THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JOHN DOE, Appellant, v. ARIZONA BOARD OF REGENTS, Appellee.	NO. LC2017-000365 (Assigned to Honorable Patricia Starr)

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Appellant, a student at Arizona State University ("ASU" or "the University"), was expelled from ASU December 2016 after a biased, botched investigation of sexual misconduct allegations. After an administrative appeal, where ASU violated his due process rights and disregarded its standards and procedures, his discipline was upheld. Appellant asks to set aside ASU's decisions as contrary to law, arbitrary and capricious, abuses of discretion and unsupported by substantial evidence.

II. STATEMENT OF THE CASE

Appellant seeks administrative review of disciplinary decisions issued by ASU, an entity governed by the Arizona Board of Regents ("ABOR"), on June 27, 2017, and August 30, 2017.

In April 2016, Appellant attended a get-together at an off-campus residence, where ASU alleged he committed sexual misconduct against a female ASU student ("Complainant") and an alcohol infraction. Tempe Police Department ("Tempe PD") was notified, immediately investigated, and declined to charge Appellant. Almost six months later, Complainant notified the University she did not consent to the sexual

encounter, which then began investigating potential Student Code of Conduct ("SCC") violations. ASU advised Appellant by letter that Complainant reported she was intoxicated when they had sex and thus could not consent. The notification letter contained no factual basis for an alcohol violation, just a citation to the SCC. ASU informed Appellant by letter dated December 22, 2016, that he violated the SCC by engaging in sex with a woman he knew was incapacitated and by providing alcohol to Complainant, a minor. ASU expelled Appellant, who appealed. ASU held an evidentiary hearing before the University Hearing Board ("UHB" or "Board") on May 23, 2017.

After hearing from Complainant, Appellant, and others, the UHB, finding Complainant lucid, concluded ASU failed to prove incapacitation. The UHB instead found Appellant used force during the encounter, although force was never alleged, charged, or litigated at the hearing. The UHB recommended expulsion, and referred the case to James Rund ("Rund"), an ASU Senior Vice President, for a final ruling. On June 27, 2017, Rund affirmed the UHB's findings on force without comment; reversed on the incapacitation issue, finding Complainant was incapacitated; and upheld the expulsion sanction. Appellant moved

for Review and Rehearing on August 2, 2017, which Rund denied on August 30, 2017. In this ruling, Rund elaborated on his incapacitation findings; summarily re-affirmed the force finding; and expelled Appellant from any institution governed by the ABOR. Appellant initiated this appeal on September 29, 2017, under A.R.S. § 12-901, *et seq.*

III. STATEMENT OF THE FACTS

1. On April 2, 2016, Appellant, a student at ASU, engaged in sexual activity with Complainant.[1] Two days earlier, Appellant and Complainant, who had been "talking" via social media and demonstrated an attraction to each other,[2] met in person for the first time.[3] They went to a late dinner with no drinking and returned to

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[1] ROR 0106. (ROR refers to the Institutional Record on Review for Doe [Page Number])

[2] Girlfriend Interview with University Investigator (October 6, 2016) ("Girlfriend Int. with ASU"), 28:10. *See also* ROR 1268. Any statements attributed to any party's interviews with ASU's investigator are based solely on Appellant's counsel's written notes of the recordings. ASU never released the interview recordings to Appellant—even his own—despite his repeated requests under the Family Educational Rights and Privacy Act (FERPA) to obtain them. Appellee is in possession of this evidence should the court desire to verify the veracity of the statements attributed to it.

[3] ROR 0102.

Complainant's apartment, where she voluntarily performed oral sex on Appellant,[4] after telling him earlier she would not have sex with him that night.[5] Two days later (April 2), Appellant invited Complainant to an off-campus house for a small gathering of six people.[6] She agreed, arrived, and joined a drinking game with Appellant and two others, Resident-1 and Participant.[7] Complainant drank two shots of UV Blue (a 60-proof vodka, or about 25% less alcohol than traditional vodkas, *see* https://www.uvvodka.com/products/blue) during this game.[8] In text messages inviting her friend, Girlfriend, to the residence, Complainant claimed she had consumed five drinks[9] but testified she was not drunk

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[4] *Id.*, 0514.

