

NO. A10-1440

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State of Minnesota  
*In Court of Appeals*

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Amanda Tatro,

*Relator,*

v.

University of Minnesota,

*Respondent.*

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**RESPONDENT'S BRIEF**

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## STATEMENT OF THE LEGAL ISSUES

1. Did the University of Minnesota Provost act within his discretion in concluding that the University's Student Conduct Code applied to Relator's conduct of posting Facebook messages that violated rules requiring respectful treatment of human donors and that were threatening?

The Provost affirmed application of the Student Conduct Code to Relator's conduct.

### **Apposite cases:**

*Chronopoulos v. University of Minnesota*, 520 N.W.2d 437 (Minn. Ct. App. 1994), *rev. denied* (Minn. Oct. 27, 1994).

2. Must the University's findings of Student Conduct Code violations be affirmed on certiorari review because the findings were nonarbitrary and supported by the evidence?

The Provost affirmed the hearing panel's findings of Student Conduct Code violations.

### **Apposite cases:**

*Chronopoulos v. University of Minnesota*, 520 N.W.2d 437 (Minn. Ct. App. 1994), *rev. denied* (Minn. Oct. 27, 1994).

*U.S. v. Dinwiddie*, 76 F.3d 913 (8<sup>th</sup> Cir. 1996).

3. Were Relator's First Amendment rights violated when she was sanctioned for violating rules regarding human donors and for posting threatening comments on her Facebook page that alarmed faculty and students and that resulted in disruption of the academic environment?

The Provost affirmed the findings and sanctions of the hearing panel.

### **Apposite cases:**

*Morse v. Frederick*, 551 U.S. 393 (2007).

*Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

*Wisniewski v. Board of Education of Weedsport Central School District*, 494 F.3d 34 (2d Cir. 2007).

4. Did the University act within its discretion in assigning a failing grade to Relator in a laboratory course when she violated laboratory rules requiring respectful treatment of human donors?

The Provost affirmed the failing grade.

**Apposite cases:**

*Zellman ex rel. M.Z. v. Independent School District No. 2758*, 594 N.W.2d 216 (Minn. Ct. App. 1999), *rev. denied* (Minn. July 28, 1999).

*Curators v. Horowitz*, 435 U.S. 78 (1978).

**STATEMENT OF THE CASE**

Relator Amanda Tatro, a student in the University of Minnesota's Mortuary Science Program, was cited for violating rules of professional and respectful conduct in the Mortuary Science Program and for making threatening statements in violation of the University of Minnesota Board of Regents Policy: *Student Conduct Code*. The citations were given in writing to Relator on December 29, 2009. (R 0148.) At Tatro's request, the Campus Committee on Student Behavior (CCSB) held an evidentiary hearing on March 25, 2010. (R 0122.) The panel issued its written decision finding that Relator violated the Student Conduct Code and assigning sanctions. (*Id.*) The sanctions included counseling, a directed study in professional ethics, the writing of a letter addressing the issue of respect within the department and the profession, probation, and, as requested by

the instructor, an “F” in the laboratory course in which Relator had failed to meet expectations of respectful treatment of human donors. (R 0122-0127.)

Relator appealed to the University’s Provost, who makes the University’s final decision on Student Conduct Code cases. A hearing was held before the Provost’s Appeal Committee (PAC), an advisory panel to the Provost. The PAC recommended that the CCSB decision be affirmed. (R 0137-0146.) The Provost accepted the recommendations of the appeals committee and affirmed the decision of the CCSB. (R 0147-0147B.)

Relator’s appeal by writ of certiorari followed.

### **STATEMENT OF THE FACTS**

Amanda Tatro is a student in the University of Minnesota Medical School’s Mortuary Science Program. The Mortuary Science Program is a Bachelor of Science program that trains students to become licensed funeral directors. (CCSB Hearing Transcript 43-44.). Students enter the program as upperclassmen. (CCSB Tr. 48.) In Fall 2009, when she engaged in the conduct, Tatro was 28 or 29 years old. (*Id.* at 256.)

#### **Anatomy Bequest Program**

The Anatomy Bequest Program is a program within the Medical School through which persons may donate their bodies for use in education and research. (*Id.* at 112.) Through the Anatomy Bequest Program, human donors are made available to students and researchers for many educational and research purposes, including internal University research, external research, medical education, law enforcement education, and, as here, education in the Mortuary Science Program. (*Id.*) Preservation of the

program and the research and educational missions it serves depends on the trust of the individuals and families who donate their bodies to science and education. (*Id.* at 119, 126.) Respectful treatment of donors is imperative to maintaining the public trust. (*Id.* at 119, 127.)

The Anatomy Bequest Program is a highly regulated and carefully managed program. (*Id.* at 116.) A panel reviews every request for use of a donor to ensure scientific and medical merit. (*Id.* at 117.) Every group approved for access to a donor must undergo an orientation by the Program. (*Id.*) The orientation includes a 14-minute video, in-person orientation by Program personnel, and written affirmation of understanding of the rules. (*Id.*)

#### **Rules of Student Conduct**

With respect to the Mortuary Science Program, donors are used in three laboratory courses, all of which Relator was enrolled in during Fall Semester 2009: Human Anatomy Laboratory; Embalming Theory and Laboratory; and Restorative Art Theory and Laboratory. (*Id.* at 105.) To participate in those courses, Relator received extensive orientation regarding appropriate conduct with respect to donors. Relator's Human Anatomy Laboratory was taught by Angela McArthur, who is also the Assistant Director for the Anatomy Bequest Program. (*Id.* at 112.) The first 3-hour session of McArthur's course was devoted almost entirely to orientation. (*Id.* at 129.) Students watched the Anatomy Bequest Program video, which emphasizes the responsibilities of students in appreciating the gift of access to donors in their education and the requirement to communicate respectfully about the labs and the donors. (*Id.* at 126-127.) The video

gives examples of disrespectful and inappropriate discussion of donors and laboratory practices, including one involving two medical students who were overheard by a potential donor on a bus graphically discussing dissection of a donor. (*Id.* at 128.)

