

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO: 502015CA007028XXXXMB

MICAH PHILLIPS,
Petitioner,

v.

FLORIDA ATLANTIC
UNIVERSITY,
Respondent.

Opinion filed: APR 13 2016

Petition for Writ of Certiorari from the Florida Atlantic University Board of Trustees

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PER CURIAM.

We accept Respondent's Belated Motion for Rehearing as timely filed due to a clerical error in serving the original opinion, however, the motion is denied on its merits. We amend our original opinion only to correct a scrivener's error regarding the Petitioner's attorney's information. The opinion below remains unchanged and is not subject to rehearing. *See Fla. R. App. P. 9.330(b).*

Petitioner Micah Phillips ("Phillips") seeks review of the quasi-judicial decision of the

Florida Atlantic University Board of Trustees (“FAU”) to suspend Phillips from FAU for four years after he was found responsible for multiple violations of the Student Code of Conduct. We grant the Petition as Phillips did not receive procedural due process at the Student Conduct Hearing (“Hearing”) when Pamela Malyk, the Associate Director of Student Conduct, usurped the hearing officer’s responsibility to facilitate questioning of witnesses by ruling upon the admissibility of evidence. We reject Phillips’ remaining arguments.

Phillips was a student at FAU and worked as a residence assistant in a student residence hall on campus. On February 25, 2015, the Dean of Students office issued Phillips a Notice of Interim Suspension informing him that on February 18, 2015, in an FAU Resident Hall, he was allegedly involved in a sexual act that occurred without the victim’s consent. On March 26, 2015, Phillips received an Official Notice of Charges stating that “it is alleged that you were involved in a sexual act that occurred without the consent of the victim,” and articulated that he was charged with (1) Violence, (2) Health, Safety or Welfare of Members or Guests, (3) Sexual Act, (4) State, Federal and Local Laws or Ordinance, and (5) Disruptive Conduct.

On April 21, 2015, Phillips attended a Student Conduct Hearing. The Hearing was presided over by Hearing Officer Daniel Johnson, who was accompanied by Daniel Jones, FAU’s counsel. Pamela Malyk, the Associate Director of Student Conduct, also attended the hearing. According to FAU, Malyk was acting as a University Advisor during the proceeding.

During the Hearing, the complainant testified that Phillips had non-consensual anal sex with her. After the complainant’s testimony, Phillips attempted to ask the complainant “if she’s ever had anal sex before.” Before the Hearing Officer could give a ruling, Malyk interjected, and stated that the question was irrelevant. Phillips was given permission to argue for the

question's relevance:

Phillips: it goes to our expert witness. . .and the fact that if you have had sexual intercourse anally before, it will show up. But if you've never had it before, then the fact that it will show up very latently in a rape kit or it will even show multiple days past five and seven days and it's very relevant. . .And I expect the answer to be no. I'm not trying. . .to attack her character at all. I really am not.

Malyk: Unfortunately, that is against our, um, victim's rights in the Student Code of Conduct, page 19, number 10, the right to have unrelated past behavior excluded from the hearing. The last sentence: Past sexual history of the alleged victim is not usually considered relevant. So we will not ask about her prior sexual history.

The Hearing Officer did not make a ruling as to whether Phillips's question was relevant.

On April 24, 2015, the Hearing Officer found Phillips responsible for all five charges against him. On May 23, 2015, Phillips's appeal to FAU's Dean of Students was denied, and the instant Petition for Writ of Certiorari followed.

A party may seek review of the Board's decision in its quasi-judicial capacity by filing a petition for certiorari. Fla. R. App. P. 9.100(b); 9.190(b)(3). This Court's certiorari review is limited to (1) whether procedural due process has been afforded; (2) whether the essential requirements of law have been observed; and (3) whether competent substantial evidence supports the Board's decision. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *Town of Manalapan v. Gyongyosi*, 828 So. 2d 1029, 1032 (Fla. 4th DCA 2002).

"In any proceeding in which the substantial interests of a student are determined by the state university system or a community college district, sections 120.569 and 120.57 (the general due process provisions of the Administrative Procedure Act) do not apply." § 120.81(1)(g), Fla. Stat. (2014). Rather, in accordance with section 6C-6.0105(1) of the Florida Administrative

Code, each university president is directed to “establish university rules that ensure fairness and due process in student disciplinary proceedings and that guarantee the academic integrity of the university.” Fla. Admin. Code R. 6C–6.0105(1); *Matar v. Florida Int’l Univ.*, 944 So. 2d 1153, 1157 (Fla. 3d DCA 2006). An agency violates a person's due process rights if it ignores rules promulgated which affect individual rights. *Matar*, 944 So. 2d at 1157.

Phillips alleges that he was denied procedural due process when FAU violated its rules affecting his individual rights, which are delineated in Regulation 4.007 of the Student Code of Conduct (“Regulation 4.007”). Phillips alleges the Hearing Officer did not facilitate questioning, as required by Regulation 4.007, when Associate Director of Student Conduct, Pamela Malyk¹ (“Malyk”) interfered with the proceedings by improperly ruling that Phillips’s proposed question about whether Complainant had engaged in anal sex before was not allowed.

Regulation 4.007(10)(f) states that “the Hearing shall be heard by a Hearing Officer,” and Regulation 4.007(12)(c) states that the Hearing Officer “facilitates the questioning of witnesses.” Malyk claims that she was acting as a University Advisor during the proceeding and states that her role was to (1) assist the Hearing Officer with any procedural questions, (2) advise the Hearing Officer with regard to University Policy and Procedure, and (3) to facilitate the orderly administration of the Hearing. However, neither Regulation 4.007, nor anything else in the record, makes any mention of the role of University Advisor.

Malyk violated rules which “affect individual rights” in Regulation 4.007 by improperly ruling on a question of relevancy. Phillips requested that the Hearing Officer ask the Complainant “if she’s ever had anal sex before.” Malyk interrupted the Hearing Officer and

¹ Malyk is referred to as Ms. Malcolm in the Hearing Transcript.

stated that the question was irrelevant. Phillips received permission from the Hearing Officer to explain the alleged relevance of the question; however, the Hearing Officer did not make a ruling on the issue. Rather, upon Phillips finishing his explanation, Malyk stated that the question was against the Student Code of Conduct, which states that “past sexual history of the alleged victim is not usually considered relevant.” FAU Reg. 4.007(12)(b). Although the Student Conduct Code states that past sexual history is not *usually* relevant, that does not mean it is *never* relevant. The Hearing Officer never made the required ruling on the issue of relevance, and the Hearing progressed with the question excluded.

Malyk violated Regulation 4.007(12)(c), which states that “[t]he questioning of witnesses will be facilitated by the Hearing Officer.” The Hearing Officer did not facilitate the proposed questioning of the complainant; rather, Malyk acted as the Hearing Officer by ruling the question irrelevant. The Hearing Officer’s failure to make an independent ruling contravenes Regulation 4.007(10)(f), which provides that the Hearing Officer shall preside over the Hearing. By allowing Malyk to rule on the relevancy of Phillips’s question, the Hearing Officer allowed Malyk to usurp his duties to preside over the hearing and to facilitate the questioning. Malyk’s ruling was not merely procedural, but rather deprived Phillips from having the independent decision-maker preside during his cross-examination of the Complainant. We find that this violation of Regulation 4.007 violated Phillips’s right to procedural due process.

The Petition for Writ of Certiorari is GRANTED. FAU’s decision is quashed, and the matter is remanded for a new Hearing.

ARTAU, G. KEYSER, and BARKDULL, JJ. concur.