. 632, 127 P.3d 713 (2005) (citing McKinney v. Pate, 20 F.3d 1550, 1559 (11th Cir. 1994)).

⁵⁸ Nieshe v. Concrete School District, 129 Wash.App. 632, 127 P.3d 713 (2005) (citing Danielson v. City of Seattle, 45 Wash.App. 235, 244, 724 P.2d 1115 (1986), *aff'd*, 108 Wash.2d 788, 742 P.2d 717 (1987)).

⁵⁹ Staats v. Brown, 139 Wash.2d 757, 991 P.2d 615 (2000) (quoting Gomez v. Toledo, 446 U.S. 635, 639, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980)).

Both elements are satisfied.

a. Buechler was never provided even a modicum of minimal due process.

For due process requirements to be satisfied, WVC must provide “some meaningful (as to time and manner) opportunity for a determination of Buechler’s rights and liabilities.”⁶⁰ Not even minimal opportunity occurred here.

First, WVC failed to provide Buechler a hearing. Azurdia himself testified the only meeting conducted, between him and Buechler, was “a token appearance.”⁶¹ He stated, “I would not classify that as a hearing.”⁶² When asked “Was (Buechler) allowed to see any of the evidence against her before that hearing?”, Azurdia responded, “We never had a hearing.”⁶³

Second, Azurdia failed to refer the matter to the ARC. For serious disciplinary actions, ARC hearings are required, are not optional, and are typically recorded.⁶⁴ “We have a scribe there . . . We’ve had in the past

⁶⁰ Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), quoted with approval in Kepl v. State of Washington, 34 Wash.App. 5, 659 P.2d 1108 (1983).

⁶¹ CP 221, Deposition of Marco Azurdia, p. 20, ll. 18-19.

⁶² CP 221, Deposition of Marco Azurdia, p. 20, ll. 15-16.

⁶³ CP 221, Deposition of Marco Azurdia, p. 19, ll. 11-16.

⁶⁴ CP 230, Deposition of Marco Azurdia, p. 55, ll. 4-6, 10-12; CP 231, Deposition of Marco Azurdia, p. 59, ll. 22-24, p. 60, ll. 4-19.

where we've had a serious disciplinary action, we have recorded.”⁶⁵ He concedes the ARC is required to convene and did not in Buechler's case.⁶⁶ If he decides to suspend someone, it *must* automatically go to the ARC.⁶⁷ Azurdia cannot explain why he and WVC did not follow the required process.⁶⁸

Had there been an ARC hearing, minimal due process requirements could have been met. Buechler would have had the right to be represented by counsel.⁶⁹ A summary of the proceedings would have been kept.⁷⁰ Such a summary would have included recording of the testimony.⁷¹ Nothing Azurdia or Capelo ever did with Buechler was recorded.⁷² Buechler could have examined evidence against her, identified its inaccuracies (which are replete), been informed of the identity of sources and witnesses (which was

⁶⁵ CP 229, Deposition of Marco Azurdia, p. 52, ll. 5-24.

⁶⁶ CP 230, Deposition of Marco Azurdia, p. 55, ll. 4-6, 10-12; CP 231, Deposition of Marco Azurdia, p. 59, ll. 22-24, p. 60, ll. 4-19.

⁶⁷ CP 230, Deposition of Marco Azurdia, p. 55, ll. 13-15, l. 25, p. 56, ll. 1-3; CP 231, Deposition of Marco Azurdia, p. 58, ll. 23-25, p. 59, ll. 1-25, p. 60, ll. 1-19; CP 234, Deposition of Marco Azurdia, p. 70, ll. 1-8.

⁶⁸ CP 234, Deposition of Marco Azurdia, p. 70, ll. 9-25.

⁶⁹ CP 232, Deposition of Marco Azurdia, p. 62, ll. 4-11.

⁷⁰ CP 232, Deposition of Marco Azurdia, p. 62, ll. 12-14.

⁷¹ CP 232, Deposition of Marco Azurdia, p. 62, ll. 15-17.