During the orientation, McArthur also reviewed the course syllabus. (*Id.* at 129; R 0067-0074.) She spent approximately one hour discussing the Anatomy Laboratory Rules, which were part of the syllabus. (CCSB Tr. 129; R 0073-0074.) These rules are required minimum components for any course or research program that provides access to human donors. (CCSB Tr. 132.) The rules were created by the Anatomy Bequest Program Proposal Review Committee in conjunction with the Anatomy Bequest Program Advisory Committee, which includes a bioethicist and a donor family member. (*Id.* at 132-133.) They state, in part:

The opportunity to review and dissect the human body is a privilege afforded to students in Mortuary Science and only a couple of other health sciences. It carries with it an important responsibility for treating the person who has given his/her own body to advance our education with utmost respect and dignity.

It is important that each student appreciate the opportunity afforded and observe the following rules which have been set up to promote respect for the cadaver and success for you in the laboratory. Failure to adhere to these rules may result in your eviction from the cadaver lab and the course.

....

6. Human material should always be handled with the greatest respect. The body should be appropriately draped whenever possible.
7. Conversational language of cadaver dissection outside the laboratory should be respectful and discreet. Blogging about the anatomy lab or the cadaver dissection is not allowable.

(R 0073-74.)

As McArthur testified, she went over each of the rules during orientation. She talked about the requirement of respectful and discreet conversational language regarding donor dissection and specifically addressed the prohibition against “blogging” about the anatomy lab or dissection. McArthur informed students that the prohibition applied to Internet postings including Facebook, Twitter, MySpace, and so on. (CCSB Tr. 136; 349-350.)

Tatro received orientation regarding donors not only in her Human Anatomy Lab course but also in Embalming Lab. Jody McCourt, who taught Tatro’s Embalming Laboratory course, testified that the first session of her lab was also devoted to orientation to lab practices and expectations for student behavior. (*Id.* at 199.) McCourt talked to students about professionalism; the fact that donors are not just bodies, they are somebody’s mother, father, child; the great deal of respect expected in the lab; and the requirement that what happens in the lab is not to be discussed outside of the lab. (*Id.* at 200-202.)

In addition to receiving orientation regarding the laboratory rules, Tatro also received orientation to the Mortuary Science Program generally. At the CCSB hearing, another Mortuary Science student testified as to the emphasis on confidentiality and respect in the Mortuary Science Program’s general orientation. (*Id.* at 227-229.) The general orientation included review of the Mortuary Science Student Code of Professional Conduct, which is included in the Mortuary Science student manual. (R 0103-0106.) The Mortuary Science Student Code of Professional Conduct states:

The Board of Regents of the University of Minnesota has established a Student Conduct Code which applies to all students and organizations of the University. In addition to the University's Student Conduct Code, the Program of Mortuary Science maintains a Code of Professional Conduct. The Program's Code of Professional Conduct is based upon the National Funeral Directors Association's Code of Professional Conduct ([www.nfda.org](http://www.nfda.org)). All students enrolled in the Program are required to abide by the requirements stated in the Program's Professional Conduct Code, in addition to those stated in the University's Student Conduct Code.

1. Service to Families

...

- c. Students shall carry out all aspects of the funeral service in a competent and respectful manner.

...

2. Care of the Decedent

- a. All deceased persons shall be treated with proper care and dignity during the transfer from the place of death and subsequent transportation of the remains.

(R 0103.)<sup>1</sup>

Tatro acknowledged in writing that she had received the Mortuary Science student manual, which includes the Student Code of Professional Conduct, that the contents of the manual were reviewed by the Program Director during orientation, and that she would comply with the policies in the student manual. (R 0113.) By signing the acknowledgment form, Tatro also certified that she understood that if she had questions

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<sup>1</sup> Relator notes on appeal that the student manual produced at the CCSB hearing was for academic year 2008-2009. Relator's Br. at 4 n.1. There is no evidence that the relevant provisions of the Student Code of Professional Conduct, which were discussed at the CCSB hearing, changed between 2008-2009 and 2009-2010, and in fact, they did not. See [http://www.mortuaryscience.umn.edu/prod/groups/med/@pub/@med/@mortsci/documents/content/med\\_content\\_292116.pdf](http://www.mortuaryscience.umn.edu/prod/groups/med/@pub/@med/@mortsci/documents/content/med_content_292116.pdf).

on the policies, she was to contact the Program Director for clarification. (*Id.*) Following McArthur's orientation in the Anatomy Lab, Tatro also signed the Anatomy Bequest Program orientation disclosure form. (R 0066.) By signing that form, she acknowledged that she understood that her "access to the human anatomical materials is a privilege," that it was her "responsibility to adhere to the policies of the Anatomy Bequest Program and additional laboratory policies outlined in the course syllabus," and that failure to adhere to the rules and policies regarding human anatomical materials may result in "eviction from the anatomy lab." (*Id.*)

Tatro admitted at the hearing that, despite her written acknowledgement to the contrary, she never read the Mortuary Science Student Code of Professional Conduct, neither at orientation nor any time thereafter. (*Id.* at 297-298.) With respect to the lab rules, Tatro professed confusion regarding the meaning of "blogging," but admitted she asked no questions about it at her lab orientation. (*Id.* at 299; 332-333.) Nevertheless, Tatro acknowledged that she understood that she was restricted from writing about the details of what she did in the lab, and that those restrictions applied as well to Facebook. (*Id.* at 275-277.) Tatro also acknowledged that the "no blogging rule" did not contain an exception for family or friends. (*Id.* at 294.)

