

A10-1440
STATE OF MINNESOTA
IN COURT OF APPEALS

Amanda Tatro,

Relator,

vs.

University of Minnesota,

Respondents

RELATOR'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUES	vi
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
1. Background of Parties	1
2. Description of Disciplinary Charges	3
3. Evidence Presented at Hearing	4
4. Administrative Procedure and Decisions	14
ARGUMENT	18
Standard of Review	19
I. THE UNIVERSITY LACKED JURISDICTION UNDER ITS OWN RULES TO CONDUCT A DISCIPLINARY HEARING WHERE THE ALLEGED MISCONDUCT OCCURRED OFF-CAMPUS AND DID NOT VIOLATE ANY CRIMINAL LAWS OR PRESENT A DANGER OR THREAT TO OTHERS, AND WHERE SOME OF THE RULES WERE NOT COVERED BY THE STUDENT CONDUCT CODE.	22
A. The University Lacked Jurisdiction Over Relator’s Off-Campus Conduct.	23
B. Violation of Course Rules are not Covered by the Student Conduct Code	26
II. THE UNIVERSITY FAILED TO PRESENTED EVIDENCE TO SUPPORT A DETERMINATION THAT RELATOR COMMITTED DISCIPLINARY OFFENSES WHERE NONE OF THE ALLEGED CONDUCT VIOLATED THE PLAIN LANGUAGE OF THE RULES CITED.	27
III. THE UNIVERSITY’S DISCIPLINE OF RELATOR FOR SATIRICAL FACEBOOK ENTRIES THAT WERE NOT DIRECTED AT AND DID NOT DISCLOSE INFORMATION ON ANY IDENTIFIABLE PERSONS, VIOLATED HER STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO FREE SPEECH	34
IV. THE UNIVERSITY LACKED AUTHORITY TO IMPOSE DISCIPLINARY SANCTIONS THAT INCLUDED CHANGING A PASSING GRADE TO A FAILING GRADE ITS RULES DID NOT	

AUTHORIZE SUCH A SANCTION	38
CONCLUSION	39

INDEX TO ADDENDUM

Facebook Postings - Hearing Exhibit 4	1A
Complaint, contained in email from Sharon Dzik to Amanda Tatro, dated December 29, 2009 with attachment	6A
University of Minnesota Student Conduct Code	10A
Anatomy Laboratory Rules	17A
Program of Mortuary Science Policies and Procedures (excerpt)	19A
Anatomy Bequest Program - Human Anatomy Access Orientation Disclosure Form	25A
Decision of Campus Committee on Student Behavior, contained in letter from Becky Hippert to Amanda Tatro, dated April 2, 2010	26A
Provost's Appeal Committee Recommendation, dated May 31, 2010	32A
Provost's Final Decision, dated June 24, 2010	42A

TABLE OF AUTHORITIES

CASES

Abbariao v. Hamline Univ. School of Law, 258 N.W.2d 108 (Minn. 1977) . . .	20, 21, 35
Cable Communications Board v. Nor-West Cable Communications Partnerhsip, 356 N.W.2d 658 (Minn. 1984)	21
City of Mankato v. Fetchenhier, 363 N.W.2d 76 (Minn. Ct. App. 1985)	31
DeJohn v. Temple University, 537 F.3d 301 (3 rd Cir. 2008)	34
Doe v. Pulaski County Special School District, 306 F.3d 616 (8 th Cir. 2002)	37
Healy v. James, 408 U.S. 169, 92 S.Ct. 2338 (1972)	35
In re Welfare of M.A.H., 572 N.W.2d 752 (Minn. Ct. App. 1997)	21
In re Welfare of W.A.H., 642 N.W.2d 41 (Minn. Ct. App. 2002)	21
Kolender v. Larson, 461 U.S. 352, 103 S. Ct. 1855 (1983)	31
Martin v. United States, 691 F.2d 1235 (8th Cir.1982)	36
Maye v. Univerity of Minnesota, 615 N.W.2d 383 (Minn. Ct. App. 2000)	20
Micius v. St. Paul City Council, 524 N.W.2d 521 (Minn. Ct. App. 1994)	20
Minnesota Center for Environmental Advocacy v. Metro. Council, 587 N.W.2d 838 (Minn. 1999)	20
Montella v. City of Ottertail, 633 N.W.2d 86 (Minn. App. 2001)	21
New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964)	22
Papish v. Board of Curators of University of Missouri, 410 U.S. 667, 93 S.Ct. 1197 (1973)	34
Police Dept. of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286 (1972)	34

Qvyjt v. Lin, 932 F.Supp. 1100 (N.D. Ill. 1996)	35
R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538 (Minn. 1992)	36
Riehm v. Engelking, 538 F.3d 952 (8 th Cir. 2002)	37
Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115. S.Ct. 2510 (1995)	34
Saxe v. State College Area School Dist., 240 F.3d 200 (3d Cir.2001)	34
Schuman v. University of Minnesota Law School, 451 N.W.2d 71 (Minn. Ct. App. 1990)	20-21
State v. Coleman, 661 N.W.2d 296 (Minn. Ct. App. 2003)	30, 31
State v. Machholz, 574 N.W.2d 415 (Minn. 1998)	21
State v. Newstrom, 371 N.W.2d 525 (Minn. 1985)	31
State v. Wagner, 555 N.W.2d 752 (Minn.Ct. App.1996)	30
Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894 (1949)	36
Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533 (1989)	34
Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969)	35
United States v. Dinwiddie, 76 F.3d 913 (8 th Cir. 1996)	36-37
Virginia v. Black, 538 U.S. 343 (2003)	36
Willis v. County of Sherburne, 555 N.W.2d 277 (Minn. 1996)	19

RULES

University of Minnesota Student Conduct Code	22-23, 26-29, 38
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STATEMENT OF THE ISSUES

I. WHETHER THE UNIVERSITY HAD JURISDICTION UNDER ITS OWN RULES TO CONDUCT A DISCIPLINARY HEARING WHERE THE ALLEGED MISCONDUCT OCCURRED OFF-CAMPUS AND DID NOT VIOLATE ANY CRIMINAL LAWS OR PRESENT A DANGER OR THREAT TO OTHERS, AND WHERE SOME OF THE RULES WERE NOT COVERED BY THE STUDENT CONDUCT CODE?

Relator moved to dismiss the disciplinary charges against her for lack of jurisdiction. The Campus Committee on Student Behavior determined it lacked jurisdiction to determine its own jurisdiction. The issue was presented on administrative appeal to the Provost. Provost's appeal committee rejected the issue, and the Provost did not address it in his final decision.

Apposite Authorities:

University of Minnesota Student Conduct Code

II. WHETHER THE UNIVERSITY PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A DETERMINATION THAT RELATOR COMMITTED DISCIPLINARY OFFENSES WHERE NONE OF THE ALLEGED CONDUCT VIOLATED THE PLAIN LANGUAGE OF THE RULES CITED?

Relator contested the evidence throughout the administrative process. The Campus Committee on Student Behavior conducted an evidentiary hearing and found violations. That decision was upheld on administrative appeal to the Provost.

Apposite Authorities:

State v. Coleman, 661 N.W.2d 296 (Minn. Ct. App. 2003)

State v. Newstrom, 371 N.W.2d 525 (Minn. 1985).

Kolender v. Larson, 461 U.S. 352, 103 S. Ct. 1855 (1983)

University of Minnesota Student Conduct Code

III. WHETHER THE UNIVERSITY'S DISCIPLINE OF RELATOR FOR SATIRICAL FACEBOOK ENTRIES THAT WERE NOT DIRECTED AT AND DID NOT DISCLOSE INFORMATION ON ANY IDENTIFIABLE PERSONS, VIOLATED HER STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO FREE SPEECH?

