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State of Washington

NO. 333060

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

ABDULLATIF ARISHI,

Appellant,

v.

WASHINGTON STATE UNIVERSITY,

Respondent.

BRIEF OF RESPONDENT - AMENDED

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I. INTRODUCTION

Washington State University (WSU or University) expelled Abdullatif Arishi, a graduate student seeking a degree in special education, after the University's Student Conduct Board (Conduct Board) found that Mr. Arishi engaged in sexual misconduct by having nonconsensual sexual intercourse and nonconsensual sexual contact with a fifteen-year-old girl on multiple occasions. In making its determination, the Conduct Board considered police reports, a report detailing the investigation of the University's Office for Equal Opportunity (OEO), a written statement provided by Mr. Arishi, live witness testimony from a police officer who interviewed the fifteen-year-old victim, and live testimony from OEO's investigator. During the proceeding, Mr. Arishi was assisted by his attorney, allowed to cross-examine witnesses through the student conduct board chair, permitted to submit his own evidence, including live witnesses, and allowed to address the Board regarding the allegations and any possible sanctions.

Throughout the student conduct process, WSU provided Mr. Arishi with process above and beyond that required by the Due Process Clause and Washington's Administrative Procedure Act (APA). WSU ultimately expelled Mr. Arishi based on strong evidence that he sexually assaulted a minor child on multiple occasions. WSU was not required to use a formal

adversarial proceeding to do so, and Mr. Arishi cannot show that such a proceeding would have changed the outcome.

II. ISSUES PRESENTED FOR REVIEW

1. **Does the APA require WSU to employ a formal adjudicative proceeding in a student conduct proceeding where expulsion is a possible outcome?**
2. **Do WSU's rules require it to employ a formal adjudicative proceeding in a student conduct proceeding where expulsion is a possible outcome?**
3. **Has Mr. Arishi sufficiently demonstrated substantial prejudice from the alleged error to obtain a remand for another proceeding?**
4. **If Mr. Arishi obtains the relief he seeks, is he entitled to attorney's fees?**

III. STATEMENT OF THE CASE

1. Criminal investigation of Mr. Arishi.

In the spring semester of 2014, Mr. Arishi was a Ph.D. student in WSU's College of Education, with a stated goal of teaching children with special needs. CP 310/Appendix A.¹ At the time, Mr. Arishi was living in WSU student family housing; children of all ages resided in his apartment complex. *Id.* On February 21, 2014, Washington State Trooper Shawley

¹ Appendix A—the Declaration of Adam Jussel (exhibits omitted)—was submitted in a Supplemental Designation of Clerk's Papers on October 13, 2015, and is attached for the Court's convenience.

contacted Pullman Police Detective Dow regarding a vehicle collision Trooper Shawley was in the process of investigating in the Colfax area. CP 49-54, 100-01. Trooper Shawley informed Detective Dow that upon arriving at the scene, he found the driver of the responsible vehicle to be a fifteen-year-old female, MOS.² *Id.* MOS did not possess a driver's license or learner's permit, but was in the presence of the passenger and registered owner, forty-year-old Mr. Arishi. *Id.* Trooper Shawley's suspicion was raised when he discovered that MOS's mother did not know Mr. Arishi or that her daughter was traveling to Spokane with him. *Id.*

Later that day, Detective Dow interviewed MOS. CP 50. MOS disclosed that she knew Mr. Arishi as Alex Anderson and had met him about two months prior through an online social networking site. CP 50, 100. She indicated that during the intervening months, Mr. Arishi purchased her food, phone services, and even a phone worth approximately two hundred dollars. CP 50, 100, 236. MOS stated that on the day of the accident, Mr. Arishi was taking her to Spokane to give her a car; MOS went with him although she was scared and did not want to. CP 50, 100. MOS told Detective Dow that she met with Mr. Arishi in person about four

² WSU did not learn the identity of Mr. Arishi's victim because law enforcement authorities withheld that information. CP 228. This brief uses the initials MOS to identify the victim, as those are the initials the Whitman County Prosecutor's Office used in its probable cause statement to identify her. CP 100-01.

times and that during their first such interaction, he attempted to have sex with her. CP 51. She indicated that he knew she was fifteen, but did not have an issue with her age. CP 51, 101. MOS stated that on the day previous to the accident, in an area north of Pullman, Mr. Arishi pressured her into touching his penis. CP 51, 53, 100-01, 236. She also indicated that on the day of the car accident, Mr. Arishi touched her breast and legs while she was driving. CP 53, 101. Because the locations of these incidents occurred outside of Pullman in Whitman County, Detective Dow forwarded the case to the Whitman County Sheriff's Office. CP 53.

Whitman County Sheriff's Sergeant Chapman took over the investigation and interviewed MOS again on May 2, 2014. CP 144. MOS disclosed details of her encounters with Mr. Arishi that were consistent with what she told Detective Dow; however, she additionally disclosed that Mr. Arishi digitally penetrated her vagina the first time the two met in person. *Id.* Mr. Arishi declined to be interviewed by either Detective Dow or Sergeant Chapman. CP 139. Based on the foregoing information, Mr. Arishi was arrested on May 3, 2014. CP 113.