### **Tatro's Postings and Response**

Near the end of the semester in December 2009, University administrators were informed of postings that Tatro had made on her Facebook page. According to Tatro, a Mortuary Science student who was also an employee in the Anatomy Bequest Program reported concerns about the posts to the Anatomy Bequest Program. (*Id.* at 260.) These

concerns were reported to the Program's director on Friday, December 11, 2009 (*id.* at 144), and then to Assistant Director McArthur—also Tatro's Anatomy Lab instructor—on Monday, December 14. (*Id.* at 53, 145.)

The Facebook postings, which dated from mid-November into December, stated:

- **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...
- **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.
- **Amanda Beth Tatro** 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...
- **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.

(R 0075.)

After learning of the postings on that Monday, McArthur raised concerns to Mortuary Science Program Director Michael LuBrant. (CCSB Tr. 53.) LuBrant held a meeting of four program faculty members. (*Id.* at 67.) Jody McCourt, the Embalming Lab instructor, was "very upset" by the postings. (*Id.* at 66.) According to LuBrant, McCourt was "visibly shaking." (*Id.*) It was in McCourt's lab class that a "trocar" was used for aspiration. (*Id.*) A trocar is a long, hollow needle made of stainless steel inserted in the body to aspirate gas and fluids. (*Id.* at 202-203.) As McCourt testified at the CCSB hearing, she was very concerned about safety—both for herself and students in

her lab. (*Id.* at 208.) Trocars are not tools that students possess—they are kept in McCourt’s laboratory—and McCourt was concerned about Tatro’s violent reference to use of a trocar when Tatro was to appear in her lab class, with access to a trocar, that Monday afternoon. (*Id.*) Tatro’s reference to hiding a scalpel up her sleeve also concerned the faculty members. (*Id.* at 66.)

LuBrant testified regarding his concerns for safety. Just prior to Tatro’s post regarding stabbing a “certain someone” in the neck, LuBrant had had negative interactions with Tatro concerning a rude note she had left on another University employee’s car windshield. (*Id.* at 56-62.) Tatro had parked in a handicapped parking spot that was paid for and reserved by a disabled University employee. (R 0081.) When that employee came to work and her assigned spot was occupied, she contacted the police, who ticketed Tatro’s car. (*Id.*) Tatro thereafter left a handwritten note on the employee’s car: “You must be very special to have your own designated spot. . . . Again, thank you for being the handicapped parking Nazi. Without you, things would never be the same or function properly.” (R 0082.) The employee sent a memo to the Medical School, asking someone to have a discussion with the student regarding her misdirected anger, error in judgment, and inability to take responsibility for her actions. (*Id.*) When LuBrant dealt with Tatro regarding this incident, Tatro became upset with him. (CCSB Tr. 62-63.) This incident, in addition to information from other people that Tatro was referring to LuBrant when posting about stabbing a “certain someone,” caused him concern that he was the subject of Tatro’s post. (*Id.* at 56, 64.)

Based on faculty concern for safety, LuBrant called the University of Minnesota Police Department. (*Id.* at 67.) An officer came to the building, spoke with LuBrant, and went with him to find Tatro. (*Id.* at 68-69.) LuBrant directed Tatro to stay away from Mortuary Science while the matter was looked into. (*Id.* at 69.) The police officer then met with Tatro. (*Id.* at 70.) The police did not take further criminal action.

The matter was referred to the Director for Office for Student Conduct and Academic Integrity, and a meeting was held with Tatro and University administrators on Wednesday, December 16. (*Id.* at 71.) Tatro was informed she could return to school the following day and complete her classes. (*Id.* at 71-72.)

Tatro's Facebook posts were open to at least hundreds of people. Tatro testified that she herself had "hundreds" of Facebook friends (*id.* at 278), and acknowledged that she had set her Facebook settings set so that not only her "friends" but also the "friends of friends" (including persons unknown to her) would see her posts. (*Id.* at 289.) Tatro also made her posts available to the general public. On Monday, December 14, when she was confronted about them, Tatro contacted the media and shared her Facebook posts. (*Id.* at 280.) Tatro's posts then were aired on local television news programs to the public at large. (*Id.* at 156.)

The University and the Anatomy Bequest Program received negative internal and public feedback concerning Tatro's posts. Program Director LuBrant testified that a funeral director with a clinical affiliation agreement with the University called concerned about whether Tatro had been at his funeral home or had the code for access to its crematory, and the past president of the Minnesota Funeral Directors Association called.

(*Id.* at 80-81.) Angela McCarthur testified that the Anatomy Bequest Program received letters and calls regarding the student's lack of professionalism, poor judgment, and immaturity; others wanted to ensure that Tatro did not handle their loved ones' bodies, and notes had to be placed in each donor file to ensure that would not happen; other donor families communicated that they did not find Tatro's comments to be funny and that they were dismayed by Tatro's media statements that people in the industry needed to have a sense of humor. (*Id.* at 152-156.) McCarthur, who does outreach on behalf of the program, testified that she still has people asking about the Tatro matter. (*Id.* at 154.) One family member whose parents had donated their bodies to the program wrote that she was "horrified by the total disregard and callousness of Miss Tatro." (R 0080.)