[5] Complainant Interview with Officer Kelly Tyrrel (2) (April 3, 2016) ("Comp. Int. with Tyrrel (2)"), 06:23; all audio files cited herein are attached to attached to ROR 1162 (Exhibit 83).

[6] ROR 0102. Appellant was a guest at the house and did not own or purchase any of the alcohol consumed.

[7] *Id.*, 0106.

[8] *Id.*, 0116; *see also* Complainant's Confrontation Call with Participant (April 3, 2016) ("C.C.C. 2"), 03:55.

[9] *Id.*, 1358.

when she sent the error-free[10] texts[11]; Resident-1 and Appellant say Complainant consumed 2-3 drinks before Girlfriend arrived.[12]

2. About 50 minutes later, Resident-2, who remained sober the entire night, arrived.[13] Shortly thereafter, he heard Complainant say she would hold off on drinking until her friend arrived.[14] Her speech was clear and there is no indication she slurred at any point that night.[15] Girlfriend arrived 15 minutes after Resident-2, and noticed Complainant was "a little bit buzzed."[16]

3. After Girlfriend arrived, Complainant claims she consumed two additional UV Blue shots,[17] though Girlfriend says they consumed just one drink together.[18] The high end of the observations is

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[10] ROR 1356-59.

[11] *Id.*, 1683.

[12] Resident-1 Interview with University Investigator (October 5, 2016) ("Res. 1 Int. with ASU"), 04:10.

[13] ROR 0115.

[14] *Id.*

[15] *Id.*, 1875.

[16] *Id.*, 0115.

[17] *Id.*, 1297.

[18] *Id.*, 1196-97; *see also* Girlfriend Int. with ASU, 11:57.

Complainant's own estimate of seven UV Blue shots,[19] which equates to 5.25 standard drinks because of the reduced alcohol content. Others (who unlike Complainant do not claim to be incapacitated that night) say her total was 4-5 shots of UV Blue,[20] which equates to 3 to 3.75 standard drinks. The range of consumption during the 2¾-hour event (9:36 p.m. arrival and 12:20 a.m. departure[21]) is 3 to 5.25 drinks.

4. The group was having fun, conversing and posing for photos, including the two below. The first is a "selfie" Complainant took with Girlfriend minutes before she began dancing with and kissing Appellant and Participant, approximately 35 minutes before entering the bedroom.[22] Figure 1:

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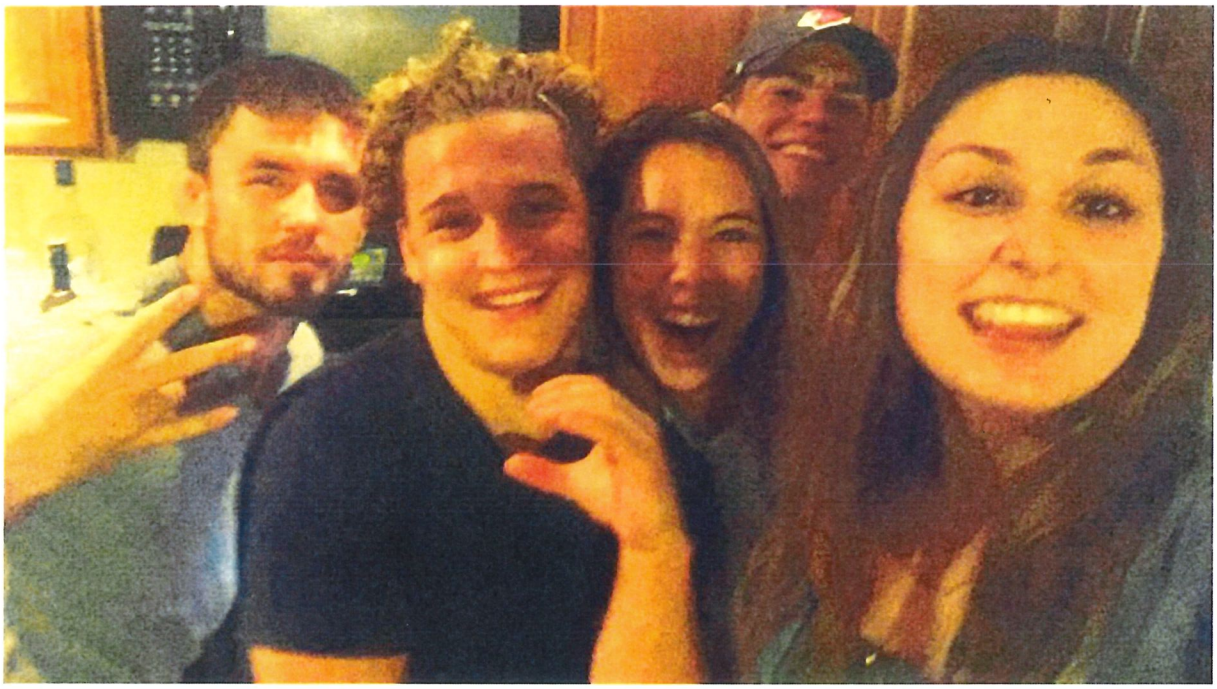
[19] *Id.*, 1297.

