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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 318061

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

BRIAN ROMER,

Appellant,

v.

WASHINGTON STATE UNIVERSITY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Washington State University (WSU or University) Conduct Board found Brian Romer responsible for sexual misconduct after he assaulted a female student (A.R.) at a party held by his fraternity. The evidence showed that Mr. Romer grabbed A.R. from behind and would not let her go, that he forcibly put his hands inside her skirt and shirt, grabbed her vaginal area and breasts underneath her clothing, and that he shoved his tongue in her mouth and tried to force her off the crowded dance floor towards the exit. A.R. fought him and yelled for help. She eventually was assisted by another female and was able to escape.

The evidence at the Conduct Board hearing, described in detail below, not only established that the assault occurred but also firmly established Mr. Romer as the perpetrator. Because there was substantial evidence supporting the Conduct Board's determination that Mr. Romer committed sexual misconduct under WSU's Standards of Conduct for Students (Conduct Code), the decision of the WSU Conduct Board should be upheld.

II. STATEMENT OF THE ISSUES

1. Was there substantial evidence supporting the determination that Mr. Romer was the perpetrator of the assault?
2. Is Mr. Romer entitled to an award of his attorney fees?

III. STATEMENT OF THE CASE

A. The Incident

A.R. attended a party at Mr. Romer's fraternity on March 4, 2013. She drank a small amount of alcohol that evening and was not intoxicated. CP 51, 52, 88, 158.¹

At the party, she began dancing with Mr. Romer, who was a member of the fraternity hosting the party. He began to touch her body in ways that made her uncomfortable, and she tried to move his hands away. He then wrapped his arms tightly around her waist from behind and pulled her backwards towards the exit. CP 49. She struggled but was unable to get free. He ran into a post as he was dragging her backwards and at that point roughly spun her around so that she faced him. CP 49.

He then grabbed her head and forced her to kiss him, shoving his tongue in her mouth. She told him "no" and tried to move her head away. She attempted to escape his grasp, but he was too strong and pulled her back. He then shoved his hand down her skirt under her underwear and groped her vaginal area while he simultaneously reached under her shirt and bra and groped her breast. CP 51, 159.

A.R. began looking for people to help her. She yelled for help, but the music at the party was extremely loud. Eventually, she was assisted

¹ Initials are being used to protect the identity of the female student, in accordance with the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, as amended (FERPA).

by a young woman who helped pry Mr. Romer's hands from her, shoved her towards the exit, and yelled at her to "Go!" A.R. ran towards the exit. CP 53. During the altercation, Mr. Romer grabbed the other woman's hair and tried to kiss her, and the woman yelled, "No, No, No!" CP 52, 159.

A.R. called a friend, crying, and asked for a ride home. She then called her mother and told her what happened. When her friends arrived to pick her up, A.R. told them what happened. CP 54, 160.

The next day, A.R. contacted Pullman Police to report the incident. CP 55, 160. She also went to Mr. Romer's fraternity's Facebook page, found a picture of him, and identified him to the police. CP 59-60.

B. Proceedings Involving Mr. Romer

WSU's Office for Equal Opportunity (OEO) began investigating the incident after a story in the local paper that "Mr. Brian Romer," "a male WSU undergraduate student," was arrested for indecent liberties and unlawful imprisonment. CP 157. Mr. Romer declined to participate in the OEO investigation due to a pending criminal matter. CP 158. According to the online superior court docket, the most recent court document was filed in the criminal case on June 18, 2012, when the superior court entered an Order Exonerating Conditions of Release. Case No. 12-1-00039-0, Docket No. 5. Thus, it appears the criminal matter remains unresolved.