### **Disciplinary Action**

The Human Anatomy Laboratory syllabus and rules called for eviction from the lab course for students who violate lab rules. (CCSB Tr. 156-157.) Eviction from the course prior to its completion would result in an "F" grade. (*Id.* at 157.) Because the rules violations did not come to light until the very end of the semester, the instructor, McArthur, let Tatro take the final examination but informed her that if the violations of lab rules were sustained through the disciplinary process, she would recommend an "F" in the course. (R 0115.) Tatro took the final and was assigned a C+, pending disciplinary review. (*Id.*)

The Office for Student Conduct and Academic Integrity sent Tatro written notice of Student Conduct Code violations on December 29, 2009. (R 0148-0149.) While described in detail in that communication, the charges were for (1) threatening, harassing,

and assaultive conduct; and (2) violation of University rules, specifically the Anatomy Laboratory Rules, the Mortuary Science Student Conduct Code, and the Anatomy Bequest Program disclosure form. (*Id.*) Tatro requested a hearing before the CCSB. The hearing took place on March 25, 2010, and Tatro was represented by counsel. The seven-person panel found Tatro responsible for threatening, harassing, or assaultive conduct by a vote of 6-1, and found her responsible for violating University rules by a vote of 7-0. (R 0124-0126.) The CCSB imposed these sanctions:

1. An "F" in the Human Anatomy Lab.
2. Completion of a directed study course in Clinical Ethics in the Center for Bioethics.
3. A letter to one of the faculty members in the Mortuary Science department addressing the issue of respect within the department and the profession.
4. A psychiatric evaluation at the student health services clinic and completion of any recommendations made by their evaluation.
5. Probation for the student's remaining undergraduate career at the University.

On appeal, the Provost affirmed the decision of the CCSB. (R 0147-0147B.)

### **STANDARD OF REVIEW**

This is an appeal by writ of certiorari from the final decision of the University of Minnesota imposing sanctions upon a student under the University's Student Conduct Code. Certiorari review of a University of Minnesota student discipline decision:

is limited to an inspection of the record of the administrative tribunal, and this court is confined to questions affecting the regularity of the proceedings and, as to the merits of the controversy, whether the determination was arbitrary, unreasonable, fraudulent, made under an erroneous theory of law, or without any evidence to support it.

*R.T. v. Univ. of Minn.*, 2002 WL 1275663 at \*1 (Minn. Ct. App. June 11, 2002)

(unpublished decision) (quoting *Chronopoulos v. Univ. of Minn.*, 520 N.W.2d 437, 441 (Minn. Ct. App. 1994), *rev. denied* (Minn. Oct. 27, 1994)).

In reviewing a student discipline decision, “This court must give great deference to University decisions affecting the University community.” *Id.* at \*1. Public schools and universities have “comprehensive authority” to prescribe and control student conduct, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969), and their judgment is owed great deference by reviewing courts. “Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment . . . .” *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985). It is not the role of the courts “to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. . . . The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators.” *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

## **ARGUMENT**

### **I. Relator's Conduct Fell Within the Scope of the University's Student Conduct Code.**

Relator's argument that her conduct fell outside of the scope of the University's Student Conduct Code is without merit. The Provost acted within his discretion in concluding that the Code applied.

#### **A. The Student Conduct Code Applied to Relator's Rules Violations.**

Relator was cited for violating two provisions of the University's Student Conduct Code: (1) violating University rules, and (2) engaging in threatening conduct. The first, violation of University rules, draws within the scope of the Student Conduct Code any rules that are published or publicized to the student:

**Subd. 16. Violation of University Rules.** 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. (Relator's Addendum 13A.)

Tatro was cited for violating the Mortuary Science Program's Student Code of Professional Conduct, a code that is included in the Mortuary Science student manual and that Tatro acknowledged receiving in writing. (R 0113.) Tatro was also cited for violating the Anatomy Laboratory Rules. Those rules were required by the Anatomy Bequest Program for students given the privilege of access to a donor; they were part of the course syllabus for Human Anatomy Laboratory in Mortuary Science; they were provided in writing to Tatro and discussed at length in her laboratory orientations; and Tatro acknowledged in writing that she received the rules. (R 0066.) Last, Tatro was cited for violating the provisions of the Anatomy Bequest Program Human Anatomy

Access Orientation Disclosure Form. That form was required by the Anatomy Request Program for any person given access to a donor; emphasized the “important responsibility for treating the person who has given his/her own body to advance your education and research with the greatest respect;” and imposed the “responsibility to adhere to the policies of the Anatomy Bequest Program and any additional laboratory policies outlined in the course syllabus.” (R 0066.) Tatro signed the form, acknowledging her “compliance and comprehension of the rules.” (*Id.*)

Relator argues that the University lacked jurisdiction because the Anatomy Laboratory Rules do not constitute University rules since they were part of a course syllabus and course syllabi are not “University, collegiate or department-wide regulations.” *Id.* at 27 (emphasis added). The Student Conduct Code does not require that regulations be University, collegiate or department-*wide*—the word “-wide” appears nowhere in Subdivision 16. The term “University rules” applies to course syllabi as well as other rules that govern student behavior and are communicated to students. The Provost acted within his discretion in concluding that the laboratory rules imposed in a University course are indeed “University rules” and are subject to enforcement under the Student Conduct Code. That conclusion is only strengthened by the fact that the laboratory rules were required by the University’s Anatomy Bequest Program to be part of any course or program using a human donor, which included all of Tatro’s laboratory courses.