2. Student conduct proceedings at WSU.

After Mr. Arishi's arrest, WSU initiated student conduct proceedings based on the circumstances leading to his arrest, alleging that Mr. Arishi violated WSU's Standards of Conduct for Students (Standards).

The Standards prescribe expectations for student conduct and provide the process to be followed in the event allegations of misconduct arise. In general, when a student is suspected of violating the Standards, a conduct officer from the Office of Student Conduct (OSC) performs an investigation. WAC 504-26-402. In matters involving discrimination, sexual harassment, or sexual misconduct, a conduct officer and OEO investigators conduct a joint investigation. CP 137. After the investigation, the conduct officer reviews an investigative memorandum authored by the OEO investigator and determines if there are any violations of the Standards. If the conduct officer believes a violation of the Standards occurred, the conduct officer can reach an agreed resolution with the student or resolve the matter with a hearing before the conduct officer or the Conduct Board. WAC 504-26-401(2)-(3); WAC 504-26-402. When the possible sanction is expulsion or suspension, a hearing before the Conduct Board is mandatory. WAC 504-26-401(3)(b). An accused student is given notice of the hearing and the basis of the allegation. WAC 504-26-402, -403. An accused student has an opportunity to present evidence and be assisted by an advisor. WAC 504-26-401, -402, -403. In the case of a Conduct Board hearing, the student also has the rights of discovery, to call witnesses and to cross-examine witnesses through the Conduct Board chair. WAC 504-26-403. At the conclusion of a conduct

officer or Conduct Board hearing, the fact-finder renders a decision and a sanction, if any. *Id.*

A student adversely affected by a finding may appeal the decision to the University Appeals Board (Appeals Board). WAC 504-26-407(1). The Appeals Board's review is generally limited to the record of the prior hearing and is not a new hearing. WAC 504-26-407(2). The Appeals Board reviews a hearing to ensure that the student received a fair hearing and procedures were followed, that substantial evidence exists in the record to support any decision, that any sanction is appropriate, and to consider any new information presented. *Id.* The Appeals Board also makes any inquiries necessary to determine if the procedure should be converted to a formal adjudicative proceeding under the APA. WAC 504-26-407(1)(c). The written decision of the Appeals Board becomes WSU's final order on the matter, except in cases of expulsion or loss of recognition, which may be reviewed by WSU's President at his or her discretion. WAC 504-26-407(4)-(6).

3. Mr. Arishi's disciplinary proceedings.

OEO learned of Mr. Arishi's arrest on May 5, 2014, and opened an investigation. CP 57. On May 7, 2014, the Whitman County Prosecutor's Office charged Mr. Arishi with one count of rape of a child in the third degree and two counts of child molestation in the third degree. *Id.* Based

on information from OEO's investigation notice and the probable cause statement in Mr. Arishi's criminal charge, OSC notified Mr. Arishi that the Conduct Board would hold a hearing on May 21, 2014, to determine if Mr. Arishi violated the following Standards: abuse of self and others; reckless endangerment; violation of university policy, rule, or regulation (specifically WSU's Executive Policy 15 prohibiting sexual discrimination and harassment (EP 15)); discrimination; sexual misconduct; and harassment. CP 120, 134.

On May 19, 2014, OEO Director Kimberly Anderson completed the OEO investigation and forwarded the findings to OSC and Mr. Arishi. CP 137-40. To complete the investigation, Ms. Anderson reviewed documents filed in Mr. Arishi's criminal case and interviewed Detective Dow, Sergeant Chapman, Whitman County Deputy Prosecutor Merritt Decker, and Mr. Arishi. *Id.* Both Sergeant Chapman and Detective Dow told Ms. Anderson that MOS's disclosures remained consistent and they both found her to be credible. CP 138-39. Mr. Arishi's attorney was present during Mr. Arishi's interview, at which Mr. Arishi declined to answer the majority of questions but did state the allegations were untrue and he had done nothing wrong. CP 138. Based on the information collected, OEO found Mr. Arishi engaged in sexual intercourse with MOS on one occasion and subjected her to sexual contact on two other occasions. CP 140.

