

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1720**

Matthew Brisbois,  
Relator,

vs.

University of Minnesota,  
Respondent.

**Filed July 2, 2012  
Affirmed  
Stoneburner, Judge**

Thomas C. Plunkett, St. Paul, Minnesota (for relator)

Mark B. Rotenberg, General Counsel, Brian J. Slovut, Associate General Counsel,  
University of Minnesota, Minneapolis, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and  
Hudson, Judge.

**UNPUBLISHED OPINION**

**STONEBURNER**, Judge

In this certiorari appeal, relator challenges his expulsion from respondent university, asserting that procedural errors in the decision-making process require that the decision to expel be reversed or, in the alternative, remanded for a new hearing. We affirm.

## FACTS

In September 2010, relator Matthew Brisbois, who was a student at respondent University of Minnesota and a member of a fraternity, had sexual intercourse with another student, C.S., on a mattress on a fire-escape landing of the fraternity house during a party. Due to her level of intoxication, C.S. has limited memory about the events of the evening, but she remembers that, at some point while she was at the fraternity house, “someone was on top of her penetrating her vaginally.” She did not know Brisbois prior to the party and has no memory of who was on top of her.

The next morning C.S. woke up in pain and with blood on her thighs. Her friends took her to a hospital where she was examined by a sexual-assault-resource-services nurse. The nurse found blood in C.S.’s underwear, vaginal pain, soreness and abrasions, and abrasions on her arms and legs. DNA obtained from vaginal and perianal swabs matched Brisbois. Toxicology reports showed C.S.’s blood alcohol content was .03 at 11:00 a.m. on the morning after the incident.

The university’s expert witness testified that C.S.’s blood alcohol content at the probable time of the sexual contact with Brisbois would have been no less than .156, an alcohol level that was consistent with witnesses’ descriptions of her behavior and C.S.’s “cameo” memory. The expert testified that C.S.’s blood alcohol content, combined with her limited experience with alcohol, would have prevented C.S. from understanding “the fact, nature, and extent of the sexual situation, and that this would have been apparent to a reasonable observer.”

The university charged Brisbois with violating three provisions of the Student Conduct Code: subdivision 6 (threatening, harassing or assaultive conduct, defined elsewhere in the code as “actual, attempted or threatened sexual contact with another person without that person’s consent”), subdivision 16 (violation of university rules), and subdivision 17 (violation of federal or state laws). Expulsion is one of the possible sanctions provided by the code for the alleged violations.

Brisbois, represented by counsel, asserted that his sexual contact with C.S. was consensual, denied the charges and requested a hearing before the Campus Committee on Student Behavior (CCSB), which assists in implementing the Student Conduct Code. The CCSB has written hearing procedures. The procedures provide that a CCSB panel consists of a chair, usually the CCSB chair, and five voting members. For cases involving sexual assault, the CCSB procedures state that “reasonable efforts will be made to have a student majority. These hearings will be held as soon as possible.” The university’s Office of General Counsel (OGC) assigns an attorney to serve as the university presenter. An OGC attorney may also provide advice to the hearing panel. The OGC handbook notes that it is the practice of the OGC to separate these functions and provide for screening between the attorneys performing these functions. Once the parties are informed of the names of the potential panel members and chair, either party may ask that the chair recuse himself or herself “due to a direct relationship with the case or being a reporting party or witness.”

A student who is dissatisfied with the decision of the CCSB may appeal to the Provost’s Appeal Committee (PAC), a standing advisory panel assisting the provost in

implementing the Student Conduct Code. The PAC's recommendations are forwarded to the provost, who makes the final university decision on discipline under the code. The provost has broad discretion to accept, modify, or reject the recommendations of the PAC.

The hearing in this case was scheduled for July 2011, which is between the spring and fall semesters. The university sent two emails to the nine students in the volunteer pool for the CCSB for the 2010-11 academic year, asking for volunteers for the hearing. Five responded that they were unavailable, three did not respond, and one volunteered for and was placed on the panel.

Prior to the pretrial hearing provided for in the CCSB procedures, the chair of the panel, Jeanne Higbee, sent an email to the university presenter, noting the importance to the panel and to the student of having the violations alleged under subdivision 17 "spelled out" with specific laws referenced. The email addresses the presenter by his first name. Based on this ex parte communication with the university presenter, Brisbois asked Higbee to recuse herself. Higbee denied the request.