**B. The Student Conduct Code Applied to Tatro's Threatening Communications.**

The Provost also acted within his discretion in concluding that Relator's threatening comments on her Facebook posts fell within the jurisdiction of the Student Conduct Code. The Student Conduct Code prohibits:

**Subd. 6. 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. (Relator's Addendum 13A.)

The Code defines its jurisdiction as "student conduct that occurs on University premises or at University-sponsored activities," as well as

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. (Relator's Addendum 10A.)

The Student Conduct Code applied to Tatro's threatening Facebook posts whether they constituted "on-campus" or "off-campus" conduct. As further described in Section II below, Relator engaged in threatening behavior that indicated a threat to health and safety, alarming faculty and students and affecting the interests of the Mortuary Science Program.

**II. The CCSB's and the Provost's Findings Were Supported by the Evidence.**

Under the deferential standard of certiorari review, the Court may not substitute its judgment for that of the decision maker below, but is confined to deciding whether a

decision was arbitrary or without any evidence to support it. *Chronopoulos v. Univ. of Minn.*, 520 N.W.2d 437, 441 (Minn. Ct. App. 1994), *rev. denied* (Minn. Oct. 27, 1994).

The CCSB hearing included testimony from Mortuary Science Director Michael LuBrant, the assistant director of the Anatomy Bequest Program and human anatomy course instructor Angela McArthur, embalming lab instructor Jody McCourt, another Mortuary science student, and Tatro herself. The evidence more than justified the findings of violations and the educational, counseling, and probation sanctions that were imposed as a result.

**A. The Evidence Supported the Finding that Tatro Violated University Rules.**

The evidence amply established that Tatro violated rules requiring professional conduct and respectful treatment of donors when she posted flippant and highly disrespectful comments about donors to the at least hundreds of people with access to her Facebook page and later shared those comments with the media for dissemination to the broader public. As the Provost observed, “The clear intent of the anatomy lab rules and the mortuary science student conduct code is that all matters related to the lab, both in and outside the lab must be taken seriously, done respectfully, and communicated about in a respectful and professional manner.” (R 0147B.) Tatro’s conduct was, the Provost concluded, “unprofessional” and “disrespectful,” in violation the conduct rules.

The CCSB found that Tatro violated Anatomy Laboratory Rules 6 and 7:

6. Human material should always be handled with the greatest respect. The body should be appropriately draped whenever possible.

7. Conversational language of cadaver dissection outside the laboratory should be respectful and discreet. Blogging about the anatomy lab or the cadaver dissection is not allowable. (R 0073-74.)

This finding was supported by the testimony of instructor Angela McArthur, who provided extensive orientation to Tatro concerning appropriate conduct relative to donors. Going through the posts, McArthur explained why Tatro's unprofessional and disrespectful posts did not constitute handling human material with the greatest respect, or respectful and discreet conversational language regarding dissection, and why they directly violated the prohibition against blogging about the anatomy lab or the cadaver dissection. (CCSB Tr. 146-51.) Tatro's referral to dissection of a human donor as "playing with Bernie;" her referral to her embalming lab as "embalming therapy;" her comment about taking out her aggression in performing an aspiration on a donor—"Give me room, lots of aggression to be taken out with a trocar;" her flippant reference to "her best friend, Bernie"—named after a cadaver in a movie comedy; and her suggestion that she was keeping a "lock of hair in my pocket" before the donor was sent for final disposition were insensitive, unprofessional, and immature comments that no one, especially a Mortuary Science student who had received extensive orientation, reasonably could have believed were anything other than unprofessional and disrespectful.

And, in fact, although denying violation of the rules, when Tatro was asked how a person who had a loved one as a donor might think of her Facebook messages, she acknowledged, "As an outsider looking in, and you could see those posts and you could say, okay, this -- this isn't right, somebody is angry or somebody is doing this or that, I could understand how someone who doesn't know me, is not familiar with my -- my

sarcasm, my sense of humor, my -- I could understand how that can be perceived in a totally different light.” (*Id.* at 287.) And when asked whether any of her comments were off-color, Tatro responded, “To people outside my kind of immediate circle, yes . . . .” (*Id.* at 301.)

Tatro’s defense is based on a cramped reading of the rules which, as the Provost observed, misses the point regarding the expectation of respectful conduct for students working with human donors and training to become professionals dealing with deceased persons and their families. (R 0147B.) Tatro argues that the Rule #6, “Human material should only be handled with the greatest respect,” is limited to the physical handling of the body. Relator’s Br. at 29. The testimony of both Relator’s instructors, McArthur and McCourt, however, established that students, including Tatro, were clearly informed that respectful treatment of donors extended beyond physical treatment of the body to other physical behavior and verbal conduct in and outside of the laboratory. (CCSB Tr. 126-137; 200-202.) Moreover, the introductory paragraph in the Laboratory Rules explained that the privilege of access to a donor for educational purposes “carries with it an important responsibility for treating the person who has given his/her own body to advance our education with utmost respect and dignity.” (R 0073.) Public comments of working out aggression on a donor, keeping a donor’s lock of hair, and “playing” with a donor did not treat the donor with respect and dignity and constituted disrespectful handling of human material.