OEO further found that Mr. Arishi pressured MOS into sexual contact by paying her cell phone bill, purchasing a cell phone for her, promising to supply her with a vehicle, and telling her he wanted to take her back to his country with him. *Id.* OEO found this conduct to violate EP 15. *Id.*

OSC retained a copy of OEO's memorandum in Mr. Arishi's conduct file for the Conduct Board's consideration at his hearing. OSC also collected other information for Mr. Arishi's conduct file, including: Detective Dow's police reports (CP 45-54); the probable cause statement from Mr. Arishi's criminal charge (CP 180-82); and OSC and OEO interviewer notes from the interviews of Mr. Arishi (CP 91-92), Detective Dow (CP 87-90, 169-71), Sergeant Chapman (CP 83-86, 159-60), and Mr. Decker (CP 102-03). On May 21, 2014, the Conduct Board held a hearing to consider the allegations against Mr. Arishi. CP 216-61. Mr. Arishi's attorney was present and acted as his advisor. CP 224. At the hearing, the Conduct Board heard live testimony from Ms. Anderson (CP 225-231) and Detective Dow (CP 231-46). Detective Dow testified that MOS appeared young to him. CP 242. Mr. Arishi declined the Conduct Board's invitation to provide testimony, but did submit a written statement indicating that the policy of the online site where he met MOS required users to be eighteen years of age and that MOS's profile indicated she was

nineteen years old. CP 247-48. At the conclusion of the hearing, Mr. Arishi addressed the Conduct Board regarding the allegations. CP 250-52.

The Conduct Board issued a written decision on May 23, 2014. CP 39-42. Based on the information in Mr. Arishi's conduct file and the information presented at his hearing, the Conduct Board found:

- 1) Mr. Arishi and MOS met online where MOS presented herself as a nineteen-year-old woman;
- 2) Mr. Arishi likewise lied about his name and age;
- 3) when Mr. Arishi first physically met MOS, he digitally penetrated her vagina;
- 4) after his first physical encounter with MOS, Mr. Arishi continued to groom MOS by purchasing phone minutes and a two hundred dollar phone, and promising to give her a car;
- 5) during a second encounter, Mr. Arishi groped MOS while she was driving his car;
- 6) during a third encounter, Mr. Arishi caused MOS to have sexual contact with his penis in his car; and
- 7) Mr. Arishi knew MOS did not know how to drive and allowed her to drive his car. CP 40-41.

Importantly, the Conduct Board considered and rejected Mr. Arishi's only proffered defense to the allegations:

We concluded that it is quite possible that when you conversed with [MOS] on line (sic) that you did think that she was an adult. However, the circumstances were such that once you met her face to face you knew that she was too young: Too young to drive, too young to travel with you without parental permission, and certainly, too young to have sex with you.

CP 41.

Based on these findings, the Conduct Board concluded Mr. Arishi's behavior violated several Standards including WAC 504-26-204 (abuse of self or others), WAC 504-26-224 (reckless endangerment), and WAC 504-26-221 (sexual misconduct). *Id.* Therefore, the Conduct Board expelled him from WSU and trespassed him from campus until January 1, 2020. *Id.*

Regarding the trespass, it is significant to note that Mr. Arishi lived in student family housing, where many minors reside with their families. In addition, the timing of Mr. Arishi's hearing coincided with the beginning of the busy youth summer camp season at WSU when many day and overnight camps occur. For example, in May WSU hosts the state FFA Convention with approximately 2,500 youth attendees. Other activities involving minors occur at WSU throughout the year, such as Running Start, new student orientation, high school student recruiting activities, athletic programs, and other educational programs and activities. CP 310-11, Appendix A. Further, WSU's on-campus Children's Center provides year-round care for children ages six weeks through twelve years. *Id.*

Mr. Arishi appealed the Conduct Board's order, arguing: 1) the conduct process was unfair because WSU should have afforded him a formal adjudicative proceeding, and 2) the decision was not supported by substantial evidence. CP 34-36. The Appeals Board issued a written decision on June 25, 2014, finding the Conduct Board hearing was

conducted fairly and in conformity to the prescribed procedures in WAC 504-26, the decision was based on substantial information, and the sanctions assigned to Mr. Arishi were appropriate for the violations. CP 23-24. The Appeals Board also evaluated Mr. Arishi's request to have a formal adjudicative hearing in lieu of a brief adjudicative proceeding and determined a formal adjudicative proceeding was not necessary. CP 24. Consequently, the Appeals Board affirmed the decision and sanctions of the Conduct Board. CP 23-24. WSU's President reviewed the Appeals Board's decision and found no reason to intervene; therefore, the Appeals Board's decision became WSU's final order on the matter. CP 25.

Mr. Arishi appealed the Appeals Board's order by filing a Petition for Judicial Review of Agency Action in the Whitman County Superior Court. CP 1-10. The Honorable Judge Frazier considered briefing from both parties, the agency record, the Conduct Board's hearing transcript, and other information presented. CP 307. After hearing oral argument of the parties, Judge Frazier issued an order affirming WSU's decision, CP 307-09. Mr. Arishi appeals.

IV. ARGUMENT

1. Standard of review.

A party seeking relief from agency action bears the burden of demonstrating not only the invalidity of such action, but also that the party

was “substantially prejudiced” by it. RCW 34.05.570(1)(a), (d). This is the prejudice necessary to obtain relief, as opposed to the standing requirement in RCW 34.05.530.