OEO interviewed A.R. and several other witnesses, and concluded there was sufficient evidence that, more likely than not, Mr. Romer had assaulted A.R. OEO then referred the matter to WSU's Office of Student Standards and Accountability (OSSA) to take action under the Conduct Code, WAC 504-26. CP 162. The Director of OSSA charged Mr. Romer with sexual misconduct, which is defined in the Conduct Code, in pertinent part, as follows:

(1) Sexual misconduct is any sexual activity with another that is unwanted and nonconsensual. Sexual misconduct includes physical contact as well as voyeurism.

(2) Consent to sexual activity requires that, at the time of the act, there are actual words or conduct demonstrating freely given agreement to sexual activity—silence or passivity is not consent.

WAC 504-26-221. The matter was referred to the Conduct Board for a hearing to determine whether Mr. Romer was responsible for the charges. CP 151-53.

The Conduct Board hearing occurred November 7, 2012. Mr. Romer presented witnesses who testified as to his character. He declined to testify but read a statement in which he acknowledged that “something happened” to A.R. that night. He stated he was “sorry for what she experienced” and then listed the steps he had taken to help mitigate the impact of the incident on A.R. CP 107. These steps included: meeting face to face with A.R. through the prosecutor's office so she

could tell him how the incident had impacted her; paying for a defense-initiated victim outreach expert to assist A.R. during that meeting; and undergoing at A.R.'s request an evaluation by an expert to determine whether he posed a danger to the community. Nothing in Mr. Romer's statement indicated he believed this was a case of mistaken identity. CP 107-09.

Kimberly Anderson, the OEO investigator, testified at the Conduct Board hearing regarding her investigation, findings, and conclusions. CP 37-43. A.R. testified about the incident, as well as events before and after the incident. CP 44-64. A.R. was permitted to testify at the hearing in a separate room from Mr. Romer, who listened by speakerphone and sent written questions to the Conduct Board chair. CP 43. This separation was in accordance with WSU's regulations, which allow for separate facilities for convenience or to accommodate concerns of confrontation. WAC 504-26-403(7). Several other witnesses testified generally about the evening of the incident and afterwards. CP 66-90.

Testimony and evidence before the Conduct Board specifically identifying Mr. Romer as the assailant included the following:

1. The evidence showed that A.R. was able to get a good look at Mr. Romer's face and clothing. In her written statement provided to investigators, A.R. stated:

He roughly turned me around. This was the first time I saw his face.

. . . He was wearing a blue and white vertical striped button up the front shirt. He had short cut hair and was a little flush. His lips seemed bigger than normal.

CP 200. At the hearing, A.R. testified that “[H]e turned me around, and that’s the first time I had actually seen him. And he was pretty pale, and he’s this big guy.” CP 49. In addition, the conduct officer’s interview notes indicate that A.R. stated, “[h]is lips looked swollen and skin splotchy, very scary.” CP 199.

2. The evidence showed that A.R. provided investigators with “a detailed description of [Mr. Romer] and his clothing.” CP 159.

3. The evidence showed that the day after the assault, A.R. went to Mr. Romer’s fraternity’s Facebook page, found a picture of him, and identified him to the police. CP 59-60; 199. Specifically, the OEO Investigation Memorandum states that A.R. determined Mr. Romer’s identity from reviewing pictures on the fraternity’s Facebook page and then “shared the information with the investigating police officer who contacted the Respondent shortly thereafter.” CP 159.

4. The conduct officer’s interview notes stated that the police came to the fraternity house the next day and that Mr. Romer went with them for voluntary questioning and was subsequently arrested. A fraternity representative later met with the Pullman Police Department

and was informed of the allegations. After that, the fraternity held an emergency meeting and suspended Mr. Romer. CP 175.

5. A.R. testified that the woman who had helped her the night of the incident was in her science class. A.R. was able to speak to the woman, who subsequently also identified Mr. Romer to police. CP 60, 62.

6. Mr. Romer stated at the hearing that he had met with A.R. “face to face” through the prosecutor’s office as part of his efforts to mitigate the impact of the incident on her. CP 108-09. A.R. also testified that after the incident, she had seen Mr. Romer in connection with the court proceedings and on campus. CP 56.