⁷² CP 232, Deposition of Marco Azurdia, p. 62, ll. 18-20.

withheld), presented evidence on her own behalf (which was denied), and questioned witnesses as to factual matters (which as never allowed).⁷³

Buechler would also have been allowed to present her own fact witnesses and produce other relevant evidence (something she was also denied).⁷⁴

Finally, Azurdia admits Buechler was not provided a copy of the students' statements, was not allowed to present her own witnesses, and was not allowed to cross-examine anyone.⁷⁵ He admits the written statements, to which Buechler did not have access, were used to discipline her.⁷⁶ He admits his letter removing her from the program was based upon inaccuracies.⁷⁷ For example, Azurdia now admits he based his decision partly upon a belief she had lied to Jody Thorn about which drug she had given her, an allegation he now admits was incorrect.⁷⁸ Even a modicum of due process could have prevented injustice.

b. Azurdia and Capelo acted under color of law.

42 U.S.C.A. §1983 provides,

⁷³ CP 232, Deposition of Marco Azurdia, p. 62, ll. 24-25, p. 63, ll. 1-5.

⁷⁴ CP 232, Deposition of Marco Azurdia, p. 63, ll. 7-11.

⁷⁵ CP 232, Deposition of Marco Azurdia, p. 63, ll. 12-20.

⁷⁶ CP 233, Deposition of Marco Azurdia, p. 67, l. 25, p. 68, ll. 1-2.

⁷⁷ CP 233, Deposition of Marco Azurdia, p. 68, ll. 9-20; CP 228, Deposition of Marco Azurdia, p. 47, ll. 7-14.

⁷⁸ CP 233, Deposition of Marco Azurdia, p. 68, ll. 6-20.

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”⁷⁹

The statute, on its face, applies to both WVC and WVC employees through application of WVC’s disciplinary rules and codified state procedural guarantees. This statute, by its terms, creates individual liability for its violators.

Azurdia’s and Capelo’s respective actions in denying Buechler due process were only possible because of the power granted them by WVC.

“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is taken ‘under color of’ state law.”⁸⁰ This misuse of power is particularly applicable in school situations, where teachers and administrators are provided “with the authority to establish rules of conduct and discipline [and] oblige student compliance . . . Private persons, jointly engaged with state officials in the challenged action, are acting ‘under color’ of law for

⁷⁹ 42 U.S.C.A. §1983 (emphasis added).

⁸⁰ Kuehn v. Renton School Dist. No. 403, 103 Wn.2d 594, 694 P.2d 1078 (1985) (internal citations omitted).

purposes of §1983 actions.”⁸¹ Here, with respect to 42 U.S.C. §1983, Azurdia and Capelo acted under color of law.

iii. The Appearance of Fairness Doctrine was violated.

Even disregarding Azurdia’s unauthorized suspension, the fact no ARC hearing was held, and that Buechler’s WAC and federal due process rights were violated, her right to a fair hearing was violated. Washington has long adhered to the “Appearance of Fairness Doctrine.”⁸² This doctrine requires that all parties receive a fair, impartial, and neutral hearing.⁸³

Azurdia normally sits on the ARC. Had Buechler forced WVC to go forward with an ARC hearing, Azurdia’s decision to immediately expel Buechler from the nursing program would undoubtedly be given deference by the ARC. Even if Azurdia recused himself from subsequent determinations of Buechler’s fate, Buechler could never receive a fair hearing. Buechler could not un-ring the proverbial bell.

Besides the fact no “hearing” ever transpired, the doctrine was violated for several reasons. Azurdia rubber-stamped Capelo’s decision, which itself was driven by no more statutory and contractual authority than

⁸¹ Kuehn v. Renton School Dist. No. 403, 103 Wn.2d 594, 694 P.2d 1078 (1985) (internal citations omitted).

⁸² State v. Brenner, 53 Wn.App. 367, 374, 768 P.2d 509 (1989) (rev’d on other grounds).

⁸³ State v. Bilal, 77 Wn.App. 720, 722, 893 P.2d 674 (1995).

Azurdia's decision.^{84,85} Azurdia's rubber-stamping of Capelo's decision does not remotely comport with the tenets of due process and Appearance of Fairness. This is particularly so where Capelo was the one who decided all punishment, recommending Jodie Thorn and Phillip Payne simply be reprimanded.⁸⁶

Even if Azurdia and Capelo considered themselves impartial and believed they had authority to act, they were not the objective judges required to satisfy the doctrine. The law goes beyond requiring an impartial judge; it also requires that the judge "appear to be impartial."⁸⁷ Capelo, an instructor who had issues with Buechler that went so far as to report her to the Washington State Department of Health, communicated ex parte with Azurdia on key issues, including recommending Buechler's expulsion.⁸⁸ "Generally, the Appearance of Fairness Doctrine requires the court to inquire as to how the proceedings would appear to a reasonably prudent and

⁸⁴ WAC § 132W-115-140.

