

FILED

JAN 12 2016

COA No. 332829

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**WASHINGTON STATE COURT OF APPEALS
DIVISION III**

EILEEN EDDY,

Petitioner-Appellant,

v.

WASHINGTON STATE UNIVERSITY,

Respondent-Appellee.

On Appeal from Whitman County Superior Court
Whitman County No. 14-2-00214-7

Reply Brief of Appellant

Steve Martonick, WSBA #32213
Martonick Law Office
207 East Main Street
Pullman, WA 99163

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE CASE1

II. ARGUMENT1

1. A request for an administrative adjudicative proceeding operates as a request for the appropriate administrative proceeding.....1

2. The University places an unreasonable interpretation on its own rule.2

3. The APA requires a formal hearing where fundamental interests are at stake.3

4. Eddy has in fact been substantially prejudiced by use of the informal proceeding.....5

III. CONCLUSION.....8

TABLE OF AUTHORITIES

Cases:

City of Bremerton v. Widell, 146 Wn.2d 561 (2002)4,5

City of Sumner v. Walsh, 148 Wn.2d 490 (2003)4

Erection v. Dept. of L&I, 121 Wn.2d 513 (1993)1

Nirk v. Kent Civil Serv. Comm’n, 30 Wn. App. 214 (1981)7

Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839
(1972)).....4

Pierce Cnty. Sherriff v. Civil Serv. Comm’n, 98 Wn.2d 690 (1983)5,6

Seatoma Convalescent Ctr. v. DSHS, 82 Wn.App 495 (1996)3

State v. Manion,173 Wn.App. 610 (2013)7

State v. Riles, 135 Wn.2d 326 (1998)4

Rules & Statutes:

MODEL ACT § 4-1022

MODEL ACT § 4-2012

RCW 34.05.4101

RCW 34.05.4131

RCW 34.05.4527

RCW 34.05.4761

RCW 34.05.4824

RCW 34.05.4911

WAC 504-26-401.....7

WAC 504-26-405.....3,6,7

WAC 504-26-407.....1,2

I. STATEMENT OF THE CASE

A statement of the case was set forth in the Appellant's opening brief and will not be repeated here.

II. ARGUMENT

1. A request for an administrative adjudicative proceeding operates as a request for the appropriate administrative proceeding.

The University argues that Eddy has waived her right to appeal the procedures used by the University because she did not specifically request a formal adjudicative proceeding during the student conduct process. (Reply Br. 18-21.) The University's rules provide that: "The appeals board *shall* make any inquiries necessary to ascertain whether the [student conduct] proceeding must be converted to a formal adjudicative hearing under the Administrative Procedure Act (chapter 34.05 RCW)." WAC 504-26-407(1)(c) (emphasis added); *see also* RCW 34.05.491(3) (stating the same). The word "shall ... is presumptively imperative and operates to create a duty." *Erection v. Dept. of L&I*, 121 Wn.2d 513, 518 (1993). The Washington Administrative Procedure Act states that the presumptive proceeding is the formal proceeding and brief proceedings are the exception. *See* RCW 34.05.410(1) ("Adjudicative proceedings are governed by RCW 34.05.413 through 34.05.476, [regarding formal adjudicative proceedings,] *except* as otherwise provided.") (emphasis

added). The Model Administrative Procedure Act of 1981 (Model Act), like the APA, provides that formal adjudicative proceedings are the default administrative hearing. *See* MODEL ACT § 4-201. Furthermore, the Model Act states: “An application for an agency to issue an order includes an application for the agency to conduct appropriate adjudicative proceedings, whether or not the applicant expressly requests those proceedings.” Model Act 4-102(c). Obviously, the onus is on the University to provide the appropriate hearing regardless of a specific demand for the same.

2. The University places an unreasonable interpretation on its own rule.

The University contends that its rules did not require a full adjudicative proceeding for Eddy. (Reply Br. 21-24.) In fact, the University appears to argue that its rules do not require a formal hearing for *any* student. As stated, the rule at issue provides: “The appeals board shall make any inquiries necessary to ascertain whether the proceeding must be converted to a formal adjudicative hearing” WAC 504-26-407(1)(c). The University focuses on the language “any inquiries necessary” to arrive at its interpretation of the rule, or at least the brief author’s interpretation. The University claims that the directive is purely subjective and therefore no full adjudicative proceedings are ever actually

required. Whether or not such a hearing is to be held is merely determined by the whim of the appeals board. However, as the University correctly notes, interpretation of its rules must be “reasonable.” (Reply Br. 22, *citing Seatoma Convalescent Ctr. v. DSHS*, 82 Wn.App 495, 518 (1996)). Interpreting its rule so that it never need apply is hardly the definition of reasonable.¹

3. The APA requires a formal hearing where fundamental interests are at stake.

First, the University refers to a number of due process cases relating to student expulsion that Eddy will not reply to. (Reply Br. 24-27.) The issue here is not due process but the requirements of the statutory scheme under the APA. Secondly, Eddy was subject to sanctions beyond expulsion. She was also trespassed from all University property, (CP 220), and potentially subject to paying restitution, WAC 504-26-405(1)(d); fines, WAC 504-26-405(1)(q); community service, WAC 504-26-405(1)(f); removal from her residence, WAC 504-26-405(1)(h); and, no contact orders, WAC 504-26-405(1)(p). No authority is required to support the proposition that the foregoing invoke substantial if not fundamental interests.

