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**IN WHITMAN COUNTY SUPERIOR COURT
STATE OF WASHINGTON**

<p style="text-align: center;">ROBERT BARBER, Petitioner, vs. WASHINGTON STATE UNIVERSITY Respondent.</p>	<p style="text-align: center;">NO. PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE ORDER</p>
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I. PETITION CONTENTS

1) The Petitioner

The Petitioner is Mr. Robert Barber, whose mailing address is 1060 NE Duncan Lane #B, Pullman, WA 99163.

2) Attorneys for Petitioner

The attorneys for Mr. Barber are Stephen Graham and Anthony Martinez of the Law Office of Steve Graham, whose address is 1312 N. Monroe, #140, Spokane, WA 99201.

3) The Name of the Agency

Mr. Barber is seeking judicial review of an agency action of Washington State University (“WSU”) whose address is: Washington State University, Office of the President, Kirk Schultz, 422 French Administration Building, Pullman, WA 99164-148. The specific entities within WSU that made the decisions adverse to Mr. Barber include the Office of Student Conduct, the University Conduct Board, and the University Appeals Board.

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4) The Attorney for the Agency

The attorney for the agency is the Attorney General of Washington whose address is Washington State University Division, 322 French Administration Building, P.O. Box 641031, Pullman, WA 99164-1031.

5) Identification of Agency Action

After a University Conduct Board hearing where an expulsion decision was rendered, a subsequent administrative appeal to the University Appeals Board which reduced the expulsion to a suspension, and a letter to WSU President Kirk Schultz, WSU has ordered a suspension for Mr. Barber until July 2017. The letter constituting the “Final Order” was decided October 17, 2016 and sent by email to Mr. Barber. A copy of the “Final Order” is attached.

6) Identification of the Parties

The only interested parties in this appeal include Mr. Barber and WSU.

7) Petition is Timely Filed by Petitioner and in the Proper Court

The “Final Order” was rendered October 17, 2016 and sent to Mr. Barber by email. Pursuant to the Administrative Procedure Act (“APA”), Mr. Barber has thirty days from the date the “Final Order” was sent to file a petition for review which means that he has until November 16, 2016 at the latest. RCW § 34.05.542(2). In addition, Whitman County Superior Court retains jurisdiction over this petition because WSU is considered a school of higher education and located in Whitman County. RCW § 34.05.514(2). Furthermore, Mr. Barber has exhausted all administrative remedies as required by seeking review by the University Appeal Board.

1 **8) Facts Demonstrating that Petitioner is Entitled to Judicial Review**

2 In accordance with the APA, Mr. Barber is properly bringing this petition for judicial
3 review to Whitman County Superior Court. Specifically, WSU is considered a “state agency”
4 and is therefore subject to the provisions of the APA as well as its own rules and regulations.
5 Moreover, prior to his suspension, Mr. Barber was a Washington State University student
6 living in Pullman, Washington and intending to graduate in December of 2016 with aspirations
7 to major in criminal science and cultural ethnic studies. However, due to an expulsion decision
8 rendered on September 13, 2016, which was subsequently reduced to a suspension by the
9 university appeals board on October 17, 2016, Mr. Barber will no longer be able to graduate
10 and finish his current and last class.

11
12 Conduct Board Hearing

13 The facts relating to the conduct board hearing are represented by the attached order
14 dated September 13, 2016 (“Conduct Order”). According to the Conduct Order, the
15 Complainant in this case hosted a party at a fraternity live-out called “The Palace” on August
16 22, 2016 which Mr. Barber attended. Conduct Order at 2. Eventually, at about 2:00 a.m., the
17 Complainant decided that the party was getting out of control, and he claims he told everyone
18 to leave. A melee broke out, and a video recording showed Mr. Barber in an altercation with
19 the Complainant. The video shows dozens of people involved in the melee and pushing,
20 shoving and striking one another. Mr. Barber one of very few individuals who have been
21 disciplined for this incident.

22
23 The conduct board rejected Mr. Barber’s claim of self-defense. *Id.* Namely, the conduct
24 board did not believe that Mr. Barber punched the Complainant because he panicked when he
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1 felt someone “push [him] or hit [him] from the side.” *Id.* The conduct board found Mr. Barber
2 “responsible” for violating WAC §§ 504-26-204 and 504-26-204. *Id.*

3 Throughout the administrative process, Mr. Barber received the assistance of Antonio
4 Huffman (“Mr. Huffman”) – a Washington State University employee and assistant athletic
5 director for football operations. The two witnesses for the school were Pullman Police
6 Detective Scott Patrick and the Complainant. Mr. Barber testified in his own defense.
7