⁸⁵ CP 188, Declaration of Jennifer Capelo, Paragraph 16.

⁸⁶ CP 189, e-mail of Jenny Capelo to Marco Azurdia dated August 12, 2009.

⁸⁷ State v. Ring, 134 Wn.App. 716, 722, 141 P.3d 669 (2006) (emphasis added).

⁸⁸ CP 245, Deposition of Jennifer Capelo, p. 49, ll. 23-25.

disinterested person.”⁸⁹ Even if Capelo or Azurdia, and not the ARC, had the authority to render a decision under the WAC, neither was a reasonably prudent and disinterested person. The doctrine was per se violated.

Finally, the doctrine was violated because the decision itself is nonsensical. Buechler was removed from the Nursing program without violating the Nursing handbook. She was allowed to remain a general student at WVC, despite allegedly violating the general student handbook. This contradictory result reveals the bumbling and poor decision making which violated the civil rights of Buechler.

2. The Superior Court erred by shifting the burden of ensuring compliance with handbook and WAC due process procedures to Buechler.

Although the Superior Court recognized the exhaustion doctrine does not apply in the case of deprivation of constitutional rights, the Superior Court inexplicably applied a de facto version of the exhaustion doctrine, holding WVC is not liable because Buechler did not demand a hearing with the ARC.

⁸⁹ State v. Brenner, 53 Wn.App. 367, 374, 768 P.2d 509 (1989) (rev'd on other grounds) (citing Chicago, Milwaukee, St. Paul, & Pac. R.R. Co. v. Washington, 87 Wash.2d 802, 808, 557 P.2d 307 (1976); Brister v. Tacoma City Council, 27 Wn.App. 474, 486-87, 619 P.2d 682 (1980)).

A. Reninger and Milligan

The Superior Court recognized, pursuant to Reninger⁹⁰ and Milligan⁹¹, that the burden of ensuring due process procedures may not be shifted to the person alleging deprivation of due process. To so shift the burden is to apply the exhaustion doctrine, which is inapplicable to due process claims.

Reninger recognized a claimant need not exhaust administrative remedies as a prerequisite to bringing a §1983 action in court.⁹² Milligan explained Washington's policy in this regard:

“Congress and the Washington Legislature intended that statutory remedies protecting civil rights and preventing discrimination be independent of state administrative remedies and collective bargaining rights. Thus, Milligan was not required to exhaust his administrative remedies before bringing a cause of action under Washington's law against discrimination, or under any of the federal civil rights laws.”⁹³

Buechler was not required to exhaust her administrative remedies by appealing Azurdia's ultra vires decision.

⁹⁰ Reninger v. Dept. of Corrections, 79 Wn.App 623, 901 P.2d 325 (1995).

⁹¹ Milligan v Thompson, 90 Wn.App 586, 953 P.2d 112 (1998).

⁹² Reninger v. Dept. of Corrections, 79 Wn.App. 623,633, 901 P.2d 325 (1995), Footnote 2, citing Patsy v. Board of Regents, 457 U.S. 496, 512-16, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

⁹³ Milligan v Thompson, 90 Wn.App 586, 596-97, 953 P.2d 112 (1998) (internal citations omitted).

B. Stone v. Prosser

Despite recognizing the holdings in Milligan and Reninger, the Superior Court went on to do exactly what it said it wouldn't do, and applied the exhaustion doctrine, expressly ruling Buechler's failure to "appeal to the ARC" was the reason it ruled against her. Superior Court Judge Allan explained,

"Had Ms. Buechler here asked for a hearing, had she appealed and said, 'I want the witnesses there,' there is absolutely no question in this Court's mind that Wenatchee Valley College would have been required to make those witnesses available and if they had not, Ms. Buechler would be standing in the same place as – I think it was Mr. Stone, but despite being afforded that opportunity, she made a calculated decision with the assistance of counsel that she did not want to go forward and seek review of that so, I mean, I know you argued Stone before. You can argue Stone again, but the Court found it to be factually distinguishable."⁹⁴

The Superior Court thus refused to apply WAC provisions explicitly delineating WVC's non-delegable, non-transferable responsibilities in the case of alleged misconduct.