The issue was presented at the evidentiary hearing, and at the administrative appeal hearing, but not addressed.

Apposite Authorities:

Healy v. James, 408 U.S. 169, 92 S.Ct. 2338 (1972)

Papish v. Board of Curators of University of Missouri, 410 U.S. 667, 670, 93 S.Ct. 1197 (1973)

Virginia v. Black, 538 U.S. 343 (2003)

United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996)

IV. WHETHER THE UNIVERSITY HAD AUTHORITY TO IMPOSE DISCIPLINARY SANCTIONS THAT INCLUDED CHANGING A PASSING GRADE TO A FAILING GRADE ITS RULES DID NOT AUTHORIZE SUCH A SANCTION?

Relator challenged the validity of the sanctions on her administrative appeal. The sanctions were upheld.

Apposite Authorities:

University of Minnesota Student Conduct Code

STATEMENT OF THE CASE

This matter originated under the authority of the University of Minnesota which charged Relator with violations of the Student Conduct Code on December 29, 2009. An evidentiary hearing was held before the Campus Committee on Student Behavior (CCSB) on March 25, 2010. The CCSB found that Relator had violated University rules and imposed sanctions in a decision dated April 2, 2010. (Addendum 26A-31A). Relator exercised her right of administrative appeal by timely submitting an appeal to the Provost's Appeal Committee (PAC). The PAC held a hearing on May 27, 2010. It recommended to the Provost that the discipline and sanctions be upheld in a letter dated May 31, 2010. (Addendum 32A-41A). The Provost, E. Thomas Sullivan, issued a final decision affirming the discipline and sanctions by memorandum dated June 24, 2010. Relator initiated his appeal of the University's action by writ of certiorari on August 20, 2010.

STATEMENT OF FACTS

1. Background of Parties.

The Program of Mortuary Science is a Bachelor of Science degree program. (Transcript of Hearing before Campus Committee on Student Behavior on March 25, 2010 [hereinafter "Hearing Tr."] at 41). The primary purpose of the program "is to prepare people to be funeral directors." (*Id.* 43). The degree is required to receive a mortician license in Minnesota, which encompasses embalming and funeral service

arrangements. (Id. 44). The program requires a variety of courses, including in science, business, grief psychology, “death and dying across cultures and religions,.” and technical aspects of caring for the deceased. (Id. 45-46). There are laboratory courses in anatomy, embalming and restorative art, and a clinical rotation in an embalming laboratory in a funeral home. (Id. 46-47). There is no specific course on ethics in the program. (Id. 108-09).

Relator Amanda Tatro became interested in mortuary science after taking care of her mother who suffered from a traumatic brain injury for 11 years and serving as her legal guardian, and thereby becoming familiar with dying and grieving. (Hearing Tr. 257-58). Tatro herself is physically handicapped. Her central nervous system does not function properly, and she needs electric spinal chord stimulators in her body to be able to move. (Hearing Tr. 261). Tatro was completely immobile for many years until medical advances caught up. (Id.). She needs to joke and express humor, or “I’d be the most miserable person on the planet.” (Id.)

Tatro relies on Facebook to keep in contact with friends and family. (Hearing Tr. 258). Due her all-encompassing obligations, Facebook was her “whole social outlet.” (Id. 258-59). At the time of her controversial Facebook posts, her privacy settings were set to only include friends of friends. (Id., 259). She subsequently restricted her privacy settings to only friends. (Id.) Tatro’s Facebook friends included friends and family, and people in the Mortuary Science program. (Id.)

2. Description of Disciplinary Charges

In December, 2009, staff at the Mortuary Science Program became aware of Facebook posts that they deemed offensive. They ultimately claimed that the following posts violated University Rules:

Amanda Beth Tatro Gets to play, I mean dissect, Bernie today. Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve... *(November 12th)*

Amanda Beth Tatro is looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar. *(December 6)*

Who knew embalming lab was so cathartic! I still want to stab a certain someone in the neck with a trocar though. Hmm..perhaps I will spend the evening updating my "Death List #5" and making friends with the crematory guy. I do know the code... *(December 7th)*

Amanda Beth Tatro realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket. *(Undated)*

(Addendum 1A-6A; Hearing Tr. 12- 13). Ms. Tatro was accused in the Complaint against her of sharing her facebook postings with the media. (Addendum 6A; Hearing Tr. 13).

The Complaint alleged that Ms. Tatro "posted statements on Facebook which could constitute violations of the University of Minnesota Student Conduct Code."

(Addendum 6A; Hearing Tr. 12). The regulations alleged to have been violated included provisions of the Student Conduct Code, Subdivision 6, "Threatening, Harassing, or

Assaultive Conduct", and Subdivision 16, "Violation of University Rules." (Addendum 7A, 12A-13A).

The University Rules alleged to be violated included Anatomy Laboratory Rules: Rule #6, "Human material should always be treated with greatest respect"; Anatomy Laboratory Rule Number #7, "Blogging about the anatomy lab or the cadaver dissection is not allowable"; and Anatomy Laboratory Rule #9, "Anatomical material must not be removed from the dissecting laboratory." The Anatomy Laboratory Rules are attached to the syllabus for the course MORT 3171 on anatomy. (Hearing Tr. 131).

The Complaint further alleged violations of the Policies and Procedures of the Program Mortuary: Science Student Conduct Code 1c, "Students shall carry out all aspects of funeral service in a competent and respectful manner"; and Mortuary Science Student Conduct Code 2a, "All deceased persons should be treated with proper care and dignity." ¹ (Addendum 7A, 19A-21A).

The Complaint finally alleged violation of the rules listed on the Anatomy Bequest Program Human Anatomy Access Orientation Disclosure which Tatro had signed, but did not specify which rules. (Addendum 7A; Hearing Tr. 13-14; Addendum 25A).

3. Evidence Presented at Hearing.

Faculty and staff at the Mortuary Science Program became aware of the Facebook

¹ The Policy and Procedure Manual relied upon and introduced into evidence was for the 2008-2009 academic year. (Addendum 19A). The incident in question occurred in December 2009, during the 2009-1010 academic year.

posts on December 11, 2009. (Hearing Tr. 144). The University's witnesses did not explain how the posts first became an issue but Tatro testified that a classmate brought the posts to the Mortuary Science staff. (Hearing Tr. 260).

The director of the Mortuary Science program, Michael LuBrant, claimed that faculty members were very concerned about the posts. (Hearing Tr. 66). He testified he was "very much concerned" when he saw the Facebook entry about wanting to stab someone with a trocar, but because he "didn't know what they meant or what they were referring to, who they were talking about." (Hearing Tr. 55). LuBrant claimed that he later heard from other people that Tatro might have been referring to him, but there was no evidence presented to indicate this was the case. (Id. 56, 89-90). Tatro's professor in the laboratory course MORT 3171 on anatomy for the embalmer, Angela McArthur, testified she heard "rumblings briefly that that was supposed to be in regards to Michael LuBrant. (Hearing Tr. 131, 151-52). LuBrant, despite subsequently meeting with Tatro on December 14, never asked Tatro who or what she was referring to in her posts. (Hearing Tr. 86:11-15, 90).

A trocar, an instrument for embalming, is a long hollow needle with a sharp end that is used to aspirate liquids, fluids and gases out of body cavities. (Hearing Tr. 53-54, 203-06). It is only used in the embalming lab and never removed from the lab. (Id. 214, 216-17). Ms. Tatro testified she had never even handled or used a trocar at the time of her Facebook post, and did not have an opportunity to use a trocar that day. (Id. 221, 265).