Assuming that a party seeking judicial review can show substantial prejudice, a court may grant relief where it is found that the agency: 1) engaged in an unlawful procedure or decision-making process, or failed to follow a prescribed procedure; 2) erroneously interpreted or applied the law; 3) did not decide all issues requiring resolution; 4) issued an order inconsistent with its own rule; or 5) issued an order that is arbitrary or capricious. RCW 34.05.570(3).

Issues of statutory interpretation are reviewed *de novo*. *Dep’t of Rev. v. Bi-Mor, Inc.*, 171 Wn. App. 197, 202 (2012). However, 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 (1996), *review denied*, 130 Wn.2d 1023 (1997).

When reviewing action alleged to be arbitrary or capricious, the scope of the review “is narrow, and the challenger carries a heavy burden.” *Keene v. Bd. of Accountancy*, 77 Wn. App. 849, 859 (citation omitted), *review denied*, 127 Wn.2d 1020 (1995). Arbitrary or capricious action is one that is unreasoned and “without consideration and in disregard of facts

and circumstances.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 609 (citation omitted) (1995), *cert. denied*, 518 U.S. 1006 (1996). Where there is “room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.” *Id.*

When reviewing agency action, “the appellate court stands in the same position as the superior court.” *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 413 (2009) (citation omitted). Therefore, an appellate court reviews the agency decision based on the record before the agency, not the superior court’s ruling. *Id.*

Here, as explained below, Mr. Arishi cannot meet his burden of showing error and also cannot meet his burden of showing prejudice, let alone substantial prejudice.

2. The APA does not require WSU to employ a formal adjudicative proceeding in a student conduct proceeding, even when expulsion is a possible outcome.

Washington’s APA divides adjudicatory proceedings into three types: 1) adjudicative proceedings, RCW 34.05.410-.476, 2) emergency adjudicative proceedings, RCW 34.05.479, and 3) brief adjudicative proceedings, (BAPs), RCW 34.05.482-.494. An adjudicative proceeding contemplates a right to full representation by counsel, direct cross-examination of witnesses by counsel, and compulsory attendance of

witnesses, which are three additional procedures Mr. Arishi now seeks in this case. RCW 34.05.428, 64.05.446, 34.05.449(2).

The APA provides that a BAP may be used where:

- (a) The use of those proceedings in the circumstances does not violate any provision of law;
- (b) The protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties;
- (c) The matter is entirely within one or more categories for which the agency by rule has adopted this section and RCW 34.05.485 through 34.05.494; and
- (d) The issue and interests involved in the controversy do not warrant use of the procedures of [an adjudicative proceeding].

RCW 34.05.482(1). Like most institutions of higher education in the state of Washington, WSU by rule adopted BAPs for student conduct proceedings. WAC 504-04-010(1) (Matters subject to brief adjudication); and, *e.g.*, Eastern Washington University (WAC 172-108-050, 172-121-120), Central Washington University (WAC 106-120-131, 106-120-132), Western Washington University (WAC 516-21-270 – -290), Spokane Community College (WAC 132Q-10-325), Wenatchee Valley Community College (WAC 132W-115-130), Columbia Basin Community College (WAC 132S-40-360), Big Bend Community College (WAC 132R-04-130), Skagit Valley Community College (WAC 132D-120-070), Everett Community College (WAC 132E-120-310), and Shoreline Community College (WAC 132G-108-050).

The adoption of BAPs for student conduct proceedings is consistent with the overwhelming majority of federal and state case law, which holds that a student who is subject to student disciplinary proceedings is entitled to a process that is fundamentally fair, including notice and an opportunity to respond to the charges, but that a student is *not* entitled to a full adversarial hearing. *Bd. of Curators of the Univ. of Missouri v. Horowitz*, 435 U.S. 78, 89, 98 S. Ct. 948, 954-55, 55 L.Ed.2d 124 (1978). Furthermore, the courts specifically reject the argument that students are entitled to full representation by counsel and full cross-examination of witnesses that would occur in a formal adversarial proceeding. *E.g., Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (two students were expelled; “Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding.”); *Gabrilowitz v. Newman*, 582 F.2d 100, 106 (1st Cir. 1978) (in case of assault with intent to rape, expulsion and trespass from university, student must be permitted advice of counsel at hearing; however, counsel need not be permitted to speak); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (in case of rape and threatened expulsion from university, there is no right to have counsel cross-examine witnesses; directing questions of witness through the panel was sufficient); *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (student was expelled for assaulting two people; court

stated that “[e]ven if a student has a constitutional right to *consult* counsel . . . we do not think he is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the traditional function of a trial lawyer. To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation.”).