After reviewing all of the evidence in the conduct file and evaluating the testimony presented at the hearing, the Conduct Board issued a decision finding Mr. Romer responsible for sexual misconduct. CP 133-35. The Conduct Board trespassed him from campus until December 31, 2018, and required him to complete his final internship off campus. CP 134. The Conduct Board’s intent in assigning the trespass sanction was to ensure that A.R. was given “the opportunity to complete her undergraduate degree without being burdened by a fear that she might encounter [Mr. Romer] on campus.” CP 134.

Mr. Romer subsequently appealed the Conduct Board decision to the University Appeals Board (Appeals Board). In his appeal, he claimed

for the first time that this was a case of mistaken identity. Specifically, he claimed the Conduct Board's decision was not supported by substantial information because the evidence did not identify him as the person who committed the assault. CP 130-32. The Appeals Board rejected this argument and affirmed the Conduct Board's decision and sanctions. CP 127-28.

On January 8, 2013, Mr. Romer filed a Petition for Judicial Review in Whitman County Superior Court, arguing that the Conduct Board's decision was not supported by substantial evidence because the evidence did not identify him as the person who committed the assault. Whitman County Superior Court upheld the Conduct Board's decision, concluding there was sufficient evidence to establish Mr. Romer's identity. The court noted it was within the purview of the Conduct Board, not the court, to weigh the evidence. CP 519. Mr. Romer then moved for reconsideration. The court denied the motion, and Mr. Romer appealed to this Court. CP 523, 525.

IV. ARGUMENT

A. Standard Of Review

Judicial review of agency action is governed by the Administrative Procedure Act (APA), RCW 34.05. A court conducting judicial review of agency action is governed by the following four standards:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

RCW 34.05.570(1). In reviewing agency action, the reviewing court gives substantial weight to an agency's interpretation of its own rules. *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996), *review denied*, 130 Wn.2d 1023, 930 P.2d 1230 (1997). A court is not to substitute its judgment for that of the agency and "will upset its determination only if the evidence establishes it was arrived at by unlawful, arbitrary or capricious action." *State ex rel. Rosenberg v. Grand Coulee Dam Sch. Dist. No. 301 J*, 85 Wn.2d 556, 563, 536 P.2d 614 (1975) (citing *State ex rel. Cosmpolis Consol. Sch. Dist. 99 v. Bruno*, 61 Wn.2d 461, 378 P.2d 691 (1963)).

A court may grant relief from an agency order in an adjudicative proceeding if "[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional

evidence received by the court under this chapter[.]” RCW 34.05.570(3)(e). “Substantial evidence” as used in RCW 34.05.570(3)(e) has been defined as evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *See, e.g., Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1996).

The substantial evidence standard is “highly deferential” to the agency fact-finder. *ARCO Products Co. v. Utils. & Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The court will view the evidence in the light most favorable to the party who prevailed in the highest administrative forum to exercise fact-finding authority. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). The court will accept the fact-finder’s determinations of witness credibility and the weight to be given to reasonable but competing inferences. *Id.*

When reviewing a decision of an administrative agency, the appellate court stands in the same position as the superior court. *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 414, 216 P.3d 451 (2009). Here, the appellate court is reviewing the Conduct Board’s decision, not the decision of the Whitman County Superior Court. Accordingly, Mr. Romer bears the burden of showing that the Conduct Board’s decision was invalid. RCW 34.05.570(1)(a).

B. Standard Of Proof And Admissibility Of Evidence In WSU Conduct Board Proceedings

The standard of proof in a WSU Conduct Board hearing is “preponderance of the evidence,” that is, “whether it is more likely than not that the accused student violated the standards of conduct for students.” WAC 504-26-403(4)(a)(x). Thus, the question on review is whether there was substantial evidence to support the Conduct Board’s determination that Mr. Romer, more likely than not, committed the assault.