¹ This fact does not appear in the record, but the University has never afforded any student or student organization a full adjudicative proceeding. Counsel’s motion to supplement the record with a declaration supporting this claim was denied in Commissioner Wasson’s ruling herein dated December 3, 2015

The University goes on to argue that Eddy's interest in her reputation and in travel and association are not interests deserving of a formal adjudicative proceeding as that term is used in RCW 34.05.482(1)(d). Nevertheless, the University concedes that Eddy's interest in her reputation is fundamental. (Reply Br. 31.) As to the trespass order the University argues that it does not implicate a fundamental right. (Reply Br. 31.) The University is wrong.

As stated, Eddy was trespassed from the University and all the activities and relationships that such a prohibition entails. However, "[t]here is a fundamental right to move freely in public places." *City of Sumner v. Walsh*, 148 Wn.2d 490, 504 (2003) (Chambers, J. concurring) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164, 92 S.Ct. 839 (1972)). "The freedom to associate and travel is a protected liberty interest granted by the First Amendment." *State v. Riles*, 135 Wn.2d 326, 346 (1998). No property owner may trespass a person from property where he is licensed to enter by one "empowered to license access thereto." RCW 9A.52.090(3). Persons empowered to license access to private property would include all tenants. *See, e.g., City of Bremerton v. Widell*, 146 Wn.2d 561, 573 (2002). In *Bremerton* our State Supreme Court cited with approval the common rule "that the landlord may not

prevent invitees or licensees of the tenant from entering the tenant's premises by passing through the common area." *Id.* at 571.

From students in dorms, to residents of University housing, to managing companies of golf courses, promoters of concerts, and business tenants of the research and technology park the University has many diverse tenants and others empowered to license access to campus. All of these entities have authority to license Eddy into their respective domains and consequently license reasonable access to common areas of the campus to do so. Therefore, per *Bremerton*, the trespass order exceeded what any property owner may lawfully do and impacted a fundamental interest of Eddy's in freedom of association.

4. Eddy has in fact been substantially prejudiced by use of the informal proceeding.

Finally, the University argues that Eddy has not demonstrated she was "substantially prejudiced" by its actions and therefore she is not entitled to review. (Reply Br. 35.) Nevertheless, Eddy was substantially prejudiced by use of the brief adjudicative proceeding in two ways.

First, failure of an agency to abide by its own rules is per se arbitrary and capricious. *See, e.g., Pierce Cnty. Sherriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 694 (1983). "Violation of the rules which govern its exercise of discretion is certainly contrary to law and, just as the right

to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also *fundamental.*” *Id.* (emphasis added.) Furthermore, the court’s have “inherent authority” to review “illegal or manifestly arbitrary and capricious action violative of fundamental rights” regardless of any statutory provision. *See, e.g., id.* at 694.

As the University concedes Eddy’s interest in her reputation is fundamental and, as shown, Eddy’s right to associate with those who live, work and do business on campus is fundamental as well. Also fundamental is Eddy’s interest in her property. Among the other sanctions the Conduct Board could have imposed were restitution, WAC 504-26-405(1)(d), and fines, WAC 504-26-405(1)(q). The University’s actions therefore, impacted or threatened Eddy’s fundamental rights by use of an inappropriate procedure. That fact alone, entitles Eddy to review under the inherent authority of the court.

Secondly, the Conduct Board heard the matter on the record, with the exception of the witness Eddy called and the testimony of Eddy herself. (CP 218.) The University did not call any witnesses, (CP 17-220), although the burden was on the University to prove the misconduct by a preponderance of the evidence, WAC 504-26-401(7). Eddy pled “not responsible” to the accusations and contested all pertinent factual

allegations of the University's case. (CP 366-460.) Other than the sworn declarations of the police officers regarding the assault, none of the documents and statements in the record was authenticated by oath or affidavit. (CP 22-365.) As stated, Eddy faced a range of potential sanctions by the Conduct Board, including but not limited to, fines, restitution, removal from her residence, WAC 504-26-405(1)(h); suspension, WAC 504-26-405(1)(i), and expulsion, WAC 504-26-405(1)(j).

In a full adjudicative proceeding the rules of evidence apply and a party may cross-examine witnesses. *See* RCW 34.05.452. In addition, witnesses must be sworn. *See* RCW 34.05.452(3). Our courts have deemed the "crucible of cross-examination" as the answer to the "evil" of ex parte testimony. *See State v. Manion*, 173 Wn.App. 610, 615 (2013). Failure to swear in witnesses likewise constitutes prejudicial error. *See Nirk v. Kent Civil Serv. Comm'n*, 30 Wn. App. 214, 221 (1981). "[T]he primary function of requiring testimony under oath or affirmation is to provide 'additional security for credibility' by impressing upon witnesses their duty to tell the truth, and to furnish a basis for a perjury charge." *Id.* at 218.

This is a case where the decision makers had to choose to believe either the accused or her accusers. It was a test of credibility that the

Conduct Board had to decide without having an opportunity to view, question and hear from the complaining witnesses under oath. The lack of sworn testimony and the opportunity for cross-examination constitute substantial prejudice.

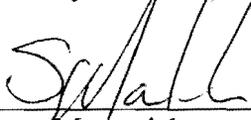
III. CONCLUSION

The Court of Appeals should vacate the Final Order.

Dated this 9 day of January, 2016.

Submitted:

MARTONICK LAW OFFICE
Attorneys for Eileen Eddy



Steve Martonick
WSBA #32213