Courts also reject the argument that due process requires compulsory attendance of witnesses in student conduct hearings. *See, e.g., Hinds Cty. Sch. Dist. Bd. of Trs. v. R.B.*, 10 So.3d 387, 400 (Miss. 2008) (due process does not require school to compel witness attendance in disciplinary hearing), *Scanlon v. Las Cruces Pub. Schs.*, 172 P.3d 185, 191-92 (N.M. Ct. App. 2007) (“Fourteenth Amendment permits the rights at stake in a school disciplinary hearing to be determined on the hearsay testimony of the school administrators who investigated the incident.”) (citations omitted); *Boykins v. Fairfield Bd. of Ed.*, 492 F.2d 697, 700-01 (5th Cir. 1974) (due process satisfied where school did not call eye witnesses, but relied on investigator’s recital of hearsay from anonymous eye witnesses to find student conduct violation).

To the contrary, courts uphold the use of procedures that include fewer protections than WSU affords in its BAP. In *Flaim v. Medical*

College of Ohio, 418 F.3d 629 (6th Cir. 2005), the Sixth Circuit Court of Appeals considered what procedures are required before a state college can expel a student. In that case, the Medical College of Ohio expelled Flaim after he was convicted of a felony drug offense. *Flaim*, 418 F.3d at 632. The college procedure provided a hearing in front of a committee. *Id.* at 633. Following the hearing, the committee recommended sanctions to a Dean, who expelled Flaim. *Id.* At Flaim's hearing, Flaim's arresting officer appeared and provided testimony. *Id.* Flaim was allowed to have an attorney present at the hearing, but the attorney was not allowed to participate or even converse with Flaim. *Id.* Flaim was provided an opportunity to present evidence and argument to the board, but was not allowed to cross-examine the witness against him. *Id.* Flaim challenged the procedure on due process grounds. *Id.*

The *Flaim* court concluded that notice and an opportunity to be heard in front of a neutral fact finder is all that is required for student conduct cases where expulsion is a possible outcome. *Id.* at 634. It rejected the argument that counsel or cross-examination is required. *Id.* at 640-41.

Moreover, the Court should not misconstrue the BAP as if it were shortchanging Mr. Arishi on procedural protections. The record shows that the BAP here provided significantly more process than that required by

Flaim or the other cases cited above. The procedure was fundamentally fair and afforded him the following:

- Mr. Arishi received written notice of the allegations against him (CP 79-80, 120-21);
- He received written notice of all anticipated witnesses and documentary evidence that were to be submitted at the Conduct Board hearing (CP 120);
- He was allowed to review all of the evidence against him, including what was submitted at the Conduct Board hearing (CP 44, 66, 121, 183);
- He was given a reasonable opportunity to prepare for the hearing (CP 120-21);
- He was given the opportunity to respond to the allegations (CP 121, 218, 246-48, 250-52);
- He submitted a written sworn statement to the Conduct Board (CP 247-48);
- He heard all of the witness testimony given at the Conduct Board hearing (CP 225-46);
- All testimony against him was given under oath (CP 225, 232);
- He was given the opportunity to suggest cross-examination questions for the Conduct Board Chair to consider and ask as she

felt relevant and appropriate, and she asked all of the questions Mr. Arishi requested (CP 218, 229-31, 244-45);

- He was allowed to call witnesses on his behalf (CP 121);
- He was allowed to have an advisor present throughout the Conduct Board hearing and was given the opportunity to take recesses to receive the benefit of the advisor's guidance (CP 121, 219, 243-44);
- He selected an attorney as his advisor at the Conduct Board hearing, thereby receiving the benefit of legal counsel's advice both prior to and at the proceeding (CP 224, 229-30, 243-47); and
- He was allowed to appeal the Conduct Board decision, which afforded him a full review by the Appeals Board (CP 23-24, 29-32, 42, 219, 252).

Despite the case law cited above, Mr. Arishi argues that use of a BAP was not appropriate because the "issues and interests" at stake warranted a formal adjudicative proceeding. Appellant's Br. at 10-12 (citing RCW 34.05.482). To support this claim, he cites the Model Administrative Procedure Act of 1981 (Model Act). In particular, Mr. Arishi cites RCW 34.05.001 for the proposition that the legislature intended the Model Act to define the terms "issue" and "interests." Appellant's Br. at 7. In RCW 34.05.001, the legislature did note that one of its hopes in passing Washington's APA was that "courts should interpret

provisions of this chapter consistently with decisions of other courts interpreting *similar* provisions of other states, the federal government, and model acts.” RCW 34.05.001 (emphasis added). However, there is no model act or foreign jurisdiction creating a BAP like the one that exists in Washington State, nor is there one with language similar to that found in RCW 34.05.482(d).

Had Washington’s legislature wanted to adopt the standards set forth in the Model Act for what it calls informal adjudications, it could have adopted the Model Act’s language full cloth as it did in other sections. *E.g., compare* RCW 34.05.050 (“Except to the extent precluded by another provision of law, a person may waive any right conferred upon that person by this chapter.”) *with* Model Act, Art. 1 § 1-105 (1981) (same). Instead, the legislature adopted its own, different procedure in the BAP. This was a new and innovative procedure based only *in part* on the provisions of the Model Act. William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 818 (1989).