Her instructor in the embalming course where a trocar is used, Jody LaCourt had never seen Ms. Tatro do or say threatening. (Id. 209). LaCourt considered Tatro a good student. (Id. 210). She never spoke with Tatro about the Facebook posts or asked her for an explanation. (Id. 212-13).

Tatro did not mention or indicate anywhere in the Facebook posts any specific person she wanted to stab with a trocar. (Addendum 1A-5A; Hearing Tr. 241). She explained at the hearing that she was referring to an ex-boyfriend who had just broken up with her. (Id. 265-66). Tatro was also upset because she had just given consent for her mother to have surgery. (Id. 270). Tatro assumed that her friends and family who saw the post would know she was not serious because they knew she was “sarcastic” and has “a morbid sense of humor.” (Id. 266). She did not expect a negative reaction or intend to cause any fear in anyone. (Id. 266-67).

LuBrant testified there was fear about Tatro’s post that she hid a scalpel up her sleeve. (Id.). The post in question, however, actually stated, “Let’s see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve.” (Addendum 1A-2A). LuBrant claimed this post violated the policy to treat deceased persons with “proper care and dignity.” (Hearing Tr. 77).

LuBrant testified that the Facebook entries about stabbing “a certain someone in the neck with a trocar” and “I will spend the evening updating my ‘Death List #5’ and making friends with the crematory guy. I do know the code . . . “ were threats to harm

another person or harassment. (Hearing Tr. 74). He asserted that the posting about looking forward to the embalming lab and taking out aggression with a trocar violated the Mortuary Science Code provisions, 1c, about carrying out “all aspects of the funeral service in a competent and respectful manner” and 2a, that “All deceased persons shall be treated with proper care and dignity.” (Id. 74-75). LuBrant also claimed this could be a threat to another person, and the lab instructor felt threatened. (Id. 75). Force is needed to get the trocar into the body tissue. (Id. 218). Tatro explained that her comment about aggression was meant as a reference to an incident in the lab where one student was using both hands on the trocar and other students joked about aggression. (Id. 322).

McArthur believed that the Facebook comment, “Amanda Beth Tatro Gets to play, I mean dissect Bernie today,” violated the Anatomy Laboratory Rules 6 that “Human material should be handled with the greatest respect, ” Rule 7 that “Conversational language of cadaver dissection outside the laboratory should be respectful and discreet” and prohibiting blogging, and Rule 11 prohibiting “Crude or off color remarks regarding the cadavers or other students.” (Hearing Tr. 146). McArthur also thought the post about the opportunity to aspirate and taking out aggression with her trocar violated the laboratory rules about blogging and constituted crude and off color remarks. (Id. 148-149).²

² The rule regarding off color remarks, Anatomy Laboratory Rule 11, which McArthur cited, was not cited in the original complaint against Mr. Tatro and she therefore did not have notice of said violation before McArthur’s testimony. The Rule

Tatro explained to McArthur that her reference to a donor³ as “Bernie” came from the movie *Weekend at Bernie’s*. (Hearing Tr. 139-140). McArthur did not have a problem with students giving a donor a name, such as “Harry,” as long as its respectful. (Hearing Tr. 190-91). The mortuary student who testified on behalf of the University stated that it is a common practice for students to name their donors. (Id. 233). McArthur thought the choice of the name Bernie was in bad taste because the movie was a comedy involving bringing around a dead person to various events as if he was still alive. (Id. 140-41). There was no mention in Tatro’s Facebook posts, however, about the reason for the choice of the name Bernie. (Addendum 1A-5A). McArthur had not provided Tatro with any feedback that she did not believe reference to a donor as “Bernie” was appropriate, even though Tatro had also written “I heart Bernie” on the blackboard in class within a week of the Facebook post.⁴ (Hearing Tr. 178-180).

None of Tatro’s Facebook posts actually identified any donor. (Addendum 1A-5A; Hearing Tr. 246).

When Tatro met with LuBrant and administrative staff after the incident on December 16, 2009, she explained that “Bernie was a metaphor that I used for a deceased person.” (Hearing Tr. 274). She did not intend the word “play” disrespectfully, but is was

was not ultimately cited as a grounds for discipline. (Addendum 27A).

³ “Donor” is the term used in the profession for a cadaver.

⁴ Tatro was part of a group of three students working with a donor. (Id. 131).

based on her sense of humor. (Id. 275). Tatro believed she could use humor with her friends, but also believed there were limitations which is “precisely why I didn’t go into graphic detail on what I do in embalming labs or in the anatomy lab.” (Id.; see also Hearing Tr. 286-87). She therefore did not believe she was violating the conduct code because she describing explicitly any procedure performed. (Id. 305). Tatro also respected the applicable rules by not making jokes in the lab because “we were too busy trying to figure out what we were supposed to be doing.” (Id. 276).

McArthur testified that the comment on Facebook about the “Lock of hair in my pocket” violated the rule against blogging about the donor, and if it was really done, would be a “very, very serious issue.” (Hearing Tr. 149-150). There was no evidence whatsoever that Ms. Tatro really took hair from the donor. (Id. 150-51, 169). Tatro meant the post as a reference to a song by Black Crow, one of her favorite bands. (Hearing Tr. 289).

LuBrant and other faculty also did not know what Tatro was talking about in her Facebook comment, “I do know the code.” (Hearing Tr. 106-07). Tatro explained at the hearing that she was referring to a code she guessed would be needed get into the crematory in St. Paul. (Id. 320-21). She did not know if a code was really needed but was joking. (Id. 321).

McArthur testified that the purpose for rules requiring that human material be treated with respect is to protect the interests, identities, and modesty of the donors, and

preserve public trust in the program. (Hearing Tr. 135). The rule restricting conversations about dissections outside the laboratory and prohibiting blogging because it upsets donors and potential donors. (Id. 135-36). McArthur claimed that she told students during orientation that blogging includes Facebook, Twitter and My Space. (Id. 136). However, in response to the question, “So you specifically tell them that essentially any Internet sites like Facebook is not acceptable to write about the dissection or the cadaver?” There is no recorded response in the transcript. (Id. 137). Tatro testified that there was no discussion of Facebook or what constituted blogging at orientation. (Id. 295). She testified it was common for students to make general comments about lab classes on Facebook. (Id. 300-01). Jesse Clarkson, the student who testified on behalf of the University, did not recall if McArthur mentioned anything specifically about Facebook, Twitter or My Space in reference to blogging when he attended orientation one year before Tatro. (Hearing Tr. 231).

McArthur conceded that “blogging” was not defined in the course rules or anywhere in the University rules or policies. (Hearing Tr. 167). She conceded that there are no rules which specifically prohibit posts on Facebook. (Id. 168-69). McArthur testified that it was not necessary to define the term that “anybody can look up in a dictionary.” (Id. 167-68). She claimed at the hearing to rely on a definition of blog from Webster dictionary, “A website that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” (Hearing Tr. 193-94). McArthur

did not share this definition in any materials provided to students. LuBrant did not know the difference between Facebook and blogging because. (Hearing Tr. 91-92). Tatro testified that she still could not define blogging after hearing McArthur's definition at the hearing. (Hearing Tr. 298).

The University elicited testimony from LuBrant over objections that there were news reports about the Facebook postings, and that students, community members and persons in the funeral business were upset about the posts.⁵ (Hearing Tr. 79-83). McArthur testified that as a result of this incident, she received letters and phone calls. (Hearing Tr. 153-54). She testified regarding a specific letter from a donor's child complaining about Tatro's conduct. (Id. 154; Record Doc. 32, R 0080). McArthur was permitted over defense objection to read the entire letter during the hearing despite the fact that the physical letter was introduced into evidence so the panel could read the letter on their own. (Hearing Tr. 154-55).

