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STATE OF WASHINGTON
WHITMAN COUNTY SUPERIOR COURT

ROBERT BARBER,

Petitioner,

v.

WASHINGTON STATE UNIVERSITY,

Respondent.

NO. 16-2-00217-38

RESPONSE TO MOTION FOR
STAY

I. INTRODUCTION

Petitioner Robert Barber was suspended from Washington State University (WSU or University) after he was found to have punched another student at an off-campus party. The undisputed facts supporting the suspension were that (1) Mr. Barber punched the other student twice; and (2) the second punch occurred while the other student was lying on the ground.

Mr. Barber also had a previous student disciplinary history, in which he was cited for yelling threatening and racially charged expletives. During that incident, when an off-duty police officer informed Mr. Barber that he was a police officer and could have him arrested, Mr. Barber responded by telling the officer he was going to "beat [his] ass."

In his second Conduct Board case, the Conduct Board expelled him after a hearing based on its findings that Mr. Barber punched another student twice--once while the student was lying on the ground unconscious--and the fact that Mr. Barber had a previous history of threatening, harassing behavior. The Appeals Board, which is an independent University body, agreed with

1 the Conduct Board's findings regarding the facts of the punching incident, but reduced the
2 sanction to a suspension until July 2017.

3 Mr. Barber's violent actions left another student bleeding from the head and unconscious
4 with a concussion. Parents, students, and other community members have a legitimate
5 expectation that the University will respond promptly to address violent student behavior that
6 causes harm to other students. In this case, as explained in detail below, the primary facts of the
7 incident were undisputed and the evidence supporting the decision was very strong. Mr. Barber
8 was provided with a full and fair hearing in accordance with the University's well established
9 conduct process, which has been upheld by the courts, including this Court, on numerous
10 occasions.

11 **II. BACKGROUND**

12 On July 23, 2016, Mr. Barber was involved in a large fight at a house referred to by
13 students as "The Palace." Two students were seriously injured in the fight. One suffered a
14 concussion and the other suffered a severely broken jaw. Five WSU students have faced student
15 conduct charges as a result of the fight. The charges and sanctions against individual students
16 vary in severity depending on the injuries they inflicted on others, the level and nature of their
17 involvement in the altercation, and their past contacts with the Office of Student Conduct. *See*
18 *Decl. of Adam Jussel.*

19 The fight on July 23, 2016, was not Mr. Barber's first student conduct violation. An
20 earlier incident occurred in March 2015, when Mr. Barber became angry after his friend was
21 arrested for disorderly conduct. During the arrest of his friend, Mr. Barber hit the side of another
22 student's car with his hand and began to yell expletives, repeating the phrase "fuck with you"
23 and "fuck with me." As his friend was being arrested, he yelled, "Fuck this white shit," "Fuck
24 white people," and "I hate white people." Mr. Barber then yelled "Fuck you frat boy" at a nearby
25 off-duty police officer. Mr. Barber then pointed at the off-duty officer and said, "Once these
26 officers leave I'm going to beat the shit out of you." The off-duty officer told Mr. Barber that

1 he was a police officer and could have him arrested. Mr. Barber pointed at him and said that “he
2 was going to take care of [him] when the cops left and ‘beat [his] ass.’” The off-duty officer
3 tried to call 911 for help, and Mr. Barber said, “What? Are you a little bitch? Now you’re gonna
4 call 911?” The off-duty officer was able to notify the nearby police of the situation, and
5 Mr. Barber was subsequently arrested and cited for harassment, a gross misdemeanor.

6 **Exhibit A** to Jussel Decl.

7 At his student conduct hearing for this incident, Mr. Barber admitted to engaging in
8 disorderly conduct, but said he became angry because people were laughing at his friend. He
9 received an educational sanction (specifically, he was required to write a reflection paper). In
10 his reflection paper, Mr. Barber stated that he should have walked away and “I know that I would
11 get in serious trouble for physical assault.” Importantly, Mr. Barber acknowledged that he was
12 aware of the consequences if he assaulted someone. **Exhibit B** to Jussel Decl.