It is also clear that the legislature knew how to require a formal adjudicative proceeding for certain “issues” or “interests” that it deemed were not fit for a BAP. In the 1988 APA, for example, the legislature exempted “public assistance and food stamp programs provided for in Title 74 RCW” from BAPs. RCW 34.05.482 (1988) (amended in 1998 to

add the phrase “benefit programs” under Title 74). In the initial draft of Washington’s APA as proposed in 1988, no such language existed. Washington State Senate Journal (1988) p. 987. However, after a conference with the House of Representatives, the final bill included the language exempting Title 74 benefits from BAPs. *Id.* at 1411. For all other “issues” or “interests” the legislature left it to the agencies to decide when it is appropriate to use a BAP.

Mr. Arishi points to two interests he claims were at stake in the student conduct proceedings that were so important that the APA required WSU to abandon its BAP. First, Mr. Arishi cites *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632 (2005) for the proposition that his “fundamental interest” in his reputation was at stake in the proceedings. Appellant’s Br. at 11. Although *Nieshe* supports Mr. Arishi’s contention that his reputation was arguably an interest at stake, it does not stand for the proposition that a BAP cannot adequately protect this interest. In fact, *Nieshe* does not even contemplate the APA or adjudicative hearings. In *Nieshe*, a student who was excluded from her high school graduation ceremony sued the school district under 42 U.S.C. § 1983. *Nieshe*, 129 Wn. App. at 635. The *Nieshe* Court ruled in the school district’s favor, finding that attending a high school graduation was not a federally protected right. *Id.* at 640. Although the court did note that a person’s liberty interest may be implicated where a

person's reputation is affected by government action, it certainly did not hold that a person has a "fundamental" interest in his reputation that must be protected by the panoply of rights inherent in a formal adjudicative proceeding. Rather, the *Nieshe* court failed to find any protected interest the plaintiff had in attending her graduation, including one in her reputation. *Id.* at 640-45. Moreover, reputation cannot possibly be an "interest" that prohibits the use of a BAP; if this were so, no government action taken against a person could use a BAP because it would presumably affect that person's reputation.

Mr. Arishi also argues that his First Amendment interest of travel was implicated by the trespass order imposed. Appellant's Br. at 11. However, trespassing a person from university property for violation of university policy does not implicate a person's right to travel. *See People v. Leonard*, 62 N.Y.2d 404, 410, 465 N.E.2d 831, 835 (1984) ("It cannot be said that excluding from college campuses individuals who have flouted basic rules of order implicates the broad concept of freedom of movement embraced in this constitutional right") (citation omitted). There is no constitutionally protected interest in accessing a university. *Souders v. Lucero*, 196 F.3d 1040, 1046 (1999). Therefore, universities maintain the right to exclude individuals from their campuses. *Souders*, 196 F.3d at 145-46. However, even assuming Mr. Arishi maintains some interest in

access to WSU property, he points to no case law to support his argument that such interest is one that WSU's BAP does not adequately protect.

As discussed above, WSU's BAPs include robust and fair procedures that adequately protect a student's rights in a student disciplinary proceeding. In addition, the institution has a strong interest in employing a BAP. For instance, an adjudicative proceeding under the APA sections RCW 34.05.410-4791 requires additional specialized training of participants, employment of attorneys, and added process, all which add cost and slow the procedure. WSU would have risked violating 20 U.S.C. §§ 1681 *et seq.* (Title IX) had Mr. Arishi's case been adjudicated using the time-consuming formal process. *See* Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (April 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (stating Title IX requires prompt resolution of sexual harassment/assault cases in student conduct proceedings; suggesting sixty days as an average timeline for a university to complete an investigation and render an initial decision). Finally, in WSU's case, the use of that more formal process would detract from the overall purposes of the conduct procedure. *See, e.g.,* WAC 504-26-001 (stating that the procedure should be educational, nonadversarial, and designed to protect the community).

Washington's APA purposefully allows significant flexibility to agencies in administering adjudicatory proceedings; absent extraordinary circumstances, a court should not second-guess an agency's decision on the process employed. *See Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 613 (2000) (discussing different courts' refusal to second-guess agency decision making). Washington agencies chose to utilize BAPs to adjudicate a diverse and vast number of interests. *E.g.*, WAC 326-08-011 (minority and women's business certifications), WAC 192-35-080 (state contracts for persons with disabilities), and WAC 314-42-110 (liquor licenses). BAPs are commonly used to revoke a person's business or professional license. *E.g.*, WAC 308-12-345 (architect license), WAC 196-09-050 (engineering licenses), and WAC 308-124-305 (real estate broker's license). Thus, BAPs are used in other contexts to adjudicate important interests, including those that significantly impact a person's livelihood.