8 The hearing conducted by Lisa McIntyre was riddled with procedural errors. Mr. Barber
9 attempted to submit cross-examination questions to the conduct board director, but she did not
10 ask all the questions Mr. Barber proposed. These questions were posed to the Complainant in
11 relation to Mr. Barber’s self-defense claim. The Complainant also submitted written questions
12 and or written comments. The written questions by Mr. Barber, and the written questions or
13 comments of the Complainant were destroyed by school staff. Lisa McIntyre read the written
14 comment or comments of the Complainant to herself, but did not share this with Mr. Barber.
15 Lisa McIntyre threw away what was written by the Complainant thus destroying the record.
16 This amounted to improper ex parte contact. Additionally, when Lisa McIntyre had the police
17 detective testify, he was under oath only for part of his testimony. Comments through out the
18 hearing by Lisa McIntyre and the board showed bias and discrimination against Mr. Barber.
19 Lisa McIntyre claimed that Mr. Barber looked angry or mad in the video even though the video
20 only showed Mr. Barber’s back. The only part of Mr. Barber that was visible was his clothing
21 and the color of his skin. Mr. Barber was polite and professional with the board, but Lisa
22 McIntyre forced Mr. Barber to leave the room when the Complainant testified and directed him
23 to another room to listen via speakerphone. It was hard for him to hear. When Mr. Barber was
24 out of the room, the conduct board whispered about him, and joked that Mr. Barber was being
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1 sent to a “holding cell”. The Complainant was in the room at this time. (Mr. Barber doesn’t
2 have a criminal record, has never been charged with a crime, and had no disciplinary history of
3 suspensions or detentions at the high school he graduated from.) During the time Mr. Barber
4 testified, he was interrupted by Lisa McIntyre and his advisor called for a recess so he could
5 caution Mr. Barber to not let anyone put words in his mouth.
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8 University Appeals Board

9 After the conduct board hearing, Mr. Barber submitted a letter to the University
10 Appeals Board appealing the Conduct Order. Assisting Mr. Barber with this Letter was his
11 advisor, Mr. Huffman. In this Letter, Mr. Barber refuted much of the reasoning that the conduct
12 board used to draw its conclusions, and complained about the bias of the University Conduct
13 Board.
14

15 In response to Mr. Barber’s Letter, the University Appeals Board issued a “Final Order”
16 reducing the discipline from an expulsion to a suspension. Mr. Barber was suspended from
17 WSU for one year, ruining Mr. Barber’s plans to graduate in December, 2016.
18

19 **9) Reasons that Petitioner Should Be Granted Relief**

20 **a. Washington State University Failed to Follow Prescribed Procedures**

21 During the conduct board hearing, WSU failed to follow multiple prescribed
22 procedures. First, WSU failed to retain Mr. Barber’s cross-examination questions considered
23 for the conduct board hearing in violation of RCW § 34.05.494(1). Second, WSU failed to
24 follow prescribed procedures by arbitrarily declining to ask relevant cross-examination
25 questions in violation of WAC § 504-26-403(4)(a)(v). Third, WSU considered testimony from
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1 a witness when he wasn't under oath. Fourth, Lisa McIntyre allowed improper ex parte contact
2 by reading a statement or statements from the Complainant without notifying Mr. Barber or
3 sharing the statement with him. Fifth, the board engaged in bias in its decision against Mr.
4 Barber. Ultimately, since these errors are questions of law relating to WSU's failure to follow
5 prescribed procedures, this Court engages in *de novo* review. *Spokane Cty. v. Eastern Wash.*
6 *Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 564, 309 P.3d.673, 677 (2013).

8 ***i. Washington State University Failed to Maintain an Agency Record***

9 In this case, one of the prescribed statutory rules that WSU failed to follow is RCW
10 § 34.05.494(1). With regard to RCW § 34.05.494(1), WSU is required by statute to maintain an
11 agency record of all documents that were considered for the brief adjudicative hearing as its
12 official record. However, in this case, WSU failed to retain Mr. Barber's cross-examination
13 questions which were clearly considered during the conduct board hearing when the board
14 director decided whether they were relevant and whether or not to ask them. *See* WAC § 504-
15 26-403(4)(a)(v). Specifically, Mr. Robert's cross-examination questions were proffered to
16 substantiate his self-defense claim. On this note, not only was it an error substantially
17 prejudicing Mr. Barber for the board chair to decline to ask these questions¹, but it was also an
18 error to not preserve these questions so Mr. Barber could bring these to the attention of the
19 University Appeals Board pursuant to WAC § 504-26-407. By not being able to reference these
20 self-defense questions in his appeal, WSU did not properly provide Mr. Barber with his right to
21 appeal that WSU provides in WAC § 504-26-407(1). So, instead of the University Appeals
22 Board having the opportunity to determine if the "university conduct board hearing was
23 conducted fairly in light of all the charges and information presented, and in conformity with
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26 ¹ This issue will be addressed in the next section.