13 As a result of Mr. Barber’s participation in the July 23, 2016, fight at The Palace, he was
14 charged with violating WSU’s Standards of Conduct for Students, specifically abuse of others
15 and reckless endangerment. He was provided with a written notice of charges that informed him
16 of his rights in the student conduct process. **Exhibit C** to Jussel Decl. He appeared at a Conduct
17 Board hearing with his advisors, including a representative from WSU Football, who also had
18 received a copy of the notice of charges. He chose not to be accompanied by an attorney at the
19 hearing. The Conduct Board heard sworn testimony from the student Mr. Barber had punched
20 (the complainant) and Pullman Police Detective Scott Patrick. In addition, the Conduct Board
21 reviewed written witness statements from students who were at the party and reviewed three
22 videos of the fight.

23 One video of the fight shows Mr. Barber wearing red shorts and a black tank top. It
24 shows him punching another individual, the complainant, who falls to the ground. It then shows
25 Mr. Barber punching the complainant again after he is lying on his back on the ground. At the
26 hearing, Mr. Barber acknowledged that he was the person in the video in the red shorts and black

1 tank top, and that he punched the complainant twice, the second time after the complainant was
2 lying on the ground. *See* Jussel Decl.

3 Detective Patrick provided limited testimony because the police investigation was still
4 ongoing. He stated that the police had interviewed close to 60 individuals who were at the party.
5 He testified regarding the video that had been circulated on social media and that Mr. Barber had
6 been identified as being involved. He stated there was conflicting evidence about whether
7 Mr. Barber was pushed or struck by the complainant prior to hitting the complainant the first
8 time.

9 The complainant testified at the hearing that Mr. Barber's companions were setting off
10 firecrackers and he asked them to stop. He said that one of them then set off a firecracker in the
11 crowd. The complainant then told them to leave, using expletives. He then spoke to his
12 roommate, who also tried to get them to leave. The next thing the complainant remembers is
13 waking up on the ground. He was transported to the hospital and treated for a concussion. He
14 said he had watched the video and described it as him getting "blindsided clocked." *See* Jussel
15 Decl.

16 Mr. Barber engaged in cross-examination of the complainant through the Conduct Board
17 Chair by submitting several questions to the Chair to ask the complainant. Contrary to
18 Mr. Barber's claims, the Chair asked all the questions he submitted. Mr. Barber asked the
19 complainant whether he was consuming any substances other than alcohol, and the complainant
20 said he was snorting caffeine but not using any illicit substances, which he said was proven by
21 the "tox screen" done at the hospital when he arrived there that night. Mr. Barber also asked
22 whether complainant remembered trying to fight him, and the complainant responded, "That
23 didn't happen." *See* Jussel Decl.

24 Mr. Barber testified that earlier in the evening, the complainant had tried to fight him and
25 some of the other football players who were there. He said he saw people at the party doing
26 cocaine. At the time of the assault, he said he felt someone push him from the side, which made

1 him feel threatened, and he reacted to it by punching the person. He stated he did not know who
2 the person was that he punched. Mr. Barber testified that he didn't know the residents wanted
3 them to leave and he didn't remember hearing any fireworks. He testified that he had seen the
4 video of the fight, and he acknowledged he was the one wearing the black shirt and red shorts.

5 The Conduct Board Chair questioned Mr. Barber about his claim that he felt threatened
6 when the complainant was lying on the ground. When she asked Mr. Barber whether it was
7 justified to hit the complainant again after he was on the ground, Mr. Barber answered "yes
8 ma'am." He said he was just trying to protect himself. When asked if he still felt in danger once
9 the complainant was lying on the ground, Mr. Barber answered yes. He said he just "didn't
10 think" and "felt threatened." It was clear from these questions that the Chair was struggling with
11 the idea that someone could feel threatened and/or the need to defend himself when the other
12 person is lying on his back on the ground.