Finally, Mr. Arishi argues that he would be entitled to more procedural rights if he received a parking ticket. Appellant's Br. at 15. This is wholly inaccurate. WSU utilizes a BAP to adjudicate parking tickets just as it does student conduct issues, only with much less defined process and without the aid of an advisor. *Compare* WAC 504-15-860 (parking ticket procedure) *with* WAC 504-26-403 (student conduct procedure).

3. WSU's rules do not require a formal adjudicative proceeding in student conduct proceedings in which expulsion is a possible outcome.

Mr. Arishi argues that WSU failed to follow its own rules when it “failed to provide, or even consider providing, [Mr.] Arishi with a formal adjudicative proceeding.” Appellant’s Br. at 5. Mr. Arishi’s argument fails for two reasons. First, the University did consider providing Mr. Arishi with a formal proceeding. CP 16 (“The Appeals Board also evaluated your request to have a formal adjudicative hearing. . . . [W]e determined that doing so was not necessary.”). Second, WSU’s rules do not mandate that it provide Mr. Arishi with a formal hearing.

Mr. Arishi’s ostensive argument is that WSU did not follow WAC 504-26-407(1)(c) by refusing to convert his conduct proceeding into a formal proceeding. Appellant’s Br. at 14-15. However, WAC 504-26-407(1)(c) merely requires that “[t]he appeals board shall *make any inquiries necessary* to ascertain whether the proceeding must be converted to a formal adjudicative hearing” (emphasis added). As stated *supra*, the Appeals Board did make an inquiry and decided a formal hearing was not necessary. Rather, it appears Mr. Arishi’s true argument is that the Appeals Board’s decision not to convert his hearing to a formal hearing was arbitrary or capricious.

A decision is arbitrary or capricious when it is unreasoned and “without consideration and in disregard of facts and circumstances.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d at 609 (citation omitted). Where there is “room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.” *Id.* Nothing about Mr. Arishi’s proceeding was so extraordinary that the Appeals Board should have converted it to a formal proceeding. The process provided to Mr. Arishi was in accordance with WSU’s own rules and gave him notice; an opportunity to be heard; an opportunity to present testimony, evidence, and witnesses, and to question opposing witnesses; an opportunity to have an advisor present, which he did in the form of an attorney; and the opportunity to appeal. This process went considerably beyond that required by case law. *See, e.g., Horowitz*, 435 U.S. at 89, 98 S. Ct. at 954-55 (student was dismissed for academic deficiency; court stated, “Even in the context of a school disciplinary proceeding, however, [this] Court stopped short of requiring a *formal* hearing since ‘further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as a part of the teaching process.’”) (quoting *Goss v. Lopez*, 419 U.S. 565, 583, 95 S. Ct. 729, 741, 42 L.Ed.2d 725 (1975)); *Goss*, 419 U.S. at 581, 95 S. Ct. at 740 (students

are entitled to a process that is fundamentally fair, in that they receive notice of the charges against them and an opportunity to respond to the charges). Therefore, the Appeals Board's decision not to convert Mr. Arishi's hearing to a formal proceeding cannot be said to be arbitrary or capricious.

4. Mr. Arishi is not entitled to relief because he does not show that WSU's use of a BAP in his student conduct proceeding caused him substantial prejudice.

As noted above, "[A] 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)(d). The party seeking relief bears the burden of proving substantial prejudice. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 217 (2007). Here, the record clearly demonstrates Mr. Arishi was given substantial due process that sufficiently protected his interests and provided "fundamentally fair procedures" to determine whether misconduct occurred. However, even if he could demonstrate that WSU erred by using a BAP, he has not shown that it substantially prejudiced him in light of the significant due process he received and in light of the evidence against him.

Mr. Arishi's main complaint appears to be that MOS was not compelled to personally appear at the hearing, provide testimony, and be subject to direct cross examination. *See, e.g.*, Appellants Br. at 2 ("Arishi was denied a formal proceeding where he could confront and cross-exam

(sic) the one witness against him.”). However, he fails to point out how the use of a formal proceeding would alleviate his chief complaint, much less change the result. First, as discussed *supra*, due process is satisfied in student conduct proceedings when an investigator relays information gleaned from first-hand witnesses and the investigator is available for questioning; this is exactly what happened here. Washington’s APA also allows this in formal proceedings “if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” RCW 34.05.452(1). Based on the corroborating circumstantial evidence, the information provided by law enforcement in Mr. Arishi’s case would have met this standard and would have been admissible even in a formal proceeding. Second, WSU would not have compelled MOS’s attendance at Mr. Arishi’s hearing even if it utilized a formal proceeding. This is because doing so would violate Title IX. *See* Catherine E. Lhamon, U.S. Dep’t of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence 30 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (stating under Title IX, schools are prohibited from requiring sexual assault victim to be present at student conduct hearings regarding sexual assault). Therefore, Mr. Arishi fails to show how he was substantially prejudiced by WSU’s use of a BAP.