[20] *Id.*, 1303.

[21] *Id.*, 1125.

[22] ROR 1352.

The second is a group photo showing the attendees at the get-together (except Resident-2).[23] Figure 2:



[23] *Id.*, 1363.

5. Despite omitting it from four previous interviews (and Girlfriend not recalling it and Appellant denying it occurred), Complainant—208 days after the encounter—alleged for the first time that Appellant made a sexual overture in a bedroom shortly after Girlfriend arrived.[24] She declined and rejoined the group without mentioning the advance.

6. After the photos, everyone mingled or danced, culminating in Complainant grinding (back-to-front sexual dancing) "all over"[25] Participant and Appellant.[26] She moved easily between Participant and Appellant, in full view, without stumbling,[27] vomiting,[28] acting nonsensically, or exhibiting symptoms of incapacitation.[29] Complainant kissed both males,[30] and danced for 25-30 minutes.

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[24] ROR 0515.

[25] Res. 1 Int. with ASU, 10:45.

[26] ROR 0515.

[27] *Id.*, 1865-66.

[28] *Id.*, 1578.

[29] *Id.*, 0891; other "context clues" for incapacity: slurred speech, bloodshot eyes, smell of alcohol on breath, outrageous behavior, and unconsciousness—none of which Complainant exhibited.

[30] ROR 1306 & 0115-16.

7. Afterward, Complainant, Appellant, and Participant talked in a hallway.[31] Resident-1 and Girlfriend walked passed the trio on their way to a bedroom, but neither reported any concerns about Complainant.[32] Girlfriend, Complainant's "best friend," told police she observed no one having difficulty walking and nothing out of the ordinary.[33] Resident-2 never saw Complainant stumble or act unsteady, even as she danced and kissed the males.[34] Complainant's eyes were not bloodshot; there was no smell of alcohol on her breath; and she never lost consciousness or vomited.[35] Complainant never appeared out of control.[36] Complainant claims she grew unsteady,[37] eventually having to use a wall to stay upright.[38]

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[31] Int. with ASU, 15:58.

[32] ROR 0522.

[33] Girlfriend Interview with Tempe PD (April 3, 2016) ("Girlfriend Int. with Tempe PD"), 08:10.

[34] ROR 1865-66.

[35] *Id.*, 1297.

[36] Resident-2 Interview with University Investigator (October 5, 2016) ("Res. 2 Int. with ASU"), 30:10.

[37] *Id.*, 0106.

[38] *Id.*, 0513.

8. Complainant was aware enough to know that "literally two minutes after"[39] Girlfriend left, she walked together into a bedroom with Appellant and Participant.[40] Sober Resident-2 observed Complainant leading the males into the room by the hand.[41] He rated her a three on a ten-point intoxication scale before entering the bedroom.[42] At this point, both ***Complainant***[43] ***and Resident-2***[44] ***said she was "coherent."***

9. The three entered the bedroom around 11:30 p.m. Complainant kissed Participant,[45] causing Appellant to offer to leave.[46] Complainant told Appellant to stay.[47] Participant then offered to leave. Complainant told him to stay.[48] Before progressing further, Appellant

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[39] Complainant Interview with Officer Kelly Tyrrel (1) (April 3, 2016) ("Comp. Int. with Tyrrel (1)"), 09:45.

[40] ROR 1869-1870.

[41] *Id.*, 0520.

[42] *Id.*, 1195.