13 Written notes of interviews with witnesses that were reviewed by the Conduct Board
14 included witness statements that Mr. Barber "just turned around and right hooked [the
15 complainant] in the face" and "[the complainant] blacked out for a few minutes." One witness
16 said fireworks were being thrown and he was trying to get people to leave the party when he
17 "noticed [the complainant] was knocked unconscious on the ground getting punched."¹

18 At the end of the hearing, Mr. Barber read a statement apologizing for causing harm to
19 the complainant and stating that he accepted the consequences of his actions. He requested
20 community service as a sanction instead of expulsion or suspension.

21 On September 13, 2016, the Conduct Board issued its decision. The Board rejected
22 Mr. Barber's claim of self-defense, stating, "We did not believe your claims of self-defense. The
23 man you struck was not even looking toward you when you struck him. And certainly, after he
24 was on the ground and unconscious, he was no threat to you, but you still struck him again."

25 ¹ The entire student conduct file will be provided to the Court with a request for a protection order to
26 protect personal identifying information of students consistent with the Family Educational Rights and Privacy Act
(FERPA), 20 U.S.C. § 1232g; 34 C.F.R. pt. 99.

1 Based on the facts at the hearing, the Board found by a preponderance of the evidence that
2 Mr. Barber committed the violations of abuse of others and reckless endangerment. Taking into
3 consideration Mr. Barber's prior conduct offense in March 2015, the Conduct Board determined
4 that expulsion was the proper sanction because Mr. Barber was a risk to other members of the
5 community. **Exhibit D** to Jussel Decl.

6 Mr. Barber appealed the Conduct Board's decision to the University Appeals Board,
7 which is a separate and independent body that reviews appeals on specific grounds as specified
8 in the Standards of Conduct for Students, WAC 504-26-407. The Appeals Board modified the
9 sanction from expulsion to suspension. **Exhibit E** to Jussel Decl. However, it denied
10 Mr. Barber's request to postpone implementation of the suspension until the end of the fall
11 semester, which would have resulted in no sanction whatsoever as he would be done with his
12 coursework and his athletics at that time.

13 On September 16, 2016, Pullman Police Chief Gary Jenkins held a joint press conference
14 with WSU Athletic Director Bill Moos. Chief Jenkins stated that the police found the
15 complainant unconscious on the ground when they arrived. As a result of the police
16 investigation, Mr. Barber was arrested with a recommendation that he be charged with 2nd degree
17 assault, and the case was forwarded to the Whitman County Prosecutor. The press conference
18 is available at this link:

19 <http://www.spokesman.com/blogs/sportslink/2016/sep/16/pullman-police-press-conference/>

20 On November 2, 2016, Mr. Barber filed this petition for judicial review and motion to
21 stay agency action.²

22 **III. ISSUES**

- 23 1. Was the University's order based on public health, safety or welfare grounds?
24

25 _____
26 ² WSU plans to submit additional declarations from the Conduct Board Chair and the Appeals Board Chair
in support of its response to the motion to stay.

1 unconscious, and caused that student serious injury. Furthermore, Mr. Barber's previous student
2 conduct incident involved threats of harm to an off-duty police officer. These threats continued
3 even after the officer revealed he was a police officer. In his reflection paper on that incident,
4 Mr. Barber stated that he was aware there would be serious consequences if he physically
5 assaulted someone. Yet, he was apparently unable or unwilling to prevent that from happening.
6 These facts demonstrate that Mr. Barber poses an ongoing threat to the safety of other WSU
7 students. Furthermore, the University would face significant liability exposure if it did not take
8 action to protect the University community, given its knowledge of Mr. Barber's conduct.