1 prescribed procedures . . . giving [Mr. Barber] a reasonable opportunity to prepare and respond
2 to [Complainant's] allegations. . . [,]"² the conduct board director effectively decided to take
3 that right of appeal away by disposing of the relevant cross-examination questions to make it so
4 the University Appeal Board never knew of these questions and never was able to consider
5 these questions.

6
7 This behavior constitutes substantial prejudice pursuant to RCW § 34.05.570(1)(d)
8 because the University Appeals Board was not able to determine if a procedural error occurred.
9 Now this Court is not able to perform its appellate functions by going back through the record
10 to determine if WSU followed its prescribed procedures of asking relevant cross-examination
11 questions as there is no current record of these questions.

12
13 ***ii. Washington State University Failed to Ask Relevant Cross-Examination***
14 ***Questions***

15 The second error by WSU substantially prejudicing Mr. Barber is its failure to ask
16 relevant cross-examination questions pursuant to **its own** prescribed rules. WAC § 504-26-
17 403(4)(a)(v). Both Mr. Barber and Mr. Huffman both have submitted declarations indicating
18 that it is their recollection that Lisa McIntyre did not ask all of their proposed questions.

19 In an effort to protect students from **arbitrary** orders depriving them of liberty or
20 property rights within the school system, the Supreme Court in *Goss v. Lopez* stated that there
21 must be at least minimal due process rights in school disciplinary proceedings. 419 U.S. 565,
22 574, 95 S.Ct. 729, 736, 42 L.Ed.2d 725 (1975) (citing *Tinker v. Des Moines Indep. Cmty. Sch.*
23 *Dist.* which stated that “[p]eople do not shed their constitutional rights at the schoolhouse
24 door.” 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969)). The minimal due process
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26 ² WAC § 504-26-407(2)(a)

1 rights that the Court in *Goss* specifically referenced were the right to notice and a hearing,
2 however, the Court also mentioned that **the disciplinarian could permit cross-examination** in
3 these hearings to be "alerted to the existence of **disputed facts.**" *Id.* at 584 (emphasis added);
4 *see also Seattle Area Plumbers v. Wash. State Apprenticeship and Training Council*, 131 Wn.
5 App. 862, 875, 129 P.3d 838, 845 (2006) (stating that a denial of cross-examination is arbitrary
6 and capricious as it denies the right to a fair and full hearing). For further clarification, the *Goss*
7 Court stated that a liberty interest encompasses "a person's good name, reputation, honor, or
8 integrity [] at stake." *Goss*, 419 U.S. at 574. (citing *Wisconsin v. Constantineau*, 400 U.S. 433,
9 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971)). Moreover, the Court also noted that students
10 have a property interest in an education when students are afforded the opportunity to attend a
11 school and therefore should be afforded minimal due process rights. *Goss*, 419 U.S. at 574.

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13 Put simply, to protect students from deprivations of liberty or property arising from
14 **arbitrary** school orders, there must be minimal due process rights. *Id.* at 574. Depending on if
15 the disciplinarian permits, minimal due process rights may include the right to cross-
16 examination in an effort to **consider disputed facts.** *Id.* at 584 (emphasis added). Thus, both
17 RCW 34.05.570(3)(i) and the Supreme Court have the goal of protecting people from agency
18 orders that are **arbitrary.** *See* RCW 34.05.570(3)(i); *see also Goss*, 419 U.S. at 574. Therefore,
19 in this situation, an agency order is arbitrary or capricious if it willfully disregards pertinent
20 facts because it deprived liberty and property rights without minimal due process, which
21 includes the right to cross-examination if the disciplinarian permits it. *Goss*, 419 U.S. at 584. _

22
23 WSU, the disciplinarian in this case, allows the right to cross-examination as a minimal
24 due process right when it conducts agency hearings. *See* WAC 504-26-403(4)(a)(v). Pursuant
25 to WAC 504-26-403(4)(a)(v), WSU allows the right to cross-examination to both the accused
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1 and complainant, albeit in a different manner. Rather than one student directly cross-examining
2 another student, the students hand cross-examination questions to the Conduct Board director.

3 *See id.* Specifically, WAC 504-26-403(4)(a)(v) states:

4 Questions **may be suggested by the accused student** and/or complainant to be
5 answered by each other or by other witnesses. **Written questions are directed to the**
6 **conduct board chair**, rather than to the witness directly. This method is used to
7 preserve the educational tone of the hearing and to **avoid creation of an unduly**
8 **adversarial environment**, and to allow the **board chair to determine the relevancy**
9 **of questions**. Questions concerning whether potential information may be received are
resolved at the discretion of the chair of the university conduct board. The chair of the
university conduct board shall have the discretion to determine admissibility of
information.