[43] *Id.*, 1294.

[44] *Id.*, 1298.

[45] ROR 1302.

[46] *Id.*

[47] *Id.*

[48] *Id.*

told Complainant: "You don't have to do this."[49] Appellant then laid against the bed's headboard, and Complainant performed oral sex on him.[50] Participant engaged Complainant from behind vaginally.[51] The positions eventually switched, with Complainant now performing oral sex on Participant and Appellant engaging vaginally.[52]

10. Complainant described the event as a threesome,[53] and the action as "we [Complainant and Appellant] were fucking"[54] and "[giving] blow jobs" to both males.[55] Complainant was active, moving her hips appropriately,[56] digitally manipulating Appellant's genitals to facilitate

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[49] C.C.C. 2, 21:15.

[50] ROR 1803-04.

[51] *Id.*

[52] *Id.*, 1804-05.

[53] C.C.C. 2, 10:51 (Complainant: "I know we were having a threesome. That is something I remember very clearly.").

[54] Complainant Confrontation Call with Appellant (April 3, 2016) ("C.C.C. 1"), 14:55 (Complainant: "I know there was someone in the room with us while we were fucking."); C.C.C. 2, 15:07 (Complainant: "So please don't tell me that you weren't in the room while me and [Appellant] were fucking.").

[55] C.C.C. 2, 15:35 (Complainant: "I remember giving [Appellant] a blow job...and I remember giving you a blow job.").

[56] ROR 1807.

sex,[57] and making moaning sounds indicative of pleasure[58]—in a dark room.[59]

11. After 25 minutes, Complainant reported vaginal pain because neither male was using protection or lubrication.[60] Complainant cried because "my vagina was hurting because they weren't using [any condoms or lubricant],"[61] so she asked to stop.[62] Appellant asked Complainant if Participant could "finish" (ejaculate).

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[57] *Id.*, 1805.

[58] *Id.*, 1807.

[59] Complainant Interview with Detective Mark Lucas (April 3, 2016) ("Comp. Int. with Lucas"), 22:35.

[60] Complainant Interview with University Investigator (October 27, 2016), 16:26.

[61] *Id.*

[62] ROR 1298. Complainant altered her previous statements (ROR 1187 and 1297), adding that, besides the physical discomfort, she also cried because she realized, for the first time, she was having sex. She initially raised this point during the confrontation call with Appellant, where she admittedly misrepresented whether she knew a second male was in the room. The premise of that call—that she was unaware of the second male—requires she not know what is happening around her. That is, for the call's "staged" story to work, she cannot admit awareness of the second male because that would require knowledge of the sex.

Complainant replied, "I don't want to do this anymore. No. Stop,"[63] at which point the intercourse ended.[64]

12. They remained on the bed, with Complainant manipulating Appellant's genitals by hand (*see* Fig. 3). Participant, without consent,[65] began recording using his cellphone.[66] After a flash, Complainant asked Participant what he was doing.[67] He denied taking pictures. She said, "But you are taking pictures."[68] He said not to worry about it. Concerned the photos might be distributed on social media,[69] she replied she did not want to be recorded.[70]

13. Participant recorded a five-second video of the encounter.[71] The police report includes a video screenshot partially redacted by Tempe PD for privacy.[72] Figure 3:

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[63] Comp. Int. with Lucas, 27:36.

[64] ROR 1310 & 1705.

[65] *Id.*

[66] *Id.*, 1303.

[67] Comp. Int. with Lucas, 25:53.

[68] Comp. Int. with Tyrell (1), 15:31.

[69] Comp. Int. with Lucas, 31:18.

[70] ROR 1187.

[71] *Id.*, 1305.

[72] *Id.*, 0135.

14. The screenshot shows Complainant's left hand on Appellant's penis, her right hand holding his hand; the detective characterized the screenshot/video as depicting a sex act with her hand on a penis.[73] Complainant testified there was no penis in her hand.[74]

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[73] ROR 1322.

[74] *Id.*, 1678.