9 **B. Mr. Barber is unlikely to prevail on the merits**

10 To be entitled to a stay, the petitioner has the burden of showing that he is likely to prevail
11 on the merits of his petition for review. RCW 34.05.570(1)(a). *City of W. Richland v. Dep't of*
12 *Ecology*, 124 Wn. App 683, 689-90, 103 P.3d 818 (2004). An agency order can be overturned
13 only if the superior court determines that:

14 (a) The order, or the statute or rule on which the order is based, is in violation
of constitutional provisions on its face or as applied;

15 (b) The order is outside the statutory authority or jurisdiction of the agency
conferred by any provision of law;

16 (c) The agency has engaged in unlawful procedure or decision-making
process, or has failed to follow a prescribed procedure;

17 (d) The agency has erroneously interpreted or applied the law;

18 (e) The order is not supported by evidence that is substantial when viewed in
19 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;

20 (f) The agency has not decided all issues requiring resolution by the agency;

21 (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was
22 made and was improperly denied or, if no motion was made, facts are shown to
support the grant of such a motion that were not known and were not reasonably
discoverable by the challenging party at the appropriate time for making such a
23 motion;

24 (h) The order is inconsistent with a rule of the agency unless the agency
explains the inconsistency by stating facts and reasons to demonstrate a rational
basis for inconsistency; or

25 (i) The order is arbitrary or capricious.

26 RCW 34.05.570(3).

1 In reviewing an agency action, the court gives substantial weight to an agency's
2 interpretation of its own rules. *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.*,
3 82 Wn. App. 495, 518, 919 P.2d 602 (1996). The court is not to substitute its judgment for that
4 of the agency and "will upset its determination only if the evidence establishes it was arrived at
5 by unlawful, arbitrary or capricious action." *State ex rel. Rosenberg v. Grand Coulee Dam Sch.*
6 *Dist. No. 301 J*, 85 Wn.2d 556, 563, 536 P.2d 614 (1975). Arbitrary and capricious action is
7 defined as "willful and unreasoning action, without consideration and in disregard of facts or
8 circumstances. Where there is room for two opinions, action is not arbitrary or capricious when
9 exercised honestly and upon due consideration, even though it may be believed that an erroneous
10 conclusion has been reached." *Smith v. Hollenbeck*, 48 Wn.2d 461, 464, 294 P.2d 921, 923
11 (1956).

12 "[A] court shall grant relief only if it determines that a person seeking judicial relief has
13 been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d). The party
14 seeking relief bears the burden of proving substantial prejudice. *Densley v. Dep't of Ret. Sys.*,
15 162 Wn.2d 210, 217, 173 P.3d 885 (2007). Thus, the petitioner must show not only an
16 irregularity but that the irregularity substantially prejudiced the petitioner. RCW 34.05.570(3),
17 .570(1)(d).

18 In this case, as explained below, Mr. Barber cannot show that he will likely meet any of
19 these burdens and therefore his motion to stay must be denied.

20 **1. The University's conduct process, and the process provided to Mr. Barber,**
21 **greatly exceeds constitutional due process requirements**

22 Mr. Barber first claims that WSU's student conduct process violates constitutional
23 standards for due process. This claim is without merit. Student conduct proceedings are not
24 criminal proceedings, and students are not entitled to all the procedural safeguards accorded
25 criminal defendants. *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Jaska v. Regents*
26 *of Univ. of Mich.*, 597 F. Supp. 1245, 1250 (E.D. Mich. 1984), *aff'd* 787 F.2d 590 (6th Cir. 1986).

1 Rather, they are entitled to a process that is fundamentally fair, in that they receive notice of the
2 charges against them and an opportunity to respond to the charges. *E.g., Bd. of Curators of the*
3 *Univ. of Missouri v. Horowitz*, 435 U.S. 78, 89, 98 S. Ct. 948, 954-55, 55 L.Ed.2d 124 (1978);
4 *Goss v. Lopez*, 419 U.S. 565, 581, 95 S. Ct. 729 (1975). *See also Nash v. Auburn Univ.*, 812
5 F.2d 655, 664 (11th Cir. 1987) (two students were expelled; “Where basic fairness is preserved,
6 we have not required the cross-examination of witnesses and a full adversary proceeding.”).