Civil and criminal court rules do not apply during WSU Conduct Board hearings. WSU’s regulation states:

Formal rules of process, procedure, and/or technical rules of evidence, such as are applied in criminal or civil court, are not used in conduct proceedings. Relevant evidence, including hearsay, is admissible if it is the type of evidence that reasonable members of the university community would rely upon in the conduct of their affairs. The chair of the university conduct board shall have the discretion to determine admissibility of evidence.

WAC 504-26-403(4)(a)(xi). In *Alpha Kappa Lambda Fraternity*, this Court upheld these evidentiary standards, concluding that hearsay evidence was admissible in a Conduct Board hearing involving a fraternity. *Alpha Kappa Lambda Fraternity*, 152 Wn. App. at 414 (“[H]earsay is not a valid basis for excluding evidence in a student conduct proceeding if reasonable members

of the university community would rely on the information in the conduct of their affairs.”). *See also Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635-36 (6th Cir. 2005) (noting that courts have been “unanimous” in concluding that “neither rules of evidence nor rules of civil or criminal procedure need be applied” in student conduct hearings) (citations omitted). The WSU conduct process takes place regardless of whether criminal charges have been filed against a student, and there is no requirement that it be postponed pending the outcome of the criminal case. However, an accused student has the right to remain silent during the conduct process. WAC 504-26-305(1).

C. Substantial Evidence Established Mr. Romer’s Identity As The Assailant

Mr. Romer claims that the Conduct Board’s burden of proof should be governed by Evidence Rule (ER) 404(b)² and that the Conduct Board should require the same kind of evidence as is required in a

² ER 404(b) states:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In a criminal case, in order for evidence of other crimes or acts to be admissible under ER 404(b), the defendant’s link to prior bad acts must be shown by a preponderance of the evidence. *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998). In *Norlin*, a child abuse case, this requirement was met when the evidence showed that the child had been injured previously while the defendant was the primary caregiver. *Id.* at 584.

criminal case to prove identity. Br. of Appellant at 12-13. He further argues that in order for there to be substantial evidence of his identity, A.R. or another witness was required to identify Mr. Romer as the perpetrator by either pointing to him at the hearing or by pointing to the photograph of him in his conduct file. Br. of Appellant at 14.

To support his argument, Mr. Romer cites *State v. Huber*, 129 Wn. App. 499, 119 P.3d 388 (2005). In *Huber*, a criminal case, the court held that the State failed to show that the defendant at trial was the same defendant who had jumped bail. In arguing that the defendant was properly identified at trial, the state relied on defense counsel's opening remarks, in which he had introduced his client by name. The court rejected this argument, stating that (1) counsel's remarks are not evidence, and (2) the introduction of the defendant "had no logical tendency to show" that the person being introduced was the same person named in the documents offered by the prosecution. *Id.* at 504. The court noted that names are not sufficient to prove identity beyond a reasonable doubt because many people bear identical names. *Id.* at 502; see *State v. Ceja Santos*, 163 Wn. App. 780, 785, 260 P.3d 982 (2011) (name insufficient to link defendant to prior DUI judgments, particularly when birth dates on prior document conflict).

Huber is distinguishable from this case. First, the State in that case was required to prove the identity of the defendant “beyond a reasonable doubt.” *Id.* at 501. Here, in contrast, the standard of proof was “preponderance of the evidence.” WAC 504-26-403(4)(a)(x). In addition, formal evidence rules and criminal standards do not apply in Conduct Board proceedings. *Alpha Kappa Lambda Fraternity*, 152 Wn. App. at 414; *see also Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077, 1090 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970) (noting that “school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure . . .”). Under WSU’s conduct rules, evidence is admissible to support any element of a case, including identity, if “it is the type of evidence that reasonable members of the university community would rely upon in the conduct of their affairs.” WAC 504-26-403(4)(a)(xi).