The Anatomy Bequest Program had 323 donors in 2007 and more in 2009. (Hearing Tr. 113-14). There is concern about public image in order to encourage donations. (Hearing Tr. 119). There was no evidence that the incident caused a decrease in the number of donors. (Hearing Tr. 159).

LuBrant could not say whether there is room for any humor within the Mortuary

⁵ Tatro contacted the media in response to being banned from campus on December 14, believing she had no other avenue for making her voice heard. (Hearing Tr. 280-82).

Science Program. (Hearing Tr. 90). He did not know if there was ever any joking or kidding or light-hearted banter among students and faculty in the program. (Id. 91).

LuBrant claimed that he personally never made a joke. (Id. 91). McArthur testified that people in her course might smile or laugh, but she did not hear any “clear-cut jokes.” (Hearing Tr. 139).

LuBrant and other staff decided to call the police to report the Facebook posts. (Id. 56, 67-68). LuBrant then called Tatro to his office on December 14, 2009, and banned her from coming to the Mortuary Science Program offices, classroom or teaching spaces while the matter was being investigated by police and the student conduct office.

(Hearing Tr. 68-70). He took this action notwithstanding his claim that he was concerned about due process. (Id.) LuBrant claimed that Tatro was not suspended. (Id. 71, 88-89). However, according to the police report, LuBrant stated that Tatro was being suspended from the program. (Id. 87; Record Doc. 38, R 0118). Tatro was told by LuBrant that she was suspended at their meeting on December 14, 2009. (Hearing Tr. 280-84, 316-18). The police decided that no crime had been committed. (Hearing Tr. 71; Record Doc. 38, R0117).

Ms. Tatro was allowed to return to the program three days later. (Hearing Tr. 71). Sharon Dzik, the student conduct code administrator, called Tatro at the end of the day on December 16, 2009, and told Tatro she could finish her final exams. (Id. 284).

Tatro was subsequently informed by McArthur by email on December 22, that she

had made a complaint to the Office of Student Conduct and Academic Integrity. (Hearing Tr. 284; Record Doc. 37, R0115). McArthur's email informed Tatro that she had earned a C+ in MORT 3171, but that she would recommend that the Office of Student Conduct and Academic Integrity change grade to an "F" as a sanction. (Id.) Dzik emailed the University's version of a formal complaint to Tatro on December 29, 2009. (Addendum 6A).

LuBrant complained that in his conversations with Tatro about the Facebook postings, she did not believe what she did was wrong, and that she "straightened her back and looked at me and she said, what about my right to free speech?" (Hearing Tr. 84). LuBrant stated, "I don't believe Ms. Tatro believes she did anything wrong, and I think she's firm in that conviction. I think that's why we're here today." (Id.) LuBrant testified that because Ms. Tatro had not expressed remorse for her action, "the core faculty believed that she should be expelled from the program." (Id. 85). The other faculty who testified also advocated expulsion. (Id. 157, 214). None of the faculty members who recommended Tatro's expulsion at the hearing had ever asked her for an explanation of her Facebook posts. (Id. 269-270).

According to the Anatomy Laboratory Rules, the consequences of violation "may result in your eviction from the cadaver lab and the course." (Addendum 17A). There is no mention of any other disciplinary consequences.

Ms. Tatro had not previously been subject to any discipline. (Hearing Tr. 93, 171).

She had successfully performed academically. (Id. 93, 257) There had not been any complaints from families involved in the clinical programs about Ms. Tatro. (Id. 96-97). She did not have any performance problems with dissection. (Hearing Tr. 187).

Ms. Tatro believes her discipline was constituted retaliation by LuBrant for to her interaction with him several days before the Facebook incident about a dispute with medical faculty Judy Tiedemann over a handicap parking space. (Hearing Tr. 278-79, 325-26). LuBrant described interactions with Tatro regarding an angry note she placed on Tiedemann's car. (Hearing Tr. 56-58). LuBrant claimed he "was appalled that anybody would write a message or leave a message like this on anybody's car." (Hearing Tr. 59). The University presented the documentation and testimony regarding this incident even though it did not claim it violated any rule, and was not the subject of any discipline. (Id. 60-61, 96). LuBrant testified that he requested Tatro write a letter of apology, and that she responded by stating she would submit a complaint to the Student Conflict Resolution Center. (Id. 62-63).

4. Administrative Procedure and Decisions.

At the beginning of the disciplinary hearing, Tatro's attorney argued that the allegations against her were not within the jurisdiction of the University its rules of student conduct. (Hearing Tr. 20). He argued that there was no rule restricting private internet communications from one's own private off-campus residence. (Id.) Her attorney pointed out that no specific person was identified as a target of any threat. (Id.) He

argued that Subdivision 6 of the Code of Student Conduct requires endangering the health, safety of, or welfare of another person, and there is no basis for Facebook postings to be used a violation of the University's code. (Id. 21-22).

The University's attorney argued that the panel did not have authority to determine jurisdiction, but only the merits of the case. (Hearing Tr. 28). He claimed that only the provost could address the issue of jurisdiction. (Id. 28-29). The University further contended that the rule against blogging prohibited joking about cadaver dissection on Facebook. (Id. 29).

At the beginning of the hearing, Tatro's attorney also requested a continuance because he has just engaged his client two days prior, and had not yet been able to review the substantial documentary materials and prepare to present testimony. (Hearing Tr. 27). He requested another week to get ready. (Id. 28).

The Student Conduct Code Panel announced that it did have jurisdiction and denied Tatro's request for a continuance. (Id. 33). It provided no reasoning or any explanation whatsoever for these decisions. At the subsequent Provost's Appeal Committee Hearing, the chair of the Student Conduct Board, Jeanne Higbee stated that based on the applicable procedures, the CCSB did not have jurisdiction to "rule on our own jurisdiction." (Transcript of Provost's Appeal Committee Hearing, May 27, 2010 at 50, 112, 114).

Higbee repeatedly made clear the evidentiary hearing was "not a court of law" and

rules of evidence such as hearsay and foundation did not apply. (Hearing Tr. 7, 11, 40, 72, 79).

On April 2, 2010, the CCSB issued a written decision which found Tatro “Responsible” for all of the alleged rule violations except for Anatomy Laboratory Rule #9 which prohibits removing human material from the laboratory. (Addendum 26A-30A). The CCSB placed Tatro on probation for the remainder of her undergraduate career, and imposed the following sanctions: Her grade in MORT 3171 was changed to an “F”; she was required to enroll in a clinical ethics course; she was required to write a letter addressing the issue of respect; and Tatro was required to complete a psychiatric evaluation and fulfill any recommendations. (Addendum 30A-31A).

Pursuant to applicable procedures, Ms. Tatro appealed the CCSB’s decision to the Provost’s Appeal Committee. The appeal raised issues of lack of jurisdiction, denial of due process and a fair hearing, retaliation, and unauthorized sanctions. (Record Doc. 41, R0128-0130). A hearing was held before the Provost Appeal Committee (PAC) on May 27, 2010. The purpose of the Appeal Committee is “to determine whether the grounds, as presented in the student’s appeal, are sufficient and convincing to cause further action.” (Provost Appeal Committee Transcript [hereinafter “Appeal Tr.”] 5). The PAC is an advisory panel that only makes a recommendation to the Provost. (*Id.*) The student must prove a serious error in the original proceeding that resulted in unfairness. (*Id.* 5-6). At this hearing, the parties made arguments and officials from the Student Conduct

proceedings were questioned..