7 To the contrary, courts uphold the use of procedures that include far fewer protections
8 than WSU affords in its process. In *Flaim v. Med. College of Ohio*, 418 F.3d 629 (6th Cir. 2005),
9 the Sixth Circuit Court of Appeals considered what procedures are required before a state college
10 can expel a student. In that case, the Medical College of Ohio expelled Flaim after he was
11 convicted of a felony drug offense. *Flaim*, 418 F.3d at 632. The college procedure provided a
12 hearing in front of a committee. *Id.* at 633. Following the hearing, the committee recommended
13 sanctions to a Dean, who expelled Flaim. *Id.* At Flaim’s hearing, Flaim’s arresting officer
14 appeared and provided testimony. *Id.* Flaim was allowed to have an attorney present at the
15 hearing, but the attorney was not allowed to participate or even converse with Flaim. *Id.* Flaim
16 was provided an opportunity to present evidence and argument to the board, but was not allowed
17 to cross-examine the witness against him. *Id.* Flaim challenged the procedure on due process
18 grounds. *Id.* The court rejected the challenge, concluding that notice and an opportunity to be
19 heard in front of a neutral fact finder is all that is required for student conduct cases where
20 expulsion is a possible outcome. *Id.* at 634.

21 Here, Mr. Barber received significant procedural protections throughout the student
22 conduct process. These procedures included:

- 23 • Written notice of the allegations against him;
- 24 • Written notice of all anticipated witnesses and documentary evidence that were to be
25 submitted at the Conduct Board hearing;

- 1 • He was allowed to review, in advance of the hearing and with his advisor, all of the
- 2 evidence against him, including what was submitted at the Conduct Board hearing;
- 3 • He was given a reasonable opportunity to prepare for the hearing;
- 4 • He was given the opportunity to respond to the allegations;
- 5 • He submitted a written statement, which was in the conduct file;
- 6 • He heard all of the witness testimony given at the Conduct Board hearing;
- 7 • All testimony against him was given under oath;
- 8 • He was given the opportunity to engage in cross-examination of the complainant
- 9 through the Conduct Board Chair, who asked every question he requested;
- 10 • He was allowed to call witnesses on his behalf and was informed of this fact; he could
- 11 have brought a number of fellow students, athletes, or others as witnesses, however,
- 12 he chose not to;
- 13 • He had two advisors help him prepare for the hearing and be present throughout the
- 14 hearing;
- 15 • He and his advisors were given the opportunity to take recesses during the hearing
- 16 and confer, which they did; Mr. Jussel also asked for a recess specifically so that
- 17 Mr. Barber could confer with his advisors;
- 18 • He was allowed to appeal the Conduct Board decision, which afforded him a full
- 19 independent review by the Appeals Board; and
- 20 • He was permitted to petition the Appeals Board for a stay of his suspension.

21 It is clear that these procedural protections went far beyond constitutional due process
22 requirements as set forth in the case law. Therefore, the Court should reject Mr. Barber's claim
23 that WSU's student conduct process fails to meet constitutional standards.

24 Furthermore, the issue of whether WSU's process was procedurally inadequate, or that
25 additional procedures should have been provided, was never raised during Mr. Barber's student
26

1 conduct process, either at the Conduct Board level or the Appeals Board level. The APA limits
2 a petitioner's ability to raise issues for the first time on appeal. It provides:

3 (1) Issues not raised before the agency may not be raised on appeal, except to the
4 extent that:

5 (a) The person did not know and was under no duty to discover or could not
6 have reasonably discovered facts giving rise to the issue;

7 (b) The agency action subject to judicial review is a rule and the person has not
8 been a party in adjudicative proceedings that provided an adequate opportunity
9 to raise the issue;

10 (c) The agency action subject to judicial review is an order and the person was
11 not notified of the adjudicative proceeding in substantial compliance with this
12 chapter; or

13 (d) The interests of justice would be served by resolution of an issue arising
14 from:

15 (i) A change in controlling law occurring after the agency action; or

16 (ii) Agency action occurring after the person exhausted the last feasible
17 opportunity for seeking relief from the agency.