In Stone, this Division III Court of Appeals refused to render WAC provisions meaningless. One student in Stone allegedly threatened another

⁹⁴ Verbatim Report of Proceedings, Motion for Reconsideration, September 30, 2011, p. 9.

student, and was expelled from school.⁹⁵ The expelled plaintiff alleged the school violated WAC provisions and constitutional law, like here, by failing to present the witnesses against the student for questioning and cross-examination.⁹⁶ In Stone, unlike here, the assistant vice principal issued a notice of emergency expulsion.⁹⁷ This Court recognized the student's right, provided under the WAC, to “inspect in advance of the hearing any documentary and other physical evidence which the school district intends to introduce at the hearing.”⁹⁸ In the Stone trial court, the plaintiff student's attorney had requested production of the witnesses for confrontation and cross-examination, but none were produced.⁹⁹ The trial court in Stone improperly rejected the student's contentions he was entitled to confront and cross examine the witnesses against him. On appeal to Division III, the plaintiff contended, as Buechler here contends, that the

⁹⁵ Stone v. Prosser Consolidated School District No. 116, 94 Wn.App. 73, 74, 971 P.2d 125 (1999).

⁹⁶ Stone v. Prosser Consolidated School District No. 116, 94 Wn.App. 73, 74, 971 P.2d 125 (1999).

⁹⁷ Stone v. Prosser Consolidated School District No. 116, 94 Wn.App. 73, 74, 971 P.2d 125 (1999). Here, notably, no one has ever alleged Buechler was a danger to WVC or caused any sort of danger. To the contrary, Buechler was allowed to continue attending classes at the college - just not in its Nursing School.

⁹⁸ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 75, 971 P.2d 125 (1999).

⁹⁹ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 75, 971 P.2d 125 (1999).

Washington Administrative Code applied. The student's attorney argued, "The WAC 180-40-305(2)(c) and due process guarantee Josh the right to confront and question the witnesses against him."¹⁰⁰ This Court agreed, citing Goss:

"The United States Supreme Court has held that state statutes providing a free public education through high school and compelling a student to attend school confer a property interest that may not be taken away without at least minimum due process procedures."¹⁰¹

Judge Allan (the trial court judge herein) opined that Stone was distinguished as a high school student. The trial judge was wrong. This case is stronger than Stone for two reasons: (1) Unlike the plaintiff in Stone, Buechler was not only deprived of witness access, she was never afforded her WAC-required hearing; and (2) Such WAC protections are even more sacrosanct where a student like Buechler has paid tuition to attend, creating financial consideration that WVC adhere to student handbooks and WAC provisions. Buechler had a right to rely upon the promised due process in the WAC's and in WVC's Handbooks in exchange for her tuition payment to attend WVC.

¹⁰⁰ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 76, 971 P.2d 125 (1999).

¹⁰¹ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 76, 971 P.2d 125 (1999) (citing Goss v. Lopez, 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)) (emphasis added).

Notably, Goss held that a 10-day *suspension* is a “serious event” for a student, requiring “at minimum” some kind of notice and a hearing.¹⁰² Buechler’s punishment was permanent expulsion from the nursing program, for which she had paid tuition, without any hearing. The “minimum” notice of Goss is not satisfied even if Azurdia thereafter *offered* a hearing, as he had already removed her from the nursing program in contravention of the specific mandates of the WVC handbooks and the WAC’s. As noted in Stone, “(Goss) concluded by warning that longer exclusion from school could require more stringent due process protections . . . [and] may require more formal procedures.”¹⁰³ Here, such formal procedures were not only constitutionally required, but were reiterated both in the handbooks and in the WAC provisions.

Azurdia improperly believed he could singularly remove a student from the nursing program, in a non-emergent situation, based upon personal impressions. Azurdia weighed the value of these undisclosed statements himself. This argument was specifically rejected in Stone. The defendant in Stone argued the vice principal had interviewed the witnesses and “had

¹⁰² Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 76, 971 P.2d 125 (1999) (citing Goss v. Lopez, 419 U.S. 565, 576, 579, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)).