The Court should reject Relator’s invitation to apply the penal law to student discipline and find the definition of “handling” to be ambiguous and therefore not

applicable to Relator's conduct. As the United States Supreme Court wrote in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), rejecting a student's argument that he did not know his speech could subject him to discipline, "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions."

With respect to Rule #7, Relator argues that her postings on Facebook did not constitute "blogging" and in any event "did not describe any specific activities or dissection that took place in the anatomy lab." Relator's Br. at 30-32. The argument is without merit. First, Rule #7 is not limited to "blogging." The first sentence of that rule states that "[c]onversational language of cadaver dissection outside the laboratory should be respectful and discreet," and the conversational language in Tatro's posts clearly was not. Second, as McArthur testified, the term "blogging" was used in the rules without specific reference to particular platforms (Facebook, MySpace, etc.) so as to state a broader principle of conduct that was not tied to the particular technology of the day. (CCSB Tr. 168-169.) The term "blog" carries the dictionary definition of "a website that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer." (*Id.* at 193.) That definition is sufficiently broad to cover Facebook's functionality of posting comments and reflections on a website, as Tatro did here. In any event, McArthur testified that she explicitly told students during orientation that "blogging" included all modalities such as Facebook, Twitter, MySpace, etc., and Tatro signed the orientation form indicating her understanding of the Rules (*Id.* at 136; R

0066). Third, Tatro acknowledged at the CCSB hearing that she understood that there were, in fact, limitations on what she could write on Facebook (CCSB Tr. 275-277), so she cannot argue now that her postings were outside the scope of the rule requiring respectful conversation about donors because they were made on Facebook rather than some other website.

The CCSB's finding that Tatro's conduct violated the Anatomy Bequest Program Human Anatomy Access Orientation Disclosure form, too, was supported by the evidence. The form stated that the privilege of reviewing and dissecting the human body "carries with it an important responsibility for treating the person who has given his/her own body to advance your education and research with utmost respect and dignity." (R 0066.) By signing it, Tatro confirmed that she understood her "responsibility to adhere to the policies of the Anatomy Bequest Program and additional laboratory policies outlined in the course syllabus." (*Id.*) Tatro's disrespectful comments regarding the donor and lab practices did not treat the donor with the "utmost respect and dignity" and were in clear violation of the Anatomy Bequest Program and laboratory policies.

The CCSB also found that Relator violated the Mortuary Science Student Code of Professional Conduct: "Students shall carry out all aspects of the funeral service in a competent and respectful manner" (R 0103), and "All deceased persons shall be treated with proper care and dignity during the transfer from the place of death and subsequent transportation of the remains." (R 0103.) Treatment of decedents with respect, proper care, and dignity is not limited to just a one-hour memorial service or the minutes during which the donor is in moving transit. Rather, the professional rules of conduct—which

students are expected to learn and be guided by throughout their professional career—require respectful treatment of decedents throughout their presence at the University of Minnesota until their ultimate disposition, including their embalming.

Tatro's violations of the rules regarding respectful treatment of donors were flagrant and repeated. The Provost acted within his discretion in affirming the CCSB's finding that Tatro violated University rules. The sanctions imposed on Tatro were justified based on the finding of rules violations alone.

**B. The Evidence Supported the Finding that Tatro Engaged in Threatening Conduct.**

The evidence also supported the finding that Tatro engaged in threatening behavior. Tatro broadcast on her Facebook page:

- **Amanda Beth Tatro** 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...

Tatro also made reference in another post to hiding a scalpel up her sleeve. These comments greatly alarmed the faculty in the Mortuary Science program.

Jody McCourt, the instructor in the lab course in which trocars are used, testified that reading the "stab a certain someone in the neck" post made her "very upset," it made her "heart race," and it caused her to get "sweaty" and "feel really uncomfortable." (*Id.* at 208.) Tatro was in her lab class, where Tatro had access to a trocar. (*Id.*) Director LuBrant testified that the post raised the concern that Tatro "may want to use a trocar to injure another student and/or the lab instructor." (*Id.* at 75.) LuBrant testified that McCourt was "visibly shaking, she was very upset" when she saw the posts. (*Id.* at 66.)

Tatro herself, when asked at the CCSB hearing whether she believed McCourt when she said she was scared by the post, said, “Yes. She had a physiological reaction to that. You can’t fake that.” (*Id.* at 280.)

All four faculty members were unanimous that police should be called when they learned of the posts. As LuBrant testified, “Our biggest concern was what was the potential for threat, you know? There have been lots of instances of violence on campuses, and we’re all acutely aware of that, and we wanted to make sure that if there was a potential threat for violence that we in fact did the appropriate thing to address that early on, and calling the police we agreed was the appropriate action.” (*Id.* at 68.) LuBrant was personally concerned about his own safety, given Tatro’s reaction to him when he intervened concerning the note Tatro left on the car of a disabled University employee, and in light of reports within the program that Tatro’s comment about stabbing a “certain someone” related to him. (*Id.* at 56-64.)

In addition, the student president of the Mortuary Science student association testified that students expressed concern to him about feeling fearful because of Tatro’s comments. (*Id.* at 246.) He quoted one student in particular who talked about her fear of being threatened with physical violence. (*Id.*)

Tatro’s language and the impact of that language on others amply supported the conclusion that the comments were threatening. Tatro’s arguments to the contrary are unavailing. Tatro argues that her comment was not directed at a specific person and therefore could not have been threatening. In the hearing, however, Tatro acknowledged that she was directing her comment at a specific person—a former boyfriend she

expected to read her Facebook posts. (*Id.* 265-66.) The fact that she did not identify the “certain someone” she wanted to stab in the neck with a trocar did not allay the concern that she had physical violence in mind with respect to a specific person—not knowing who that person was only heightened the concern for all students and faculty.