18 RCW 34.05.554.

19 In *King Cnty. v. Boundary Review Bd.*, 122 Wn.2d 648, 669, (1993), the court explained
20 that RCW 34.05.554 serves important policy goals associated with the integrity of the
21 administrative process. The court stated:

22 [R]ules like RCW 34.05.554 further the purposes of:

23 (1) discouraging the frequent and deliberate flouting of administrative processes;
24 (2) protecting agency autonomy by allowing an agency the first opportunity to
25 apply its expertise, exercise its discretion, and correct its errors; (3) aiding judicial
26 review by promoting the development of facts during the administrative
proceeding; and (4) promoting judicial economy by reducing duplication, and
perhaps even obviating judicial involvement.

King Cnty. v. Boundary Review Bd., 122 Wn.2d at 669 (quoting *Fertilizer Inst. v. U.S. Env'tl.*
Protection Agency, 935 F.2d 1303, 1312-13 (D.C. Cir. 1991) (additional citation omitted)). See
also *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 75 (2005), review
denied, 156 Wn.2d 1004 (2006) (holding failure to raise issue of equitable estoppel before
agency precluded consideration for the first time on judicial review); and *Thurston Cnty. v. W.*
Wash. Growth Mgmt. Hearings Bd., 137 Wn. App. 781, 805 (2007) (citing RCW 34.05.554 in
refusing to address whether the board relied on incorrect land use figures because it was not

1 raised before the board) (reversed in part on other grounds by *Thurston Cnty. v. W. Wash. Growth*
2 *Mgmt. Hearings Bd.*, 164 Wn.2d 329 (2008)). See also *Alpha Kappa Lambda Fraternity v.*
3 *Wash. State Univ.*, 152 Wn. App. 401, 420 (2009) (refusing to address issue argued for the first
4 time on appeal).

5 Thus, not only is Mr. Barber's claim without merit, but because Mr. Barber never raised
6 it before the University, either at the Conduct Board level or the Appeals Board level, the Court
7 should decline to address it.

8 2. **The University did not commit prejudicial error with respect to cross-**
9 **examination questions**

10 WSU's cross-examination procedure allows the parties to a student conduct matter to ask
11 questions of witnesses through the Conduct Board Chair. The regulation provides:

12 The complainant, the accused student, and the student conduct officer may
13 arrange for witnesses to present pertinent information to the university conduct
14 board. The conduct officer tries to arrange the attendance of possible witnesses
15 who are identified by the complainant. Complainant witnesses must provide
16 written statements to the conduct officer at least two weekdays prior to the
17 hearing. Witnesses identified by the accused student must provide written
18 statements to the conduct officer at least two weekdays prior to the conduct
19 hearing. The accused student is responsible for informing his or her witnesses of
20 the time and place of the hearing. Witnesses provide information to and answer
21 questions from the university conduct board, the complainant, and the accused
22 student, as appropriate. **Questions may be suggested by the accused student
and/or complainant to be answered by each other or by other witnesses.
Written questions are directed to the conduct board chair, rather than to the
witness directly. This method is used to preserve the educational tone of the
hearing and to avoid creation of an unduly adversarial environment, and to
allow the board chair to determine the relevancy 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.

23 WAC 504-26-403(4)(a)(v) (emphasis added).

24 This method of cross-examination has been upheld by numerous courts, including
25 Division III of the Washington Court of Appeals. *Alpha Kappa Lambda Fraternity*,
26 152 Wn. App. 401 (2009), e.g., *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (two

1 students were expelled; “Where basic fairness is preserved, we have not required the cross-
2 examination of witnesses and a full adversary proceeding.”); *Gabrilowitz v. Newman*, 582 F.2d
3 100, 106 (1st Cir. 1978) (in case of assault with intent to rape, expulsion and trespass from
4 university, student must be permitted advice of counsel at hearing; however, counsel need not
5 be permitted to speak); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (in case of
6 rape and threatened expulsion from university, there is no right to have counsel cross-examine
7 witnesses; directing questions of witness through the panel is sufficient); *Osteen v. Henley*,
8 13 F.3d 221, 225 (7th Cir. 1993) (student was expelled for assaulting two people; court stated
9 that “[e]ven if a student has a constitutional right to *consult* counsel . . . we do not think he is
10 entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-
11 examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to
12 perform the traditional function of a trial lawyer. To recognize such a right would force student
13 disciplinary proceedings into the mold of adversary litigation.”).