The supervisor overseeing the investigation agreed, rejecting the detective's description.[75]

15. Next, Participant turned on the lights and left, leaving the other two on the bed.[76] Appellant asked Complainant, who appeared upset, why she was being so "dramatic."[77] Complainant rebuffed Appellant's question, dressed herself,[78] and engaged in brief argument in which both called the other an asshole.[79] Complainant left, found her friend, and said she wanted to go home.[80] Without difficulty, per Resident-2, Complainant walked outside. Girlfriend followed. Complainant told Girlfriend that Appellant was mad because Complainant would not have sex with him.[81] Complainant called someone she knew would be up and close by to give her and Girlfriend a ride home.[82] Resident-2 checked on Complainant. He observed her

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[75] *Id.*, 1776.

[76] Comp. Int. with Lucas, 14:34.

[77] *Id.*

[78] ROR 1809-10.

[79] Comp. Int. with Lucas, 14:34.

[80] Girlfriend Int. with Tempe PD, 05:08.

[81] ROR 1495.

[82] Comp. Int. with Tyrrel (1), 19:05.

intoxication level to be 6 out of 10,[83] not because Complainant was more drunk, but because she was emotional and upset, which happens with drinking.[84] Complainant spoke to Resident-2 to ask if Appellant and Participant were leaving. Although upset, Complainant communicated coherently.[85]

16. Back home, Complainant described the events to Girlfriend, including Participant's camera and that when she said stop the sex ended.[86] Complainant's roommate returned home, so Complainant stopped talking, and the roommate cooked for them.[87] In the morning, Complainant returned to the residence with two friends to search for a driver's license,[88] one of who told Appellant's friends: "[Complainant] almost got raped last night,"[89] but fortunately "nothing happened."[90]

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[83] ROR 1195.

[84] Res. 2 Int. with ASU, 12:12; *see also* ROR 1884.

[85] ROR 1874.

[86] *Id.*, 1310.

[87] *Id.*

[88] *Id.*, 1194.

[89] *Id.*, 1307.

[90] Res. 2 Int. with ASU, 09:00.

17. Later that afternoon, Complainant reported the sexual encounter to Tempe PD.[91] Complainant claimed she was intoxicated but ***coherent*** just before entering the bedroom.[92] Complainant also recounted when the encounter started;[93] the order of the sexual positions;[94] how long after Girlfriend and Resident-1 went into a room together that she went into a room with Appellant and Participant;[95] and the bedroom's orientation, including the color of the sheets.[96] Complainant also told an officer (falsely) that before April 2, she had had no sexual contact with Appellant.[97]

18. During her Sexual Assault Nurse Examination (SANE),[98] Complainant disclaimed threats and intimidation.[99] When asked about force, her sole response was "I was really intoxicated."[100] Complainant

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[91] ROR 1293.

[92] ROR 1294.

[93] Comp. Int. with Tyrrel (1), 09:04.

[94] ROR 1294.

[95] Comp. Int. with Tyrrel (1), 09:45.

[96] ROR 1295.

[97] Comp. Int. with Tyrrel (1), 05:57.

[98] ROR 1075-88.

[99] *Id.*, 1120.

[100] *Id.*

recalled the sexual encounter starting at "1130ish" and that neither male ejaculated, wore a condom, or used lubricant.[101] The SANE report noted minor genital abrasions and bruising around her knees.[102] Complainant's circumoral swabs revealed male DNA that was not Appellant's or Participant's.[103] Her blood tests were negative for alcohol.[104]

19. Detective Mark Lucas ("Lucas") then interviewed Complainant.[105] She repeated that intoxication prevented her from physically or verbally stopping the encounter.[106] She reported she was coherent when entering the bedroom,[107] understood what was occurring throughout the sexual encounter,[108] and told the males to stop when the sex began to hurt.[109] She dressed herself after the sex ended,[110] which

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[101] *Id.*

[102] *Id.*, 1081-83.

[103] *Id.*, 0386.

[104] *Id.*, 1117.

[105] *Id.*, 1297.

[106] *Id.*, 1298.

[107] *Id.*, 1294.

[108] *Id.*, 0401.

[109] *Id.*, 1298.