Tatro’s argument that anyone of “social or literary sophistication” would have understood this post to constitute “satire” and “literary expression” is meritless. On their face, the Facebook posts reveal no evidence of satire or literary worth, and the testimony more than established that the posts were not so understood and that the safety concerns raised by the posts were not arbitrary.

Tatro argues that this post was a “private Facebook message,” Relator’s Br. at 24, intended only for “friends and family,” *id.* at 2, and therefore could not have been considered threatening. This claim flies in the face of the evidence. Tatro acknowledged that her Facebook page was available not only to her own Facebook “friends,” which numbered in the hundreds, but also to the Facebook “friends” of Tatro’s “friends,” which would include total strangers to Tatro and would presumably number in the many, many hundreds. (*Id.* at 289.) Moreover Tatro knew that the posts would reach the Mortuary Science program, because, as she testified, she “knew all of the Mort Sci kids would see it.” (*Id.* at 266.) In addition, the faculty members, using their own Facebook accounts, had access to Tatro’s posts and were able to view them directly when reported to them by a student. (*Id.* at 164.) Tatro’s attempt to characterize her posts as “private” communications only to close friends and family who would understand her particular sense of humor fails.

Tatro also argues that no threat could reasonably have been perceived because she wrote about “wanting” to stab someone, not “intending” to stab someone. Relator’s Br. at 24. It was not arbitrary, however, for the hearing panel to conclude that the expressed desire to stab someone with a laboratory tool available to the student in class was threatening and intimidating to University staff and students, even if Tatro did not use the word “intend.” In the Eighth Circuit case cited by Relator, *U.S. v. Dinwiddie*, 76 F.3d 913 (8<sup>th</sup> Cir. 1996), the Court found a “threat of force” under a federal statute providing criminal and civil remedies for intimidating a provider of reproductive health services, even though the defendant “did not specifically say . . . ‘I am going to injure you.’” *Id.* at 925. What matters, the Court held, were the manner in which the statements were made, the context in which they were made, and the reaction to the statements. *Id.* Here, Tatro’s violent statements about stabbing, death, and a crematory, broadcast on a Facebook to an audience that included University students and faculty who did not know Tatro personally, and that upset both students and staff, were reasonably found to constitute threatening conduct.

That the University found the statements to be threatening is reflected in the sanction that Tatro undergo a psychiatric evaluation and fulfill any recommendations made as a result. (R 0126.) The University did not expel Tatro. It responded to her disturbing and threatening conduct with a measured response directed at promoting her well-being and ensuring campus safety. Colleges and universities need the flexibility to apply a range of sanctions to different levels of threatening behavior, so they can address

problems before conduct becomes so dangerous that the only reasonable response is expulsion.

### **III. The University Did Not Violate Tatro's First Amendment Rights.**

The application of the Student Conduct Code to Tatro's communications did not violate Tatro's First Amendment rights.

#### **A. The University's Enforcement of Rules Requiring Respectful Treatment of Donors Does Not Violate the First Amendment.**

Tatro did not have a First Amendment right to violate the rules regarding respectful conversation and treatment of donors. Tatro chose to enter the Mortuary Science program, which included the privilege of access to a donor for educational purposes. By entering the program and participating in laboratory courses involving donors, Tatro agreed to be bound to the rules of professionalism and respectful treatment of donors that were established in the Mortuary Science student code of professional conduct and that were conditions on access to a human donor for educational purposes. The First Amendment does not immunize all student expression except threats. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the United States Supreme Court upheld discipline of a student who used lewd language in a speech at a school assembly. The Court recognized that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 683; *see also Morse v. Frederick*, 551 U.S. 393, 404 (2007) (holding that schools may regulate speech in appropriate circumstances even when it is not disruptive). Rules implemented to

facilitate the educational process and to educate students regarding the standards of conduct acceptable in their profession are not unconstitutional.

**B. The University's Enforcement of the Rule Prohibiting Threatening Conduct Did Not Violate the First Amendment.**

Tatro's threatening communications likewise were not protected by the First Amendment. No matter what the standard for evaluating student expression, it was met here.

Tatro argues that her expression was constitutionally protected unless it constituted a "true threat," relying on the Eighth Circuit case of *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8<sup>th</sup> Cir. 2002). In that case, the Eighth Circuit upheld a school's expulsion of an eighth-grade boy who had written two letters to a former girlfriend that described how he would rape and murder her. *Id.* at 619. While the letters were never sent, the boy's friend found the letters in the boy's bedroom, and the boy let his friend read them. The friend shared the contents with the girl, and ultimately a report was made to the school.

The Eighth Circuit applied a "true threat" analysis, derived from the criminal law, to evaluate the school's action. *See id.* at 622-23 (applying *Watts v. U.S.*, 394 U.S. 705 (1969) (statute criminalizing threats against the President), and *U.S. v. Dinwiddie*, 76 F.3d 913 (8<sup>th</sup> Cir. 1996) (statute criminalizing threats of force that intimidate providers of reproductive health services)). The Court found that the student communicated the threat, even though his friend had snatched the letters from the boy's bedroom, when he then permitted the friend to read the letters and thereafter discussed their contents with

his former girlfriend. *Id.* at 625. The student knew there was a good possibility his friend would share the letter with the girl. *Id.* The Court concluded that “[o]ne can hardly say,” based on the circumstances, that the boy “intended to keep the letter, and the message it contained, within his own lockbox of personal privacy.” *Id.* The Court went on to find that a reasonable recipient of the letter would find it threatening. *Id.*

Here, Tatro did not keep her thoughts within a “lockbox of personal privacy.” On the contrary, she expressed them on Facebook to hundreds of persons, including persons unknown to her as well as all the students in the Mortuary Science program. The language of the posts themselves and the reactions to the posts established that reasonable recipients felt threatened by their contents.