¹⁰³ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 77, 971 P.2d 125 (1999) (citing Goss v. Lopez, 419 U.S. 565, 584, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)).

the experience to determine their truthfulness.”¹⁰⁴ The Court noted:

“it is risky to base an expulsion on hearsay statements bolstered by a school official’s testimony that the proponent is reliable . . . reliance on the official’s opinion of the absent witnesses’ credibility ‘is a particularly egregious departure from the adversarial standard . . . (the plaintiff) should have been provided the opportunity to cross-examine unless the burden on the school administration was prohibitive.”¹⁰⁵

This Court thus rejected the argument an administrator can circumvent WAC due process procedures when his administrative experience tells him to do so. Azurdia’s short-circuiting of due process is particularly odious where it has been conclusively proven Azurdia’s decision was based upon false information - namely that alcohol was involved and that Buechler lied to Thorn about what kind of pill she was giving her. Azurdia’s decision, based upon hearsay statements and false information, was devoid of a scintilla of due process safeguards.

C. Federal due process requirements may be expanded, but not contracted, by WAC provisions.

The WAC provisions must not be disregarded.¹⁰⁶ Washington

¹⁰⁴ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 77, 971 P.2d 125 (1999).

¹⁰⁵ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 77, 971 P.2d 125 (1999) (internal citations omitted).

¹⁰⁶ See, Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56, 62 (1993) (unilateral expectation transformed to "protected property interest if the procedural requirements are intended to be a significant substantive restriction on decision-making); Ritter v. Board of Commissioners, 96 Wn.2d 503, 509 (1981) ("A due

Courts have noted, “the construction placed on a provision by an agency promulgating it is entitled to great weight.”¹⁰⁷ Goss, a federal case requiring that due process be afforded (again, for suspensions less than 10 days, cases less serious than this), provided protections may only be expanded, and not contracted, by Washington law. To hold otherwise would be to subvert 42 U.S.C.A. §1983. Washington’s protections for high school and WVC students *are* more expansive than Goss, and more expansive than in some other states, as noted in Stone:

“Washington law, unlike Kansas or Illinois law, provides the right to confront witnesses in expulsion hearings. In light of that right, the burden on the school administration to produce the student witnesses or to show that their appearance is not possible or advisable is not onerous enough to justify the risk of erroneously depriving the accused student of his education.”¹⁰⁸

It is noteworthy that in the instant case it wasn’t just a *risk* that Azurdia would erroneously deprive Buechler her education, because it has been

process property interest exists "if there are such rules or mutually explicit understandings that support an individual's claim of entitlement to the benefit). A property interest can rest on a contractual basis, either express or implied. Ritter, p. 509. If constitutionally protected property interest in continued employment exists a public employee may not be deprived of that employment without due process of law. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985).

¹⁰⁷ Danielson v. Seattle, 108 Wn.2d 788, 742 P.2d 717 (1987) (citing Yakima v. Yakima Police & Fire Civil Serv. Comm’n, 29 Wn.App. 756, 765, 631 P.2d 400 (1981); State Liquor Control Bd. V. State Personnel Bd., 88 Wn.2d 368, 379, 561 P.2d 195 (1977)). .

¹⁰⁸ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 79, 971 P.2d 125 (1999).

demonstratively shown that he *actually* based his deprivation on improper and inaccurate evidence, and in actually making a decision he was never authorized to make.

In Stone, this Court remanded the case to the Benton County Superior Court, ordering it provide “a hearing complying with WAC 180-40-305 and permitting him to confront and question the adverse witnesses.”¹⁰⁹ The right to confront witnesses is a cornerstone of due process. Without being allowed to confront witnesses, especially in an educational context, “the student is left with the impossible task of proving that the academic judges have acted wantonly or corruptly without having the information from which evidence to support his charges can be found.”¹¹⁰ This is particularly true with a single entangled judge, Azurdia (and not a panel of ostensibly disentangled judges), and where he clearly did not have sufficient information to evaluate the charges against Buechler.

D. Chelan County Superior Court improperly and unequivocally denied Buechler’s claim because it felt she did not do enough to force due process upon WVC.

The Superior Court recognized the exhaustion doctrine does not apply

¹⁰⁹ Stone v. Prosser Cons. Sch. Dist. No. 116, 94 Wn.App. 73, 79, 971 P.2d 125 (1999).

¹¹⁰ Dismissal of Students: “Due Process”, Warren A. Seavey, Harvard Law Review, Vol. 70, No. 8 (June, 1957), pp. 1406-1410.