[110] ROR 1298.

she claimed she could not do upon entering the bedroom.[111] She recalled in detail the residence's layout[112] and said she was not held down or forced to stay in the bedroom.[113]

20. Complainant later made a confrontation call to Appellant.[114] Despite telling Lucas details of the entire encounter, Complainant told Appellant she had little memory of the night. She first said she was unaware of whether she and Appellant had sex,[115] which left Appellant dumbstruck.[116] Complainant then inquired whether another male was present when the two had sex, despite telling Lucas about her sexual acts and conversations[117] with Participant before the call.[118] These falsehoods unsettled Appellant, because he knew (as she did) that she was a full, willing, and cognizant threesome participant, in words and deeds. When she claimed not to remember anything, Appellant (rattled

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[111] *Id.*, 0513.

[112] Comp. Int. with Lucas, 19:08.

[113] ROR 1298.

[114] *Id.*

[115] *Id.*, 1596.

[116] *Id.*, 1596.

[117] *Id.*

[118] *Id.*, 1298.

by the bizarre claim) responded, "You don't?"[119] When she proceeded to ask whether "another guy" was in the room without her knowledge, Appellant denied Participant's involvement in an effort to switch topics.[120] But she also lamented that Appellant "didn't even come after [her]...didn't even try to comfort [her]" after the sex ended,[121] and recounted their argument that occurred shortly after sex.[122] She denied insinuating that Appellant raped her[123] and conceded that no one forced her to drink alcohol.[124]

21. Complainant never confronted Appellant with anything that would support her claim of incapacity, such as Appellant knew or should have known she was unable to make rational and informed decisions and judgments[125]. She never claimed she was, much less he knew she was, vomiting, in a stupor, incoherent, unable to reason, slurring, semi-conscious, physically unable to say "no"—the

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[119] *Id.*, 1597.

[120] *Id.*, 1600.

[121] C.C.C. 1, 09:33.

[122] *Id.*

[123] *Id.*, 07:06.

[124] ROR 1299.

[125] ROR 1775.

incapacitation "context clues" from the Association of Title IX Administrators ("ATIXA") standards, which ASU adopted.[126]

22. To help understand incapacitation, ATIXA provides examples: it "might be met if someone is passing in and out of consciousness, and there is a high probability they could pass out again. Or, it might be met if someone is vomiting so violently and so often that they are simply in such bad shape that they cannot be said to have capacity."[127]

23. Lucas monitored the calls, and provided notes containing topics and suggestions only.[128] Complainant conceded Lucas "didn't specifically tell [her] to lie about anything,"[129] but says the confrontation was "staged"[130] in a way that she "had to lie" to Appellant.[131] Based on the transcript, the call sought to confirm

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[126] *See* fn. 29, *supra*; *see also* Brady 0664-65 for the application of the criteria to this case. The supervisor testified at the hearing that ASU follows ATIXA standards. *Id.*, 1736.

[127] *Id.*, 0891.

[128] *Id.*, 1301.

[129] *Id.*, 1673.

[130] *Id.*, 1672.

[131] *Id.*, 1673.

whether Appellant had sex when Complainant was so intoxicated she was unaware there was another male involved. But this was false: Complainant always knew another male participated.[132] Before the call, she described in detail Participant's involvement in the sex and discussions to an officer and a detective,[133] and separately to Girlfriend.[134] Her ***actual*** claim was that she was coherent and understood what was occurring, but could not consent because she could not muster the will to say no.[135] Complainant never claimed she was unconscious, blacked out, asleep, catatonic, non-responsive, incoherent, or unable to make rational decisions. Because she never alleged these things, she never alleged the males knew she was in such an incapacitated state.

24. Complainant made a similar call to Participant,[136] again falsely claiming she was unaware he was in the room. On the call, she demonstrated awareness, conceding no one had forced her to drink

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[132] *Id.*, 1294.

[133] *Id.*, 1293-98.

[134] *Id.*, 1310.

[135] ROR 0401.

[136] *Id.*, 1300.

alcohol;[137] recounted she played one game of beer pong with Appellant and one with Participant;[138] reported she consumed most of her drinks with Participant;[139] named the genre of music playing before she entered the bedroom;[140] remembered seeing Participant's pink shirt as he walked out of the bedroom;[141] and recalled not allowing ejaculation.[142] Complainant confirmed it was the sex hurting her, without mentioning she just realized she was having sex.[143]

25. Lucas also reviewed the five-second video.[144] He concluded it showed a sex act, and Complainant saying, "I don't want...," while looking to be tired or intoxicated based on the way her voice trailed off.[145] As the UHB heard, Complainant has trouble finishing sentences

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[137] C.C.C. 2, 03:31.