Ms. Tatro's advocate moved to dismiss the proceedings based on lack of jurisdiction because the conduct occurred off-campus. (Appeal Tr. 11-13). The Committee chair responded that the issue would be incorporated into the committee's discussions and recommendations to the Provost. (Id. 14). On further argument regarding jurisdiction, Tatro's advocate pointed out that the Facebook posts had nothing to do with her University activities. (Id. 24-25). There was no course on "embalming therapy" and Bernie had "no identifiable characteristics as any person living or dead." (Id. 26-27). There was no one named in any threats, and indeed there was no threat as Tatro indicated she felt like stabbing someone rather than indicating an intent to do so. (Id. 28-29). The advocate further disputed that Facebook is a blog. (Id. 30). He pointed out that Facebook is a social networking platform. (Id. 37). The chair of the Student Conduct Board, Jeanne Higbee conceded, "perhaps instead they should say electronic media or whatever." (Id. 118).

Higbee explained her position that CCSB did not have jurisdiction to "rule on our own jurisdiction." (Appeal Tr. 50, 112, 114). Higbee claimed that the Board determined Tatro had threatened others even though her statements were not directed at any individuals based on testimony by faculty that they perceived her statement as a threat. (Appeal Tr. 160). Tatro's advocate argued in his closing statement that the disciplinary action had a chilling effect on free speech. (Appeal Tr. 170).

The PAC recommended by a split vote that the decisions and sanctions imposed by CCSB be upheld. (Addendum 32A-41A). It rejected the claim of lack of jurisdiction without address the arguments about the conduct occurring off-campus. (Addendum 37A). The PAC was split 2-2 on issues of whether Tatro was denied fair notice because the original Complaint contained wording that was different from the Rules found to be violated and because a Facebook entry is not “blogging.” (Addendum 40A). However, the PAC recommendation stated that a tie vote was insufficient for Tatro to prevail. (Id.)

The Provost issued his “final decision” on June 24, 2010, which affirmed the CCSB’s findings and sanctions. (Addendum 42A-44A). The terse decision rejected the arguments of lack of notice or due process, that Facebook is not blogging, or that the alleged threats were not sufficiently specific. (Addendum 43A-44A). The Provost did not address the issue of jurisdiction.

ARGUMENT

This case invites the Court to define the boundaries of where a University can regulate a student’s expression of her personal views on the internet. Respondent University of Minnesota imposition of discipline on student Relator Amanda Tatro for personal entries on her Facebook account that were literary expressions of her feelings, was arbitrary, lacked any basis under the University’s rules, and violated Ms. Tatro’s constitutional rights to due process and free speech. The University’s Student Conduct Code that governed the disciplinary proceedings specifically did not authorize discipline

for conduct occurring off-campus. The Student Conduct Code further did not authorize discipline for violation of individual course rules which formed part of the basis for Tatro's discipline, and those course rules further did not authorize the discipline ultimately imposed on her.

Ms. Tatro's Facebook entries were not in violation of any of the rules cited by the University based on any reasonable interpretation. Her metaphorical and unspecific statements could not be reasonably construed as threats to anyone, did not reveal any privileged or specific information about her work with cadavers in the labs, and cannot be definitively construed as "blogging." The language of most of the rules in question is vague and confusing, and not sufficiently applicable to Ms. Tatro's conduct to put her on notice that she was committing disciplinary infractions.

The University's sanction of giving Ms. Tatro a failing grade for a course that she had already passed was not within the range of sanctions authorized by the Student Conduct Code or the Mortuary Science Program's rules.

Standard of Review⁶

Unless otherwise provided by statute or appellate rule, a party must petition the Court of Appeals for a writ of certiorari to obtain review of a quasi-judicial decision an administrative body that does not have statewide jurisdiction. Willis v. County of

⁶ This Brief contains one section on Standard of Review rather than a separate one for each argument because the applicable standards are common to the different issues or intertwined.

Sherburne, 555 N.W.2d 277, 281 (Minn. 1996); Micius v. St. Paul City Council, 524 N.W.2d 521, 522 (Minn. Ct. App. 1994). The Minnesota Supreme Court has outlined three considerations in determining whether a decision is quasi-judicial: "(1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim." Minnesota Center for Environmental Advocacy v. Metropolitan Council, 587 N.W.2d 838, 842 (Minn. 1999). It is clear that all these requisites were met in light of the evidentiary hearing to evaluate testimony and evidence in light of the University's rules, and the binding decision.⁷

Although the University is part of the executive branch of state government so that its decisions are given deference by the appellate court under the principle of separation of powers, Maye v. University of Minnesota, 615 N.W.2d 383, 385 (Minn. Ct. App. 2000), the Due Process Clause protects a student's interest in attending a public university. Abbariao v. Hamline University School of Law, 258 N.W.2d 108, 112 (Minn. 1977); Schuman v. University of Minnesota Law School, 451 N.W.2d 71, 74 (Minn. Ct. App. 1990). A student is afforded more due-process protection when school-imposed sanctions are for misconduct rather than for academic failings. Id. If a student's discipline results from arbitrary, capricious, or bad-faith actions of the university officials, the court will

⁷ Respondent's Statement of the Case stated that it "does not dispute the jurisdiction of the Court of Appeals to hear this matter."

intervene and direct the university to treat the student fairly. Id. An executive body's decision "may be modified or reversed" on certiorari review if it "made its decision based on unlawful procedure, acted arbitrarily or capriciously, made an error of law, or lacked substantial evidence in view of the entire record submitted." Montella v. City of Ottertail, 633 N.W.2d 86, 88 (Minn. Ct. App. 2001). The "substantial evidence" needed to support an administrative decision has been held to consist of:

1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;
2. More than a scintilla of evidence;
3. More than some evidence;
4. More than any evidence; and
5. Evidence considered in its entirety.

Cable Communications Board v. Nor-West Cable Communications Partnership, 356 N.W.2d 658, 668 (Minn. 1984).

Challenges to constitutionality of laws or government action, however, are questions of law which are reviewed de novo. See e.g. State v. Machholz, 574 N.W.2d 415, 419 (Minn. 1998). When reviewing a claim that an adjudication "violates the First Amendment, we view the evidence in the light most favorable to the state, but independently determine whether the conduct falls outside constitutional protection." In re Welfare of W.A.H., 642 N.W.2d 41, 47 (Minn. Ct. App. 2002)(citing In re Welfare of M.A.H., 572 N.W.2d 752, 757 (Minn. Ct. App. 1997)). An appellate court's review is

unique in the context of a First Amendment claim, which requires “an independent examination of the whole record ... to assure ... that the judgment does not constitute a forbidden intrusion on the field of free expression.” New York Times Co. v. Sullivan, 376 U.S. 254, 284-85, 84 S.Ct. 710 (1964).

In the instant case, the University’s determinations that Tatro violated any rules, and even to subject her to discipline in the first place, were arbitrary and capricious, not supported by substantial evidence, and in violation of the University’s own procedures. Furthermore, the effect of the decisions violated Ms. Tatro’s constitutional rights to due process and free speech, and thereby warrant de novo review.

I. THE UNIVERSITY LACKED JURISDICTION UNDER ITS OWN RULES TO CONDUCT A DISCIPLINARY HEARING WHERE THE ALLEGED MISCONDUCT OCCURRED OFF-CAMPUS AND DID NOT VIOLATE ANY CRIMINAL LAWS OR PRESENT A DANGER OR THREAT TO OTHERS, AND WHERE SOME OF THE RULES WERE NOT COVERED BY THE STUDENT CONDUCT CODE.