Buechler's due process claims in this case. Incongruously, the Court then denied Buechler's due process claim because she had not asked Azurdia for an ARC hearing. Superior Court Judge Allan stated, "Had Ms. Buechler here asked for a hearing, had she appealed and said, 'I want the witnesses there,' there is absolutely no question in this Court's mind that Wenatchee Valley College would have been required to make those witnesses available."¹¹¹

Such a ruling inescapably applies the exhaustion doctrine. Requiring Buechler to request a hearing after being expelled is legally wrong. She never should have been expelled without a hearing in the first place. An ARC hearing was required, and its failure to convene is WVC's, not Buechler's.

E. Appeal would have been futile.

As argued, supra, Milligan and Reninger do not require exhaustion of administrative remedies as a condition precedent for pursuing civil rights violations in court. But even if the Court believes somehow Buechler did need to exhaust her administrative remedies by appealing to the ARC, the Superior Court's holding ignores holdings that an aggrieved party need not exhaust all remedies before commencing a lawsuit if pursuit of such

¹¹¹ Verbatim Report of Proceedings, Motion for Reconsideration, September 30, 2011, p. 9.

remedies would be futile under the circumstances.¹¹² Exhaustion was futile, as Azurdia sat on WVC's ARC. Had the ARC convened, its process would have been poisoned by his prior decision. Its members would have been unlikely to reverse his ultra vires decision, and would simply have rubber stamped his decision, just as Azurdia had rubber stamped Capelo's recommendation that Buechler be dismissed from the Nursing program.¹¹³ Azurdia even composed the expulsion letter to Buechler with the assistance of Capelo.¹¹⁴ Azurdia did no more than affirm a decision already made by Jennifer Capelo as nursing program director, that Buechler should be expelled.¹¹⁵ Exhaustion would have been futile under these circumstances, particularly when the whole proceeding was tainted and jurisdictionally void due to Azurdia's lack of authority to expel.

Washington courts have recognized, in addressing futility arguments, that the exhaustion doctrine may be "outweighed by

¹¹² Baldwin v. Sisters of Providence, 112 Wn.2d 127, 131, 769 P.2d 298 (1989) (citing Moran v. Stowell, 45 Wash.App. 70, 77, 724 P.2d 396, *review denied*, 107 Wash.2d 1014 (1986)).

¹¹³ CP 188, Declaration of Jennifer Capelo, Paragraph 16.

¹¹⁴ CP 222, Deposition of Marco Azurdia, p. 21, ll. 11-16.

¹¹⁵ CP 183, Declaration of Marco Azurdia, Paragraph 9; CP 188, Declaration of Jennifer Capelo, Paragraph 16.

consideration of fairness or practicality.”¹¹⁶ Futility often involves a showing of bias or prejudice on the part of discretionary decision makers.¹¹⁷ Here, Capelo told Azurdia the decision she wanted, and he gave it.¹¹⁸ Any appeal would also have been futile in this context because it would have been to the ARC committee on which Azurdia sat, after he had already meted out his own brand of discipline.¹¹⁹ Azurdia agreed there is no difference between his decision regarding Buechler and specifically making that recommendation to the ARC.¹²⁰

Similarly, if the party is challenging the constitutionality of the agency’s action or of the agency itself, the exhaustion requirement is waived.¹²¹ Buechler does so here. Azurdia is not himself an “agency.” Even if he was, his action was not authorized.

Finally, if the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise the administrative

¹¹⁶ South Hollywood Hills Citizens v. King County, 101, Wn.2d 68, 677 P.2d 114 (1984). Moran v. Stowell, 45 Wn. App. 70, 724 P.2d 396 (1986).

¹¹⁷ Orion Corp. v. State, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985).

¹¹⁸ CP 183, Declaration of Marco Azurdia, Paragraph 9; CP 188, Declaration of Jennifer Capelo, Paragraph 16.

¹¹⁹ CP 220.

¹²⁰ CP 221.

¹²¹ Ackerley Communications, Inc. v. Seattle, 92 Wn.2d 905, 602 P.2d 1177 (1979), cert. denied, 449 U.S. 804 (1980); Higgins v. Salewsky, 17 Wn. App. 207, 562 P.2d 655 (1977).

review procedures, the failure to exhaust those procedures is excused.¹²² Because Buechler was expelled without proper jurisdictional authority to do so, an appeal to the ARC was not necessary, as the expulsion was void *ab initio*. Even if the exhaustion doctrine is found to be somehow applicable, to appeal after the decision had been made, under the circumstances, would have been futile.