14 In *Alpha Kappa Lambda Fraternity*, WSU withdrew recognition from a fraternity due to
15 its pervasive drug-related activities. The fraternity argued the admission of evidence from
16 confidential informants constituted procedural error because it was hearsay and unreliable. The
17 Court disagreed and affirmed the University’s decision, citing with approval WSU’s cross-
18 examination process. *Id.* at 417.

19 Here, Mr. Barber challenges WSU’s cross-examination process and also claims, for the
20 first time on appeal, that WSU erred by failing to ask all of the questions he submitted and failing
21 to maintain a record of the questions. However, Mr. Huffman’s declaration submitted in support
22 of this contention is internally inconsistent. In his declaration, Mr. Huffman states, “I do not
23 recall the exact questions we asked, but my recollection of the hearing was that Dr. McIntyre did
24 not ask all the questions we proposed.” *See* Decl. of Antonio Huffman. If Mr. Huffman does
25 not remember the questions, how can he maintain that the Chair did not ask them all?
26

1 Mr. Huffman's recollection is mistaken. Each and every question was asked. *See* Jussel
2 Decl. Although Mr. Barber is correct that the questions should be part of the agency record, in
3 this case, the recording of the hearing, which will be provided to the Court, is part of the agency
4 record. Each and every question is on the recording and therefore each and every question is
5 part of the agency record. At no time did Mr. Barber or Mr. Huffman indicate there were
6 additional questions they wanted asked, even though they were asked whether they had
7 additional questions.

8 Notably, neither Mr. Barber nor his advisor raised this issue of unasked questions to the
9 University Appeals Board. **Exhibit E** to Jussel Decl. This is because it did not happen. As
10 stated above, issues such as this cannot be raised for the first time on a petition for judicial
11 review. To allow an issue to be raised after the fact denies the agency an opportunity to address
12 it, and therefore the Court should decline to hear it. *King Cnty. v. Boundary Review Bd.*,
13 122 Wn.2d at 669 (quoting *Fertilizer Inst. v. U.S. Envtl. Protection Agency*, 935 F.2d 1303,
14 1312-13 (D.C. Cir. 1991) (additional citation omitted)).

15 Finally, even if the Court decided to allow Mr. Barber to raise this issue for the first time
16 in his petition, Mr. Barber cannot show prejudice. Although Mr. Huffman states that he cannot
17 recall the exact questions that were asked, he claims they were "designed to help show that
18 Robert acted in self-defense, and to also raise the possibility that the Complainant may have been
19 under the influence of drugs at the time of the incident." *See* Huffman Decl. However,
20 Mr. Barber did ask questions regarding whether the complainant pushed him and whether he was
21 under the influence of drugs. *See* Jussel Decl. Thus, these questions were asked and answered
22 by the complainant. Furthermore, regardless of the complainant's credibility, or whether he
23 shoved Mr. Barber first, it was undisputed that Mr. Barber punched the complainant while he
24 was on the ground, presumably unconscious. This is clearly shown in the video, and Mr. Barber
25 acknowledged it was true. *See* Jussel Decl. The Board's primary reason for rejecting
26 Mr. Barber's claim of self-defense was not whether Mr. Barber had been pushed before he threw

1 the first punch, but that Mr. Barber struck the complainant again *after the complainant was on*
2 *the ground, unconscious*. In its decision, the Board stated:

3 And, certainly, after he was on the ground and unconscious, he was no threat to
4 you, but you still struck him again.

5 The paramedics found the Complainant unconscious and bleeding from the back
6 of his head. He was taken to the hospital for treatment of a concussion and later
7 had to take time off from work owing to his injuries.