Not only was the University’s discipline of Ms. Tatro for off-campus actions unreasonable and violation of her privacy, but it also exceeded the University’s authority as proscribed by its own rules. The disciplinary complaint against Ms. Tatro was brought pursuant to the University Student Conduct Code and was based on violations of the Student Conduct Code. (Addendum 7A, 9A). The Student Conduct Code’s statement of its jurisdiction does not extend to Ms. Tatro’s Facebook posts from her home, and does not include discipline for violating rules on a course syllabus.

A. The University Lacked Jurisdiction Over Relator's Off-Campus Conduct.

The Student Conduct Code defines its own jurisdiction as follows:

SECTION II. JURISDICTION.

The Student Conduct Code (Code) shall apply to student conduct that occurs on University premises or at University-sponsored activities. At the discretion of the president or delegate, the Code also shall apply to off-campus student conduct when the conduct, as alleged, adversely affects a substantial University interest and either:

(a) constitutes a criminal offense as defined by state or federal law, regardless of the existence or outcome of any criminal proceeding; or

(b) indicates that the student may present a danger or threat to the health or safety of the student or others.

(Addendum 10A). There was no evidence or suggestion that Ms. Tatro posted her Facebook entries on the University premises or at University-sponsored activities. The University appeared to insinuate that the entries that referenced stabbing constituted a criminal offense, but never cited any criminal law that was violated. The police officers who were contacted by the Mortuary Program administration concluded that no crime was committed. (Hearing Tr. 71; Record Doc. 38, R0117). There was no finding by any of the committees who reviewed the case or the Provost that any criminal law was violated, and no criminal law was ever cited. There are no grounds for concluding that any of the Facebook entries violated any criminal law.

Although neither of the committees that heard this case nor the Provost specifically addressed how there was jurisdiction under Section II of the Code, testimony by faculty at

the hearing suggested a belief that Tatro's Facebook entries presented a threat to their safety. The standard for jurisdiction is whether the conduct "indicates that the student may present a danger or threat to the health or safety of the student or others." There is no reasonable basis for concluding that Ms. Tatro presented and danger or threat to the safety of others. There was no evidence that she had ever done or said anything indicating any intent to harm anyone. The Facebook entries could not be reasonably construed to indicate that Tatro planned to harm anyone.

Faculty who testified indicated two quotes in the Facebook entries that they considered threatening. The most controversial one appeared to be the one that mentioned *wanting* to stab someone in the neck with a trocar. The quote should be read in context:

Who knew embalming lab was so cathartic! I still want to stab a certain someone in the neck with a trocar though. Hmm..perhaps I will spend the evening updating my "Death List #5" and making friends with the crematory guy. I do know the code...

(Addendum 1A). The post is obviously based on any common sense interpretation intended to be satirical, and at worst, its meaning is indecipherable. The specific quote did not even state or even suggest that she intended or planned to stab anyone, but merely that she *wanted* to do so. It did not mention anyone or even suggest any specific person who she wanted to stab. This was a private Facebook post accessible only to Ms. Tatro's Facebook friends and friends of friends. There is no evidence that she intended anyone to feel threatened. There is no evidence whatsoever, either within the post or from any other

statements or behavior by Ms. Tatro that she meant it seriously.

As the dissenting Provost's Appeal Committee member aptly recognized,

the supposed threats in the facebook entries were not credible. The lack of specificity of the alleged target and the conversational tone make it clear that the threat was metaphorical. Furthermore, the current pop culture references (e.g. "Death List #5", in quotation marks, from the movie *Kill Bill*) would be readily recognized by the appellant's college-aged peers (the audience to which the note was drafted) as further indication that the alleged threat was merely a literary device expressing emotion.

(Addendum 40A). The Provost's Appeal Committee's report summarily concluded that this issue lacked merit but failed to provide any explanation for why it rejected the obvious problem with construing this literary expression as a threat to others. (*Id.*) The Provost, in his terse final decision, emphasized that Tatro explained at the hearing that the entry referred to her recently estranged ex-boyfriend. (Addendum 40A). Ms. Tatro, however, did not reveal this information to anyone until she was asked to explain, and so there is no way to conclude from the entry that any specific person could feel threatened. It is further clear in any event that the purpose of the facebook entries were merely to vent and joke.

Director LuBrant also claimed to feel threatened by the first Facebook entry regarding hiding a scalpel in her sleeve. The full entry stated, "Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve..." (Addendum 7A). The construction of this entry as a threat is even more irrational and unreasonable than the entry referencing the trocar. For the reasons

previously stated, it is obvious that the Facebook entries are not meant to be taken literally or seriously. Even if his entry is taken literally, it merely contemplates hiding a scalpel to avoid having it taken away if she is reprimanded.

The interpretation of Tatro's personal and private Facebook entries as threats is unreasonable and irrational on many levels. It is frankly disappointing that various members of the University community are so lacking in social or literary sophistication, and so lacking in respect for freedom of literary expression that they would insist on taking Ms. Tatro's literary expressions seriously, and misinterpreting them in the process. Despite three written decisions in this matter, there was no explanation as to how these Facebook entries could be deemed a threat. The Court need not fill in rationale that the University failed to provide. However, any rationale would not be rational. There were no threats and the University therefore lack jurisdiction to prosecute and discipline Ms. Tatro under its Student Conduct Code.

B. Violation of Course Rules are not Covered by the Student Conduct Code.

The discipline of Ms. Tatro was based in part on alleged violations of two Anatomy Laboratory Rules. The Anatomy Laboratory Rules were part of the syllabus for that course. Based on the Complaint, these violations fall under the Student Conduct Code based on "Subdivision 16. Violation of University Rules." (Addendum 7A). Subdivision 16 provides, "Violation of University rules means engaging in conduct that violates University, collegiate, or departmental regulations that have been posted or

publicized, including provisions contained in University contracts with students.” The Anatomy Laboratory Rules do not fit within any of these categories. They are rules specific to a course as specified in a syllabus. They are not University, collegiate or department-wide regulations. It is therefore in violation of the University’s Student Conduct Code to discipline Ms. Tatro based on these course rules.

The Anatomy Laboratory Rules themselves also provide that the sole sanction for violation is “eviction from the cadaver lab and the course.” The University could therefore place Ms. Tatro on probation and order the other sanctions based on violation of the laboratory rules.

Since the Anatomy Laboratory Rules, which pertained to disrespecting human material and blogging, were a significant basis for disciplining Ms. Tatro, the University’s decision to discipline her is severely tainted by the reliance on rules that were not properly part of the disciplinary process. This error compels reversal of the University’s decision to discipline Ms. Tatro.

II. THE UNIVERSITY FAILED TO PRESENTED EVIDENCE TO SUPPORT A DETERMINATION THAT RELATOR COMMITTED DISCIPLINARY OFFENSES WHERE NONE OF THE ALLEGED CONDUCT VIOLATED THE PLAIN LANGUAGE OF THE RULES CITED.

The University disciplined Ms. Tatro for conduct that it found objectionable and embarrassing by invoking various rules that had remote relationships to her conduct, but did not accurately or reasonably describe her conduct. There is a lack of evidence in the record to support a finding that the specific language of any cited rule was violated.