Even though Tatro’s posts reasonably could be considered “true threats,” that is not the constitutional standard that applies. This Court has not applied the “true threat” standard, and would be better guided by other legal authority applying a more appropriate standard in an educational setting. The Second Circuit, in *Wisniewski v. Board of Education of Weedsport Central School District*, 494 F.3d 34 (2d Cir. 2007), refused to apply the “true threat” standard to a school case: “[W]e think that school officials have significantly broader authority to sanction student speech than the Watts standard allows.” *Id.* at 38. The Court held that the appropriate standard is that established by the Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), namely, substantial disruption of the work or discipline of the school. *Id.* In *Wisniewski*, an eighth-grader was suspended for sharing with friends, via the Internet, a small drawing suggesting that a particular teacher should be shot and killed.

While the drawing was not made at or distributed at school, the Court concluded that “it was reasonably foreseeable that [the student’s] communication would cause a disruption within the school environment.” *Id.* at 35. The Court concluded, even if the drawing could be viewed as an expression of opinion, it crossed the boundary of protected speech when it disrupted school activities and could be grounds for discipline. *Id.* at 39.

Here, Tatro’s posts, which were available to students and faculty alike, disrupted school activities: they caused serious concern for safety on the part of faculty and students; they resulted in the calling of University police; and they required the University to respond to calls from funeral directors and others concerned about the behavior.<sup>2</sup> These posts were not protected speech under the First Amendment.

This is not a criminal case, nor is it a student expulsion case. Tatro was not dismissed from the program. She was assigned a failing grade for failing to meet expectations in the laboratory course and required to complete a directed study in clinical ethics, write a letter on the issue of respect within the department and profession, and be evaluated by a psychiatrist at the Student Health Service. She was also placed on probation. (R 0126-0127.) These sanctions responded to Tatro’s failure to meet educational and behavioral standards closely tied to the Mortuary Science Program, fostered Tatro’s personal and professional development and success in the program, and

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<sup>2</sup> Even substantial disruption, however, should not be required when the expression conflicts with the educational mission. In *Morse v. Frederick*, 551 U.S. 393 (2007), the United States Supreme Court reviewed school speech cases and concluded that even “substantial disruption” is too high a standard for student discipline. *Id.* at 416-18. The Court held that other valid educational interests may justify restrictions on student expression.

were directed at promoting campus safety. Whether Tatro's conduct is evaluated as a "true threat" or substantial disruption or as conflicting with the University's educational mission, it was constitutionally addressed through these sanctions.<sup>3</sup>

#### **IV. The University Acted Within its Discretion in Assigning a Failing Grade.**

The University did not act arbitrarily or beyond its discretion in assigning Tatro a failing grade in her Human Anatomy Laboratory course.

In *Zellman ex rel. M.Z. v. Independent School District No. 2758*, 594 N.W.2d 216, 219 (Minn. Ct. App. 1999), this Court upheld a failing grade for student who plagiarized in violation of course guidelines. *Id.* at 219. In evaluating the sanction on certiorari review, the Court warned, "Judicial intervention in the public school system requires restraint. The judiciary should exercise even greater restraint in cases involving academic discipline in contrast to expulsions or suspensions." *Id.* at 220 (citing *Curators v. Horowitz*, 435 U.S. 78, 87-91 (1978)). The Court stated that a school's decision satisfies substantive due process unless it is "arbitrary, capricious, or unreasonable," meaning it is "willful and unreasoning, without consideration of the facts and circumstances." *Id.* at 221 (citations omitted).

Here, the syllabus for Human Anatomy Laboratory course expressly included compliance with the Anatomy Laboratory Rules. (R 0067-0074.) The syllabus stated that failure to adhere to the rules could result in eviction from the course. (R 0073.) Tatro violated the rules before the end of the course. As the instructor, Angela McArthur

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<sup>3</sup> Relator's request for attorney's fees under 42 U.S.C. § 1988, *see* Relator's Br. at 40, exceeds the bounds of this case, since this case was not brought under 42 U.S.C. § 1983.

testified, immediate eviction would have resulted in an "F" on the final and an "F" in the course. (CCSB Tr. 284.) Although Tatro could have been immediately evicted from the course, McArthur let her take the final, but advised her that a finding that she violated lab rules would result in an "F." (R 0115.) The "F" sanction thus accorded with the faculty member's recommendation and was consistent with the syllabus.

Tatro's failing grade was consistent with clearly expressed course expectations, it followed a full evidentiary hearing, and it was a reasonable sanction to address the misconduct.

### CONCLUSION

The Provost acted within his discretion affirming the CCSB's findings that Tatro's conduct violated the University's Student Conduct Code and the CCSB's imposition of sanctions to address the misconduct and foster Tatro's success in the academic program. His decision should be affirmed.

Dated: January 24, 2010

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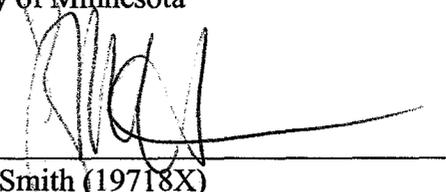
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