8 **Exhibit D** to Jussel Decl.

9 Dr. McIntyre's questioning of Mr. Barber on this point during the hearing supports the
10 fact that this was the Board's main concern. Mr. Barber claims this questions demonstrates bias,
11 but the other, more plausible, interpretation is that the Chair simply could not understand,
12 because it makes no sense, that Mr. Barber could feel threatened by someone lying on the ground
13 unconscious. Thus, the Conduct Board rejected Mr. Barber's claim of self- defense.

14 Even if (1) the Court agreed to hear the issue of unasked questions, and (2) Mr. Barber
15 could show that there were unasked questions of the complainant, he cannot show how these
16 unasked questions could have changed the outcome of the case. Consequently, there is no
17 substantial prejudice, and there is no likelihood that he could prevail on the merits of this issue.
18 Therefore, the Court should deny the motion to stay.

19 **3. Mr. Barber's claims of bias are without merit and fail to demonstrate**
20 **procedural error or constitutional error**

21 Mr. Barber also claims that the University Conduct Board was biased against him. In
22 doing so, he points to several alleged statements or actions by the Conduct Board Chair: (1) the
23 Chair presumed he had been in prior altercations; (2) the Chair asked him pointed questions
24 about his claim that he felt threatened when the complainant was lying on his back, unconscious,
25 and made the statement that Mr. Barber looked "angry"; and (3) someone made a comment about
26 a "holding cell." As explained below, each of the comments is taken out of context and does not
in any way demonstrate bias against Mr. Barber.

1 First, the Chair did not presume Mr. Barber had been in fights prior to the punching
2 incident but was aware of an *actual* previous incident involving Mr. Barber, in particular, the
3 one in which he yelled obscenities and racial epithets at others and threatened violence against
4 an off-duty police officer. Second, as explained above, the Chair did ask Mr. Barber pointed
5 questions about his claim that he felt threatened by the complainant. This was because it defies
6 logic that Mr. Barber would feel threatened after the complainant was lying on the ground on his
7 back unconscious. She clearly was trying to understand how Mr. Barber could have felt that
8 way. The Conduct Board struggled with Mr. Barber's claim of self-defense, particularly once
9 the complainant was on the floor, as evidenced by its decision letter.

10 Finally, the "holding cell" comment is taken out of context. WSU's process is non-
11 adversarial and allows the parties to be in separate rooms while the other party is providing
12 testimony. This involves some exchanging of rooms and some delays in between witnesses.
13 During one delay, the following exchange took place, as documented on the audio recording:

14 12:24 – Jussel explains shuffling down the hall

15 Chair: "Is there anything else you want to tell us?"

16 Jussel: "They aren't on the line right now, so I shuffled them down the hall"

17 Chair: "Oh okay"

18 Complainant: "Well I guess just back on the caffeine pills..."

19 Jussel: "Just a second, we're going to have to move them back down"

20 Other Board member: "He's already in here, put him in the holding"

21 Chair: "Put him in a holding pattern"

22 12:40 – Other Board member: "Guess it's better than a holding cell"

23 Chair: "Holding office"

24 Other Board member: "holding space"

25 Jussel Decl. As is evident from this exchange, no one on the Board stated or implied that Mr.
26 Barber belonged in a "holding cell." Furthermore, the exchange demonstrates that Mr. Jussel
stopped the complainant from making further statements until Mr. Barber and his advisors were
ready. Mr. Barber cannot meet his burden that any of these comments demonstrated bias against
him or constituted prejudicial error.

1 **PROOF OF SERVICE**

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

4 Steve Graham
5 Law Office of Steve Graham
6 1312 North Monroe, #140
7 Spokane, WA 99201
8 *By U.S.P.S. mail, postage prepaid*
9 *Courtesy copy sent via email*

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

12 DATED this 3rd day of November, 2016, at Pullman, Washington.

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14 RITA HAAS
15 Legal Administrative Manager
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