The first specific rule violation listed against Ms. Tatro was Subdivision 6 of Section V, Disciplinary Offenses, of the Student Conduct Code: “Threatening, Harassing, or Assaultive Conduct. Threatening, harassing, or assaultive conduct means engaging in conduct that endangers or threatens to endanger the health, safety, or welfare of another person, including, but not limited to, threatening, harassing, or assaultive behavior.” (Addendum 7A). The University alleged that Ms. Tatro’s Facebook entries were construed as threats to others. For reasons explained in detail in Argument I.A., supra., the Facebook entries in question could not be reasonably construed as threats. The statements did not identify, describe or provide any basis for concluding that they were directed at any specific person. The entries, when read in context, were obviously literary expression, intended to be satirical, vent emotion, and incorporate popular cultural references. They were intended to be shared with Tatro’s family and friends, and not directed at the faculty that claimed to feel threatened. The most controversial statement about wanting to stab a someone with a trocar, merely indicated *want* and not any plan or intent. Any reasonable construction of the context makes it clear that the entries were not intended to be taken literally or seriously. As also discussed in Argument I.A., supra., it is unfortunate that so many members of the University community lack understanding and appreciation of literary and satirical expression. However, statements that were so obviously not meant to be taken literally, that are not backed by any evidence that they were meant seriously, and even when taken literally, do not evince an intent to harm

anyone, cannot be legally deemed as threats against others that could violate any disciplinary rule.

The remaining substantive rule violations are encompassed within Subdivision 16 of the Student Conduct Code which references other University, Collegiate and Departmental rules. (Addendum 7A).

The next alleged violation is Anatomy Laboratory Rule 6, "Human material should always be treated with the greatest respect." (Addendum 7A). For reasons discussed in detail in Argument I.B., supra., this rule is contained in a course syllabus, and therefore does not qualify as a University, Collegiate or Department rule covered by the Student Conduct Code. Even if this Rule is considered, it is completely unclear how it was violated. The meaning of this rule is unclear, and was never specifically explained at the evidentiary hearing or in any of the findings and decisions. The full rule states, "Human material should always be handled with the greatest respect. The body should be appropriately draped whenever possible." (Addendum 17A). When read in its entirety and based on its plain meaning, it is clear this rule refers to the physical handling of cadavers, and requires that the cadavers and their parts be physically handled with respect.

Although the University seemed to conclude that discussing a cadaver constitutes *handling* human material, the Rule of Lenity requires that where there is ambiguity, "Penal statutes are to be strictly construed with all reasonable doubts concerning

legislative intent to be resolved in favor of the defendant." State v. Coleman, 661 N.W.2d 296, 300 (Minn. Ct. App. 2003)(quoting State v. Wagner, 555 N.W.2d 752, 754 (Minn. Ct. App.1996)). There is no evidence whatsoever that Ms. Tatro ever handled a cadaver improperly. The violations all relate to her Facebook entries, and what she said in reference to cadavers rather than how she handled them. Furthermore, the Facebook entries did not specifically describe any cadavers or body parts, much less describe them disrespectfully. The University failed to provide any justification for finding a violation of this rule, and there is no evidence to support a violation.

The next violation found was Anatomy Laboratory Rule #7, "Blogging about the anatomy lab or the cadaver dissection is not allowable." (Addendum 7A). For reasons discussed in Argument I.B., supra., this rule from the course syllabus does not fall within the jurisdiction of the Student Conduct Code. If the rule is considered, its most fatal flaw is that it does not define "blogging." The faculty member responsible for the rule expected students to look it up in the dictionary, but she deliberately did not provide a definition or direct students to her favored dictionary. McArthur's Webster definition, which she did not share with anyone prior to the hearing was "A website that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer." (Hearing Tr. 193-94). It is at best ambiguous whether Facebook is a blog.⁸

⁸ Webster's dictionary, at least online, does not have a definition for Facebook. However, Dictionary.com defines Facebook as "a popular social networking website." See Dictionary.reference.com/browse/Facebook. The Cambridge Dictionary online

Two of the four members of the PAC believed that “A Facebook entry is not ‘blogging’ . . . It was proposed that there were 1000 University of Minnesota undergraduate students asked is a ‘facebook entry blogging’, 999 would say no.” (Addendum 40A).

As the Conduct Committee Chair conceded at the PAC hearing, if McArthur wanted to prohibit all internet communications about cadavers, she should have said so. It is unreasonable to expect Ms. Tatro to read McArthur’s mind as to the definition of blogging, and to conclude the Facebook entries are blogging when it is completely unclear if the definition fits. It is also unconstitutional to apply a rule prohibiting blogging so broadly beyond any clear common understanding of its meaning. Vague statutes are prohibited under the Due Process Clause of the Fourteenth Amendment. State v. Newstrom, 371 N.W.2d 525, 528 (Minn. 1985). The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Larson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983); City of Mankato v. Fetchenhier, 363 N.W.2d 76, 78 (Minn. Ct. App. 1985). The Rule of Lenity also requires that ambiguity in a penal rule be construed in favor of the accused. Coleman, 661 N.W.2d at 300.

Furthermore, whether Ms. Tatro was considered to be “blogging”, or writing or

defines Facebook as “a website where you can show information about yourself, and communicate with groups of friends, classmates, etc.” See dictionary.cambridge.org/dictionary/british/facebook.

posting on Facebook, she was not discussing “the anatomy lab or the cadaver dissection.” Her references to dissection were vague and unspecific, and not intended to be taken literally. She did not identify any cadaver, did not describe any specific activities or dissection that took place in the anatomy lab. There was no evidence to support a violation of this Rule.

The next violations found involved Mortuary Science Student Conduct Code 1c, “Students shall carry out all aspects of funeral service in a competent and respectful manner,” and 2a, “All deceased persons should be treated with proper care and dignity.” (Addendum 7A). These rule are not applicable because they are contained in the Policies and Procedures for the 2008-2009 academic year, (Addendum 19A), rather than for the 2009-2010 academic year when the incident took place. It is also important to note that 2a is again taken out of context in the Complaint and the findings and decisions issued. The full provision states, “All deceased persons should be treated with proper care and dignity during the transfer from the place of death and subsequent transportation of the remains.” (Addendum 21A). None of the University’s three written findings, recommendations, or decisions explain how Rules 1c or 2a of the Mortuary Science Student Code of Professional Conduct were violated. It is clear that 2a, when read in full rather than taken out of context, applies to how deceased persons should be treated during transport. Since the Facebook entries had nothing to do with transporting the deceased, Rule 2a is wholly inapplicable. Rule 1c specifically applies to the carrying out of funeral

service. Again, the act of posting Facebook entries has nothing to do with carrying out a funeral service. This Rule is also wholly inapplicable. The University's repeated findings and affirmations of Ms. Tatro's guilt of rules that are obviously inapplicable demonstrates how the extensive proceedings utilized were not *due* process, but merely utilized to present an appearance of due process that was not based on substantive deliberations.

The final violation found involved "the rules listed on the Anatomy Bequest Program Human Anatomy Access Orientation Disclosure Form." (Addendum 7A). There was no explanation of how these "rules" were violated in the Complaint, at the hearing, or in any of the University's three written decisions/recommendations. The Form does not appear to list any specific rule, but merely contains acknowledgment that the student has received various materials and information, and is required to follow various rules set forth elsewhere. (Addendum 25A). The University's repeated findings and affirmations of Ms. Tatro's guilt of non-existent rules demonstrates that the decisions driven by a will to punish her without substantive consideration whether there was evidence that she violated rules.

The University's discipline of Ms. Tatro must be reversed and vacated due to the lack of evidence that she violated any applicable rules. Even if the Court somehow found substantial evidence to support violation of some rules, the clear lack of any basis for finding violations of other rules fundamentally undermines the credibility of the

University's decision, and further makes it impossible to determine whether sanctions would have been the same.

III. THE UNIVERSITY'S DISCIPLINE OF RELATOR FOR SATIRICAL FACEBOOK ENTRIES THAT WERE NOT DIRECTED AT AND DID NOT DISCLOSE INFORMATION ON ANY IDENTIFIABLE PERSONS, VIOLATED HER STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO FREE SPEECH.