Brisbois objected to the minutes of the pretrial conference. Higbee emailed the university presenter and the OGC attorney assigned to advise the panel that she was not responding to the message from Brisbois, stating: "I am assuming that the most we might provide in a response would be something like 'duly noted for the record.'" Based on this ex parte communication with the university presenter, Brisbois again requested that Higbee recuse. To address this request, Higbee created a procedure not provided for in the CCSB written procedures, whereby, after the panel was seated, the panel would hear

brief arguments from Brisbois's attorney and the university presenter on the recusal requests, Higbee would respond, and the panel would determine the issue. Brisbois did not challenge the make-up of the panel and did not object to the procedure for resolving his recusal request. The panel voted four in favor of retaining the chair and one abstention.

The subsequent hearing on the merits of the charges lasted almost twelve hours. Three days later, the CCSB issued a decision, finding Brisbois responsible for violating subdivision 6 and subdivision 16, but not responsible for violating subdivision 17. The panel found that C.S.'s level of intoxication at the time of the incident was such that she could not understand the fact, nature, or extent of the sexual situation, that a reasonable person would have understood C.S.'s impaired condition, and that Brisbois's assessment of C.S.'s level of intoxication at the time of sexual contact was unreasonable. The CCSB imposed the sanction of expulsion, banning Brisbois from the campus until September 1, 2014, and prohibiting him from having any contact with C.S.

Brisbois appealed the CCSB's decision to the PAC. The PAC determined that most of Brisbois's challenges were without merit, but found merit in his claims (1) regarding the lack of students on the panel, (2) that the charge for violation of subdivision 17 was erroneously and prejudicially included when the university knew there would be no criminal prosecution, and (3) that the panel used an erroneous definition of consent. The PAC unanimously recommended that the decision of the CCSB be set aside and that Brisbois receive a new hearing.

Provost E. Thomas Sullivan issued a final decision on September 15, 2011, finding that none of Brisbois's claims merited a new hearing and affirming the CCSB's decision. This certiorari appeal followed.

## D E C I S I O N

In his brief on appeal, Brisbois initially references his right to due process, but he does not present any argument or analysis of a due-process violation in this case. Issues not briefed on appeal are waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). We therefore decline to address due process further except to note that the fundamental requisite of due process is the opportunity to be heard, which incorporates the requirement of notice. The record reflects that the hearing process afforded Brisbois meets these requirements. *See Goss v. Lopez*, 419 U.S. 565, 579, 95 S. Ct. 729, 738 (1975).

Certiorari review is limited to an inspection of the record of the decision-making entity "confined to questions affecting the jurisdiction of the [entity], the regularity of its proceedings, and, as to the merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 921 (Minn. App. 1994) (citation omitted).

Brisbois challenges the decision of the provost, alleging six instances in which the university violated its own procedures that, he claims, made the decision arbitrary. *See id.* (holding in part that failure of a hearing panel and review committee to issue findings

of fact required by their own procedures made their decisions arbitrary). Brisbois alleges that the university violated its own procedures when (1) the chair improperly refused to recuse herself for bias, (2) reasonable efforts were not made to ensure that the panel consisted of a majority of students, (3) the university denied access to information on how other students were punished, (4) the panel used an improper standard for “consent,” (5) the appeal process did not provide for a fair and adequate review of the panel’s decision, and (6) the provost abused his discretion by failing to follow the PAC’s recommendations.

**A. Failure of chair to recuse**

The provost noted that (1) the CCSB procedures permit panel members to be challenged on grounds of “conflict of interest or bias,” (2) the chair, as a nonvoting member, may be challenged “due to a direct relationship with the case or being a reporting party or witness,” and (3) the chair has the authority to decide all challenges. Because the record does not show any direct relationship between the chair and the case as a reporting party or witness, the provost concluded that the chair did not abuse her discretion by declining to recuse herself.

Brisbois asserts that the chair’s ex parte communications with the university presenter violated the policy in the OGC handbook that separate attorneys shall be assigned to the party and to the hearing panel and those attorneys shall not communicate with each other on the merits of the matter outside of the presence of the other party or the party’s counsel. But the record does not reflect that the OGC attorneys had any inappropriate communication with each other, and we find no merit in Brisbois’s claim

that the OGC's process for separating the functions of the attorneys was implicated by the chair's communications with the university presenter.

