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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**WASHINGTON STATE COURT OF APPEALS
DIVISION III**

ABDULLATIF ARISHI,

Petitioner-Appellant,

v.

WASHINGTON STATE UNIVERSITY,

Respondent-Appellee.

On Appeal from Whitman County Superior Court
Whitman County No. 14-2-00157-4

Reply Brief of Appellant

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

The University refers to a number of due process cases relating to student expulsion that Arishi will not reply to. (Reply Br. 14-19.) The gist of the argument is that due process does not always require that a university student facing expulsion receive the full array of legal protections normally associated with judicial proceedings. The issue here is not due process, but the requirements of the statutory scheme under the Administrative Procedures Act ("APA").

The University argues that Arishi's interests in his reputation and in travel and association were sufficiently protected by its use of an informal proceeding. (Reply Br. 21-23.) The APA permits an agency to use informal hearings only when the "issue and interests do not warrant formal process." RCW 34.05.482(1)(d). The APA applies to all agencies unless specifically exempted. *See* RCW 34.05.030(5). The definition of "agency" includes "institution of higher education." RCW 34.05.010(2).

Here, Arishi's interests were not just substantial but fundamental. The University does concede that Arishi's interest in his reputation is fundamental. (Reply Br. 21.) But as to the trespass order the University argues that it does not implicate a fundamental right. (Reply Br. 22.) The University is wrong.

Arishi was ordered from his home where his family lived (CP 164) and trespassed from the University (CP 40) with all the activities and relationships that such a prohibition entails. "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). "There 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.

The University has many diverse tenants and others empowered to license access to campus. These include, but are not limited to, family members, managing companies of golf courses, promoters of concerts, restaurant and bar owners and business tenants of the research and technology park. All of these entities have authority to license Arishi 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 Arishi's fundamental interest in freedom of association and travel.

The University imposed sanctions against Arishi substantially impacting his fundamental rights of reputation, travel and association. It could have imposed no greater sanctions with no more severe consequences than what it imposed on Arishi. If the severest sanctions a university can impose do not invoke the procedural protections of a full adjudicative hearing, then the requirements of the APA simply do not apply to universities.

2. The University ignores its own rule establishing an opportunity for a full adjudicative hearing.

The University contends that its rules did not require a full adjudicative proceeding for Arishi. (Reply Br. 25.) Nevertheless, the University never explains why this is so. 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 notes that the Appeals Board denied Arishi’s request for a full hearing. (Reply Br. 25.) But the University does not once attempt to explain to whom and when the rule actually applies. It simply argues Arishi got all the process that he was due and therefore a formal hearing was not required.

Arishi does not challenge the proceeding on due process grounds. Arishi argues that WAC 504-26-407(1)(c) is intended to implement the directive of the APA that brief adjudicative hearings are not authorized when the “issue and interests involved in the controversy do not warrant use of the procedures” RCW 34.05.482(1)(d). If the Appeals Board must inquire into the necessity of a formal hearing, then somewhere, sometime, a formal hearing must be available.

The foregoing rule can be interpreted in light of the University’s rules referring to brief proceedings as “educational in tone” that seek to

avoid an “unduly adversarial environment.” *See* WAC 504-26-403(4). The Conduct Board decision in this case states that “when it can” the board “attempts to craft educational sanctions that will help individuals . . .” (CP 40.) However, the board felt it necessary in Arishi’s situation to act instead for the “safety of our community.” (CP 40.) If ever WAC 504-26-407(1)(c) were to have any application, it would be in a case of this nature where the Conduct Board action was intended as remedial and non-educational.

3. Arishi has in fact been substantially prejudiced by use of the informal proceeding.

Finally, the University argues that Arishi has not demonstrated he was “substantially prejudiced” by its actions and therefore he is not entitled to review. (Reply Br. 27.) Nevertheless, Arishi 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 Arishi’s interest in his reputation is fundamental and, as shown, Arishi’s right to associate with his family and those others who live, work and do business on campus is fundamental as well. Also fundamental is Arishi’s interest in his 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 Arishi’s fundamental rights by use of an inappropriate procedure. That fact alone, entitles Arishi to review under the inherent authority of the court.

Second, Arishi was denied a formal proceeding where he could confront and cross-exam the one witness against him. (CP 23.) Arishi was accused of having sexual contact with an under aged individual calling herself “Panda.” (CP 247.) Panda did not testify before or make any statements for submission to the Conduct Board. (CP 216.) Only two witnesses spoke before the board, a Pullman police officer and a University investigator. (CP 216.) Neither witness had first hand knowledge of the matters alleged. (CP 228-29.) Nor was either witness subject to direct questioning by Arishi or his attorney who was present.

(CP 228-29, 242-44.) The witnesses talked about what other people told them and in some instances what others told others. (CP 228-29, 242-44.) Arishi provided a written statement that Panda represented herself as nineteen years of age. (CP 247.) The police officer stated that Panda appeared physically mature to him. (CP 243.)

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 his accuser. An accuser who was not present and whose statements were not presented to the fact finder under oath. 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 in

person. The lack of sworn testimony by the accuser and the lack of an opportunity for cross-examination constitute substantial prejudice.

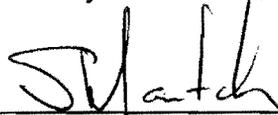
III. CONCLUSION

The Court of Appeals should vacate the Final Order and impose attorney fees.

Dated this 18 day of January, 2016.

Submitted:

MARTONICK LAW OFFICE
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A handwritten signature in black ink, appearing to read "SMartch", written over a horizontal line.

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