10 (Emphasis added). Put simply, this regulation states that a student may question witnesses
11 through the Conduct Board director, as long as the questions are relevant, so it explicitly allows
12 the right to cross-examination. WAC 504-26-403(4)(a)(v). Particularly, this regulation is
13 similar to administrative statute of RCW 34.05.452(1) which states that: “[t]he presiding officer
14 may exclude evidence that is **irrelevant**, immaterial, or unduly repetitious.” (Emphasis added).
15 The destruction of the questions makes it impossible for this court to review the relevancy of
16 the questions proposed by Mr. Barber.

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19 ***iii. Washington State University Improperly Considered Testimony Not***
20 ***Under Oath.***

21 Under the APA, all testimony must be made under oath. RCW 34.05.0452(3). In this
22 case it is clear from listening to the audio of the hearing that Detective Patrick was sworn by
23 Lisa McIntyre, was formally discharged from that oath and still spoke to the board on questions
24 of fact before the board. Failure to require an oath of witnesses in an administrative hearing is
25 reversible error. See *Appeal of Nirk*, 30 Wash. App. 214, 221, 633 P.2d 118, 122 (1981). The
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1 statutory form of an oath is set out in RCW 5.28.020, and can be issued by a notary public or a
2 presiding officer.

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4 ***iv. Washington State University Improperly Tolerated Ex Parte Contact***
5 ***During the Hearing.***

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7 During the hearing Lisa McIntyre allowed the Complainant to write down proposed
8 questions of the witnesses. This was permissible under WAC 504-26-403(4)(a)(iv). The
9 problem arose when the Complainant also made factual assertions in the writings he submitted
10 to the board chair. It is clear from the audio of the hearing that this occurred, and then the chair
11 destroyed the written submission that Complainant tendered to the chair. RCW 34.05.455(2)
12 provides: "... a presiding officer may not communicate, directly or indirectly, regarding any
13 issue in the proceeding, with any person not employed by the agency who has a direct or
14 indirect interest in the outcome of the proceeding, without notice and opportunity for all parties
15 to participate." *Ex parte* communications can "shadow the impartiality, or at least the
16 appearance of impartiality," of a proceeding and "may, in some circumstances, constitute a
17 deprivation of due process of law." *Grieco v. Meachum*, 533 F.2d 713, 719 (1st Cir.1976), *cert.*
18 *denied*, 429 U.S. 858, 97 S.Ct. 158, 50 L.Ed.2d 135 (1976), *overruled on other grounds by*
19 *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). Presentation of
20 evidence to the decision-making body outside the presence of the accused can be a due process
21 violation. *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 927 (6th Cir.1988). *Ex parte*
22 conversations are a due process violation if "the integrity of the process and the fairness of the
23 result" is tainted by the communication. *Gomes v. Univ. of Maine Sys.*, 365 F.Supp.2d 6, 35
24 (D.Maine 2005).
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2 **v. *Washington State University Improperly Acted with Bias Against***
3 ***Robert Barber.***

4 Mr. Barber was the victim of bias by the conduct board. Recent legal precedents have
5 addressed the subject of bias by school conduct boards. Doe v. Univ. of Cincinnati, 173 F.
6 Supp. 3d 586, 601 (S.D. Ohio 2016), the court explained:

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8 School disciplinary boards must of course be impartial, *Heyne v. Metropolitan*
9 *Nashville Pub. Sch.*, 655 F.3d 556, 567 (6th Cir.2011), but they are entitled to a
10 presumption of honesty and impartiality absent a showing of actual bias. *Atria v.*
11 *Vanderbilt Univ.*, 142 Fed.Appx. 246, 256 (6th Cir.2005). Generally, the alleged bias of
the disciplinary board must be evident from the record and not based on inference and
speculation. *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir.1987).

12 In Robert Barber's hearing, the evidence of bias is evident from the record. The board jokes
13 about him needing a "holding cell" even though he doesn't have a criminal record, and was
14 very polite and exceptionally respectful with the board. Unfortunately the respect that he
15 showed was not reciprocated. The board told him that he looked angry or mad in the video
16 even though they could not see his face. Despite the fact that the process of school discipline is
17 supposed to be educational for students, the board specifically wrote in their order "...it is the
18 specific intention of the Conduct Board that you not be allowed to graduate from this
19 University." This doesn't serve the purpose of educating Mr. Barber, and doesn't even do
20 anything to protect the safety of other students. Rather it is openly mean-spirited effort to ruin
21 Mr. Barber's life.

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24 **10. Petitioner Requests That the Court:**

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- a. Sets aside the “Final Order” of the Washington State University Appeals Board and allows Petitioner to finish his remaining time at WSU to receive his Bachelors degree; and
- b. Impose attorney fees and other expenses pursuant to RCW 4.84.350.
- c. Order a stay of the expulsion pending review by this court. (This will also be requested by a separate motion as required by RCW 34.05.550.)

DATED this ___ day of November, 2016

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