Brisbois also asserts that the communications violated CCSB hearing procedures that (1) prohibit the panel from speaking privately about the complaint with the parties or their advocates and (2) prohibit a panel member from acting as an advocate. Brisbois argues that the chair acted as an advocate by telling the university presenter "what evidence should be presented to the Panel to help secure a finding of responsible" for the charge of violating section 17 of the student code. Brisbois asserts that the chair again acted as an advocate when she told the university presenter how she was going to respond to Brisbois's objection to minutes of the pretrial and again when she devised a procedure for handling the second recusal request that allowed her to advocate against recusal to the panel. Brisbois argues that "[t]he Panel Chair's actions in failing to follow existing rules and creating [] rules showed that the Panel Chair and the Panel's actions in this case were arbitrary and capricious."

But Brisbois makes no argument and has cited no authority to demonstrate that any of these matters rendered the decision on the merits arbitrary or capricious. The chair's emails did not address the merits of the case and the chair's submission of the second recusal request to the panel afforded Brisbois more process than was required by the CCSB procedural rules.

The procedural violations alleged surrounding the recusal requests are far different from the procedural violations that occurred in *Ganguli*, in which the decision-makers failed to make any findings required by their own procedures and the first panel

communicated with the review panel before issuing its decision. *Ganguli*, 512 N.W.2d at 921. *Ganguli* held that a decision by a university may be arbitrary if it violates the university's own procedures, but it did not hold that *any* violation of procedures makes a decision arbitrary. *Id.* at 922-23. Brisbois has failed to establish that any of the procedural violations he complains of surrounding the chair's failure to recuse herself had any effect on the decision on the merits of this case or in any way rendered that decision arbitrary or capricious.

#### **B. Composition of panel**

Brisbois, citing the CCSB hearing procedures that require reasonable efforts to have a student majority on panels hearing sexual-assault cases, argues that he was denied a fair hearing because his panel was not composed of a majority of students. Brisbois did not challenge the composition of the panel prior to the hearing but raised this issue on appeal to the PAC. The PAC, interpreting the procedures to require *heightened efforts* at obtaining a majority of students for cases involving sexual assault, concluded that sending two emails to student volunteers did not constitute reasonable efforts because the hearing occurred in the summer when many students are not on campus. The provost disagreed that the procedures require more effort to obtain a student majority in cases involving sexual assault. The provost concluded that (1) the procedures mandate that a *reasonable effort is made* to have a student majority on the panel, not that the panel includes a student majority, (2) the CCSB "undertook reasonable efforts to obtain a student majority and acted appropriately in holding this hearing over the summer rather than waiting until the next school year," and (3) Brisbois did not object to the make-up of

the panel despite the fact that he was given the opportunity to do so; and “[p]articularly in a situation where the accused student is represented by counsel, the failure to clearly state an objection prior to commencement of the hearing can reasonably be considered a ‘waiver’ of any objection to the composition of the panel.” The provost found that there was no procedural violation by the CCSB and no unfairness to Brisbois in the composition of the hearing panel. We agree.

The record reflects that the effort to contact CCSB student volunteers is commensurate with what past panels have done, and there is no basis in the record to conclude that the provost’s finding that the efforts were reasonable under the circumstances is arbitrary or capricious. Because the procedures do not require a majority of students on a panel, Brisbois’s argument that the lack of a student majority deprived him of a fair hearing and rendered the university’s decision arbitrary and capricious is without merit.

**C. Information about other students’ punishments**

Brisbois asserts that he was denied access to information on how other students were punished, which denied him the opportunity to present meaningful information on the issue of sanctions and denied him a “fair trial.” Brisbois cites only a distinguishable unpublished case from this court involving the CCSB’s exclusion of evidence proffered by a student about the consequences of a sanction. And the record reflects that Brisbois was, in fact, provided with sanctions that had been issued with respect to prior CCSB matters. He was denied access only to information about settlements reached between the Office for Student Conduct and Academic Integrity (OSCAI) and students in prior

conduct-code matters. Brisbois does not assert that the procedural rules require disclosure of the information he was denied.

The provost determined that there is a

distinction between the sanctions imposed by the CCSB after a hearing, which is information [Brisbois] received, and informal resolutions achieved one on one between the student and the OSCAI director. . . . [T]he sanctions information supplied by the CCSB fairly put [Brisbois] on notice that expulsion was a potential outcome of his hearing.

The provost found that there was no procedural violation in denying the requested information. The record supports this finding. Additionally, Brisbois has failed to show that he was prejudiced by the university's failure to provide information about informal resolutions of conduct matters or that failure to provide that information rendered the university's decision arbitrary or capricious. Brisbois knew the possible sanctions for the charged violations, and he was given information about the CCSB's prior sanctions. No evidence concerning sanctions or the effect of any sanction on Brisbois was excluded from the hearing.