Notably, the use of hearsay in WSU's student conduct process has been upheld by the courts. In *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, WSU withdrew recognition from a fraternity due to its pervasive drug-related activities. *Alpha Kappa Lambda*, 152 Wn. App. at 404. The fraternity argued the admission of evidence from confidential informants constituted procedural error because it was hearsay and unreliable. *Id.* at 414. Citing WSU's regulations, this Court concluded "the admission of evidence from confidential informants did not constitute procedural error." *Id.* The Court also held the hearsay sufficiently reliable because it was corroborated by the police detective who testified at the student conduct hearing. *Id.* at 415. Likewise, in this case, the admission of hearsay evidence at the hearing complied with WSU's rules and was corroborated by Detective Dow's personal observations of MOS and powerful circumstantial evidence.

In determining whether Mr. Arishi violated the Standards, the Conduct Board reviewed the OEO report, police reports, charging documents, Mr. Arishi's written statement, and testimony from two primary investigators. It was based on this record of information that the Conduct Board found Mr. Arishi sexually assaulted a fifteen-year-old girl. There is no evidence that a hearing officer in a formal hearing would have heard any more or less evidence than was heard in the hearing WSU provided

Mr. Arishi. Furthermore, even if MOS was compelled to testify, Mr. Arishi fails to establish that her testimony would have been anything other than thoroughly damaging to his case. Mr. Arishi also fails to establish that the Conduct Board's or Appeals Board's decisions would have been different had a formal proceeding been conducted. In short, Mr. Arishi fails to point to any procedure provided in a formal adjudicative proceeding that would have changed the outcome in his case. Consequently, Mr. Arishi fails to meet his burden of showing that he was substantially prejudiced by the use of a BAP in his case, and his appeal should be denied.

5. Mr. Arishi is not entitled to attorney fees on appeal.

Under the Washington Equal Access to Justice Act, 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). The prevailing party threshold is not met unless the party prevails on a substantial part of the litigation and is awarded some relief on the merits. 32 Am. Jur. 2d *Federal Courts* §§ 321-322 (1995 & Supp. May 2005). In *Citizens for Fair Share v. Dep't of Corrs.*, 117 Wn. App. 411, 72 P.3d 206 (2003), *review denied*, 150 Wn.2d 1037 (2004), for example, no fees were awarded when the private litigant prevailed on one minor public disclosure violation. Here, even if the Court

determines that WSU erred in not employing a formal adjudicative proceeding and Mr. Arishi was substantially prejudiced by this error, the remedy would be to remand the case to WSU for formal adjudicative proceeding. RCW 34.05.554(2). This remedy, however, would not qualify Mr. Arishi as a prevailing party under RCW 4.84.350 or RAP 18.1. *See Ryan v. Dep't of Soc. and Health Servs.*, 171 Wn. App. 454, 476 (2012) (holding that a party awarded a new hearing on remand was not a prevailing party because the party had not yet prevailed on the merits).

Additionally, 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). The agency’s failure to prevail does not create a presumption that its position was not substantially justified. *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988). The government’s position is substantially justified, even though it is ultimately found to be incorrect, if the question of statutory interpretation is a close one. *See Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 535-36, (1999); *Johnson v. U.S. Dep't of Hous. & Urban Dev.*, 939 F.2d 586, 589-590 (8th Cir. 1991).

In this case, Mr. Arishi should not be deemed a prevailing party and should not be awarded any attorney fees.

V. CONCLUSION

Mr. Arishi, whose stated career goal was to teach special education, was expelled from WSU for serious misconduct with a minor child that posed a threat to the WSU community as well as the surrounding community. WSU provided Mr. Arishi with a significant amount of process that more than adequately protected his interests, while also protecting the University community and the University's interests by efficiently adjudicating the matter without the expense, duration, and disruption of a formal adjudicative proceeding. Additionally, Mr. Arishi fails to show how any additional procedures would have changed the outcome of the student conduct process. For all of these reasons, his appeal should be denied.

RESPECTFULLY SUBMITTED this 16th day of December, 2015.

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Steve Martonick
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By U.S.P.S. mail, postage prepaid

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of December, 2015, at Pullman, Washington.



RITA HAAS
Legal Administrative Manager

1 family housing, WSU has a number of freshman students who are minors. Minors also
2 participate in programs such as Running Start (which allows high school students to take
3 college courses), Alive! (new student orientation), high school student recruiting activities,
4 athletic programs such as swimming lessons and swim team, and other programs and activities.
5 Further, WSU's on-campus Children's Center provides year-round care for children ages six
6 weeks through twelve years. In mid-May, WSU hosts the state Future Farmers of America
7 (FFA) Convention, with approximately 2,500 youth attendees each year. In addition to other
8 youth activities, day and overnight youth camps continue on the WSU campus throughout the
9 summer, including but not limited to multiple athletic camps and music camps, Cougar Quest,
10 and Cougar Kids Camp.
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I certify under penalty of perjury under the laws of the state of Washington that the forgoing is true and correct.

DATED this 22 day of October, 2014, in Pullman, Washington.



Adam Jusel