Furthermore, unlike in *Huber*, the evidence in this case linking Mr. Romer to the incident went considerably beyond Mr. Romer’s name. It was the type of evidence that reasonable members of the university community would rely on, as well as the type of evidence police officers would rely on in making an arrest. It also provided a sufficient link between the individual who committed the assault and the accused student (Mr. Romer) attending the hearing. It included the following:

1. A.R. got a good look at Mr. Romer the night of the incident (CP 49, 199, 200);

2. A.R. provided police with a detailed description of Mr. Romer (CP 159);

3. A.R. found Mr. Romer's photograph on his fraternity's Facebook page and shared it with police (CP 59-60, 159, 199);

4. The police went to Mr. Romer's fraternity the next day, arrested him, and charged him with indecent liberties and unlawful imprisonment (CP 157, 159, 175);

5. The woman who helped A.R. the night of the incident also identified Mr. Romer to police (CP 60, 62);

6. After the incident but before the Conduct Board hearing, A.R. and Mr. Romer met "face to face" on one or more occasions, including at a meeting set up through the prosecutor's office so that A.R. could express her feelings about the incident to Mr. Romer. Mr. Romer specifically referred to this "face to face" meeting in his statement to the Conduct Board and said it was part of his efforts to mitigate the impact of the incident on A.R. (CP 56, 108-09).

Thus, not only was Mr. Romer identified as the perpetrator, there was also a well-established chain of events, from A.R.'s identification of Mr. Romer to his arrest, subsequent court proceedings, and the Conduct

Board hearing, that linked the incident directly to the “Mr. Brian Romer” sitting at the Conduct Board hearing.

This evidence showed that Mr. Romer was, more likely than not, the assailant, and therefore the Conduct Board’s decision was supported by substantial evidence. Any issues regarding the proper weight of this evidence or the credibility of the witnesses were within the sole purview of the Conduct Board. *Alpha Kappa Lambda Fraternity*, 152 Wn. App. at 414. Nothing in *Huber*, or any other case cited by Mr. Romer, stands for the proposition that A.R. was required to identify Mr. Romer at the hearing by pointing to him or to the photograph in his conduct file. Mr. Romer’s attempt to challenge the Conduct Board’s order based on a technicality derived from his misinterpretation and misapplication of Washington criminal law should fail.

D. Mr. Romer Is Not Entitled To Attorney Fees On Appeal

Under the Washington Equal Access to Justice Act (EAJA), RCW 4.84.350, attorney fees may be awarded to a qualifying prevailing party. A qualified party “prevails” if it obtains “relief on a significant issue that achieves some benefit” that the party sought in the judicial review proceeding. RCW 4.84.350(1). Even when the agency does not prevail, fees and other expenses cannot be awarded if the “agency action” is “substantially justified.” RCW 4.84.350(1); *Aponte v. Dep’t of Soc. &*

Health Servs., 92 Wn. App. 604, 623, 965 P.2d 626 (1998), *review denied*, 137 Wn.2d 1028, 980 P.2d 1280 (1999). An agency's position is substantially justified, even if ultimately found to be incorrect, if the question at issue is a close one. See *Honesty in Env'tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 535-36, 979 P.2d 864 (1999). In this case, Mr. Romer does not meet the criteria for an attorney fee award, and the Court should decline his request.

V. CONCLUSION

WSU has a legal obligation to take remedial action when one of its students is sexually assaulted by another. It also has a duty to ensure that the procedural rights of accused students are protected. Both of these obligations were met here.

The Conduct Board's conclusion that Mr. Romer engaged in sexual misconduct by assaulting A.R. was supported by substantial evidence. In particular, there was substantial evidence establishing that Mr. Romer, more likely than not, was the perpetrator. WSU therefore respectfully requests that the Court affirm the Conduct Board's decision.

RESPECTFULLY SUBMITTED this 20th day of December,

2013.

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I certify that on this 20th day of December, 2013, I mailed the foregoing Brief of Respondent to:

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