#### **D. Standard for determining consent**

The CCSB panel's decision letter to Brisbois states:

The Panel believed that the sexual contact that took place did not occur with consent. Your testimony indicated that you based the assumption of consent on your description of [C.S.'s] behaviors that included leading you up the stairs, turning bedroom door handles, and remaining prone on the mattress in the enclosed fire escape area while you went out of the building to your truck and returned with a condom. There were no corroborating witnesses to these behaviors. At no point did you actively seek consent.

The letter goes on to state that the panel “evaluated consent under the definition established by university policy.” “Consent” is defined in the Administrative Policy on Sexual Assault, Stalking, and Relationship Violence as

informed, freely and actively given, and mutually understood. If physical force, coercion, intimidation, and/or threats are used, there is no consent. *If the victim/survivor is mentally or physically incapacitated or impaired so that the victim/survivor cannot understand the fact, nature or extent of the sexual situation, and the condition was or would be known to a reasonable person, there is no consent. This includes conditions due to alcohol or drug consumption, or being asleep or unconscious.*

(Emphasis added). The panel concluded that

the complaining witness was so impaired from intoxication that she could not understand the fact, nature, or extent of the sexual situation. . . . [And] a reasonable person would have understood the impaired condition of the complaining witness, and [Brisbois’s] assessment of her level of intoxication at the time of the sexual contact was unreasonable.

Brisbois, without citing any authority, asserts that by stating the fact that he failed to actively seek consent, the panel applied the wrong standard for determining consent. The PAC agreed and opined that had there been a majority of students on the panel, “it is more likely than not that a different outcome would have occurred.” The provost noted that, when read in context, the panel’s reference to Brisbois’s failure to actively seek consent is a factual observation and not an additional criterion for determining consent, and disagreed with the PAC’s conclusion:

The PAC accepted without reservation the finding of the CCSB that “the complaining witness was so impaired from intoxication that she could not understand the fact, nature, or extent of the sexual situation.” (*PAC Recommendation, p. 19, quoting CCSB Decision, p. 3*) Yet, the PAC concluded that a reasonable

student would have judged [Brisbois's] behavior differently than a reasonable person. This reasoning and conclusion are not persuasive. It is not appropriate to boot strap the argument regarding having only one student on the panel to buttress the argument regarding the reasonable person standard. The University's Sexual Assault Policy does not distinguish between a reasonable student and a reasonable person nor does it hold students to a lower standard. Further, there is no factual basis to conclude that a reasonable student would use a different standard than a reasonable person for evaluating whether someone was too impaired to consent to a sexual act. Therefore, I find the CCSB properly applied the definition of consent under University policy. There is no serious error affecting fairness of the CCSB hearing.

The record supports the provost's finding that the reference to Brisbois's having failed to actively seek consent is merely part of a recitation of the facts surrounding Brisbois's encounter with C.S. The provost's analysis plainly demonstrates that *his* decision was based on the appropriate standard of consent and was not arbitrary or unreasonable, made under an erroneous theory of law, or without evidence to support it. We find no basis for reversal in Brisbois's mere assertion that the panel considered an improper definition of consent.

#### **E. University appellate procedures**

Brisbois asserts that the university's appeal procedures do not provide for a fair and adequate review of the panel's decision. He concludes his two-paragraph argument on this issue by stating: "The University continued to act in an arbitrary and capricious manner through the appeals process. This failure of process requires this matter to be overturned." Because Brisbois does not support this argument with any analysis or authority demonstrating that the flaws he alleges in the appellate process resulted in an unreasonable or arbitrary or capricious decision in this case, we decline to address this

inadequately briefed argument further. *See Ganguli*, 512 N.W.2d at 919 n.1 (stating that the court declines to address allegations unsupported by legal analysis or citation).

**F. Provost's discretion**

Brisbois asserts that the provost abused his discretion by failing to follow the PAC's recommendation. But this court does not review the provost's decision for abuse of discretion. And the PAC procedures specifically state that "[t]he Provost has broad discretion to accept, modify, or reject the panel recommendations. The provost makes the final university decision regarding discipline under the Board of Regents Policy: *Student Conduct Code*" and is not required to give any deference to the PAC's recommendations. There is no merit to Brisbois's assertion that he is entitled to reversal based on the provost's failure to defer to the PAC's recommendation.

**Affirmed.**