Ms. Tatro's literary expressions on her Facebook page are constitutionally protected free speech that cannot be disciplined by the University. "The government may not regulate speech based on its substantive content or the message it conveys."

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 828, 115.

S.Ct. 2510, 2516 (1995)(citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96, 92

S.Ct. 2286, 2290 (1972)). "If there is a bedrock principle underlying the First

Amendment, it is that the government may not prohibit the expression of an idea simply

because society finds the idea offensive or disagreeable." DeJohn v. Temple University,

537 F.3d 301, 314 (3rd Cir. 2008)(finding a harassment policy overbroad because it

restricted free speech)(quoting Saxe v. State College Area School Dist., 240 F.3d 200,

209 (3d Cir.2001)(quoting Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533 (1989))).

"The mere dissemination of ideas-no matter how offensive to good taste-on a state

university campus may not be shut off in the name alone of 'conventions of decency.'"

Papish v. Board of Curators of University of Missouri, 410 U.S. 667, 670, 93 S.Ct. 1197

(1973).

The Supreme Court has long held that state-operated Schools may not be “enclaves of totalitarianism,” Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511, 89 S.Ct. 733, 739 (1969), and has recognized the college environment, in particular, to be “the marketplace of ideas.” Healy v. James, 408 U.S. 169, 180, 92 S.Ct. 2338, 2346 (1972). Healy explained, “the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ ” Id. Unlike in an employee-employer relationship, a student’s speech need not be a matter of public concern to be protected from retaliation by a University, but may also be on a matter of private concern. Ovyjt v. Lin, 932 F.Supp. 1100, 1109 (N.D. Ill. 1996).

Ms. Tatro had a constitutional right to use her Facebook page as a literary device to express her emotions, including her feelings about school and how they related to her personal life. Her unspecific and obviously satirical comments which included discussion of a trocar and scalpel did not come close to the sort of “threat” that could be restricted. The Supreme Court has repeatedly affirmed the principle that the government cannot proscribe free expression except for extremely narrow categories of speech that constitute a “true threat” or somehow cause harm without any redeeming value. “Speech is often provocative and challenging.... [But it] is nevertheless protected against censorship or

punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 895 (1949). True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. Virginia v. Black, 538 U.S. 343, 349 (2003). A "true threat," despite being pure speech, lies outside the First Amendment's protection solely because it "play's no part in the "marketplace of ideas." R.A.V. v. City of St. Paul, 505 U.S. 377, 383, 112 S.Ct. 2538 (1992). Rather than contributing to the world of opinion or ideas, a true threat is designed to inflict harm. Thus, true threats are words "which by their very utterance inflict injury." Black, 538 U.S. at 349.

The 8th Circuit has held that in making a true threat inquiry, a court must analyze the the relevant facts to determine "whether the recipient of the alleged threat could reasonably conclude that it expresses 'a determination or intent to injure presently or in the future.'" United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996) (quoting Martin v. United States, 691 F.2d 1235, 1240 (8th Cir.1982)). Dinwiddie set forth a nonexhaustive list of factors relevant to how a reasonable recipient would view the purported threat, which include: 1) the reaction of those who heard the alleged threat; 2) whether the threat was conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history

of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence. 76 F.3d at 925.

Applying the Dinwiddie criteria, only the first one partially supports a threat determination - the faculty who saw the statements claimed to be frightened. However, there was no reasonable basis to from them to determine there was a threat directed at them. The “threat” was conditional in that there was no actual threat, and Tatro only claimed to “want” to stab someone. Ms. Tatro did not communicate the statements directly to the object of the threat - she could not have done so because there was real threat. Ms. Tatro had no prior history of making threats against anyone. There was no reason for anyone who read the statements to believe that the speaker had a propensity to engage in violence. The application of these criteria helps illustrate the lack of any serious basis to construe Tatro’s Facebook entries as true threats.

Writings by students that the 8th Circuit determined to be true threats consisted of detailed narratives which explicitly described brutal acts of violence committed towards a teacher or student who was named or had her identify made clear based on the description. See Doe v. Pulaski County Special School District, 306 F.3d 616, 619, 625-26 (8th Cir. 2002); Riehm v. Engelking, 538 F.3d 952, 958-59, 963-64 (8th Cir. 2002).⁹

⁹ In addition to involving far more explicit threats, Pulaski and Riehm were also in junior high and high school, respectively, and therefore had less constitutional protection than a University student.

Ms. Tatro's references to a trocar and scalpel were not even threats, must less true threats. Her statement about the trocar merely indicated *wanting* to tab someone, without indicating any intent or plan to do so. She did not make any reference to harming anyone with a scalpel. Tatro did not identify or even describe any person who might be harmed. The audience was her friends and family whom she believed understood her sense of humor. The context of the entries makes it clear she intended them as humorous and literary expressions.

The University violated Ms. Tatro's constitutional rights to free speech by disciplining her for statements alleged to be threats, that could not have reasonably been construed as true threats. The University had no remotely arguable constitutional basis for disciplining Ms. Tatro for her other Facebook entries which do not even approximate any exceptions to protected free speech. The University's action against Ms. Tatro is unconstitutional.

IV. THE UNIVERSITY LACKED AUTHORITY TO IMPOSE DISCIPLINARY SANCTIONS THAT INCLUDED CHANGING A PASSING GRADE TO A FAILING GRADE ITS RULES DID NOT AUTHORIZE SUCH A SANCTION.

The changing of Ms. Tatro's grade in MORT 3171 from C+ to failure exceeded the University's authority. The University Student Conduct Code lists permissible sanctions in Section VI. (Addendum 14A-15A). The Policies and Procedures for the Program of Mortuary Science also lists permissible sanctions, which are the same or similar to the sanctions in the University Student Conduct Code but does not include all

the sanctions in the Code. (Addendum 23A-24A). Changing the grade that a student earned in a course is not listed as an option, and does not fit within the description of the sanctions listed in either document.

The PAC justified the failing grade as being consistent with the course syllabus that provides that failure to adhere to the rules could result in “eviction” from the course. (Addendum 39A-40A). As discussed in Argument I.B., the Student Conduct Code does not reference a course syllabus as one of the areas of “University Rules” under its jurisdiction. Since the Student Conduct Code does not specifically or generally authorize changing a grade as a sanction, a proceeding taking place under the Code’s authority cannot impose such a sanction.

Even an interpretation of the plain language of the Anatomy Rules does not authorize this sanction. “Evict” does not mean “fail.” The Webster’s online definition of evict that appears applicable to the anatomy rules is “to force out.” Ms. Tatro had completed all of the requirements of the course and earned a C+ according to her instructor. There is no authority for changing her grade under any rules.

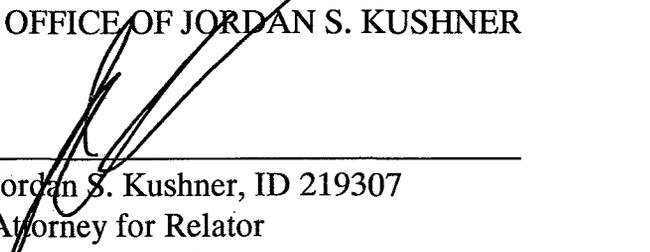
CONCLUSION

For the foregoing reasons, Relator respectfully requests that the decision of the University be reversed with instructions to dismiss all charges, take her off probation if she has not graduated by the time of the Court’s decision, remove and expunge any record of discipline from Relator’s files, change Ms. Tatro’s grade in MORT 3171 back to a C+

while leaving any higher grade that she receives in the make-up course, and awarding Ms. Tatro her costs and attorney fees due to the violations of her constitutional rights pursuant to 42 U.S.C. § 1988.

Dated: December 21, 2010

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By  _____

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