3. The Superior Court erred by holding WVC did not breach its contract with Buechler.

WVC also breached its contract with Buechler by failing to adhere to its Handbook and WAC provisions.

In its student handbook, WVC promises to forward all serious disciplinary actions to the ARC. Buechler was aware of and relied upon the promise that the Student Handbook procedures would be followed if she was to be suspended.

In DePhillips v. Zolt¹²³ the Supreme Court confirmed the rule that violations of employment policies, even if not signed by the employee, which contain the promise of specific treatment in specific circumstances,

¹²² Gardner v. Pierce Cy. Bd. of Comm'rs, 27 Wn.App 241, 243-44, 617 P.2d 743 (1980); South Hollywood Hills Citizens v. King County, 101, Wn.2d 68, 677 P.2d 114 (1984).

¹²³ DePhillips v. Zolt Construction Company, 136 Wn.2d 26, (1998).

create claims sounding in tort.¹²⁴ Although academic as opposed to employment, the same rules are applicable: where specific promises are given, and the threat of expulsion exists, WVC expects students to conform to certain behavior standards. It therefore has an obligation to follow those standards. To fail to do so breaches its contract for its services.

The substantive and procedural promises given Buechler by the WVC and Nursing Handbooks emanate from the WAC's and National Nursing Policies. As such, they represent promises of specific treatment in specific circumstances. WVC's failure to follow through with such promises, to Buechler's detriment, constitutes breach of contract.

4. Superior Court Judge Allan should have recused herself, rather than forcing Buechler to assert prejudice, after having previously represented Wenatchee Valley College.

Judge Allan should have recused herself, having had previously represented WVC. On April 25, 2011, Judge Allan wrote to the parties,

“Please be advised that between about 1990 and 1998, I was an Assistant Attorney General assigned to represent Wenatchee Valley College. I do not know Ms. Buechler and have no personal knowledge about this case. However, I believe that I know Ms. Capelo, as owner of a quilt store that I frequented. I do not recall the year in which Ms. Capelo closed her business.

“I do believe that I can be fair to both sides in this matter. However, I also believe it is my ethical duty to disclose

¹²⁴ Rule originally from Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 229-30, 685 P.2d 1081 (1984).

these prior relationships with the defendants. If, in light of this information, any party desires that I recuse from hearing this matter, I will do so without the necessity of the filing of an affidavit or prejudice.”¹²⁵

By explaining to the parties her previous representation of WVC, and offering to recuse herself, Judge Allen put Buechler in the unenviable position of either (a) accepting her offer to recuse, and potential later consequences in unrelated matters for having done so; or (b) refusing Judge Allan’s offer, and proceeding with a judge who felt it necessary in the first instance to disclose the prior representation relationship.

A trial judge has discretion to and should recuse herself where her impartiality might reasonably be questioned.¹²⁶ A trial judge’s decision for failure to recuse herself is reviewed by a Court of Appeals for abuse of discretion.¹²⁷ Judge Allan’s statement she would recuse if requested is tantamount to requiring a de facto filing of an affidavit of prejudice by trial counsel, putting Plaintiff’s counsel in a Catch-22 set of circumstances. Normally, a party must take affirmative action by asserting prejudice to remove a judge and a declaration must specify the grounds for prejudice.¹²⁸

¹²⁵ CP 204.

¹²⁶ In re Parentage of J.H., 112 Wash.App. 486, 496, 49 P.3d 154 (2002).

¹²⁷ Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wash.App. 836, 840, 14 P.3d 877 (2000).

¹²⁸ In re Parentage of J.H., 112 Wash.App. 486, 496, 49 P.3d 154 (2002).

Here, Judge Allan knew the grounds for recusal, and stated them within her letter to the parties. Having done so, it was then improper to require the parties to request her removal from the case.

VI. ATTORNEY FEES AND EXPENSES

Pursuant to RAP 18.1, Buechler requests her reasonable attorney fees and expenses on review before this Court. Costs and fees are properly awarded in this case under 42 U.S.C. §1983 and 42 U.S.C. §1988(b).

VII. CONCLUSION

For the reasons previously listed, The Superior Court's Summary Judgment Order should be reversed, and Plaintiff's Motion For Summary Judgment should be granted.

Respectfully submitted, this 19th day of MARCH, 2012.

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