[138] *Id.*, 04:22.

[139] *Id.*, 04:08.

[140] *Id.*, 02:59.

[141] *Id.*, 00:56.

[142] *Id.*, 10:32.

[143] *Id.*, 19:00.

[144] ROR 1305.

[145] *Id.*, 1305.

and is a self-described mumbler."[146] Complainant reported telling the males she "***did not want*** to be recorded" when she realized the encounter was being filmed.[147]

26. The Maricopa County Attorney's Office declined the case.

27. Almost half a year after the encounter, Complainant reported it to ASU. After receiving the report, the Dean of Students official overseeing Appellant's investigation ("supervisor") wrote her colleagues that she "wanted to figure out what to do with the male" and "clearly we would want to move swiftly," but they had to speak with Complainant first.[148] ASU's Office of Student Rights and Responsibilities (SRR) initiated an investigation on September 19, interviewing Complainant that day.[149] Appellant was immediately placed under investigation and banned from campus.[150]

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[146] *Id.*, 1752. The University official who supervised Appellant's investigation agreed that it is often difficult to understand Complainant's speech. *Id.*

[147] *Id.*, 0513.

[148] ROR 1170.

[149] *Id.*, 0513.

[150] *Id.*, 1173-74.

28. Three days later, ASU informed Appellant of Complainant's allegations,[151] which alleged alcohol (F-15), sexual misconduct (F-23(a)), and surreptitious recording (F-25) violations.[152] Because Appellant did not record anything, the F-25 charge was dropped.[153] The only basis stated for F-15—which requires "a violation of the University's rules or applicable laws governing alcohol, including consumption, distribution, unauthorized sale, or possession of alcoholic beverages"—was that Appellant allegedly "provided" alcohol to Complainant, a minor.[154] Under ASU's policy, a student cannot possess, produce, manufacture, or distribute alcohol unless otherwise permitted by state law.[155] ASU's cited state-law ground was A.R.S. § 4-241(P).[156]

29. On the alcohol charge, ASU never sufficiently identified or explained the specific conduct at issue or what law was violated. In its

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[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] Alcohol and Other Campus Drugs, *Arizona State University Student Services Manual* (August 1, 2014), https://www.asu.edu/aad/manuals/ssm/ssm106-03.html.

[156] ROR 1429.

initial letter, ASU alleged simply that Appellant "provided" alcohol to Complainant. But F-15 does not include "provided" in its terms. Appellant asked for ABOR and university rules regarding alcohol and the specific rules or laws supporting the charge.[157] The investigator did not respond with a specific basis but modified the allegation to *distribution of* alcohol to a minor.[158]

30. F-23 prohibits "actual or attempted physical sexual acts perpetrated against a person by force or without consent," and ASU alleged Appellant sexually engaged Complainant "without her consent" after she became intoxicated.[159] The letter cited the SCC, which has two subparts for misconduct: "sexual acts perpetrated against a person by force ***or*** without consent...."[160] The letter did not allege "force,"[161] only sex "without consent," which governs claims of incapacitation.

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[157] ROR 1388-89.

[158] *Id.*, 1387.

[159] *Id.*, 1173. Universities should provide, "the precise conduct allegedly constituting the potential violation." *Q&A on Campus Sexual Misconduct*, United States Department of Education, Office of Civil Rights (September 2017), *see* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf, 4.

[160] ROR 1173.

[161] *Id.*

Following ATIXA, ASU ruled out force and proceeded to an incapacitation analysis.[162]

31. In the initial notice, ASU also required that Appellant attend a meeting the following day to connect him to support resources.[163] There, the investigator, without advising that an investigation was underway, told Appellant she would be a "neutral, third party investigator."[164] She said her job was to "collect information—anything I can get, speak to people, and collect documentation that may be available."[165] She informed Appellant that the Dean's Review Committee, which would determine whether Appellant violated the SCC, "based on whatever (information) is available to them."[166] Without notifying Appellant, the investigator then

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[162] The 2017 ATIXA Whitepaper, *The ATIXA Rubric for Addressing Campus Sexual Misconduct* ("Whitepaper"), 24 ("If the answer to the question of whether force was used is no, then we have to inquire into incapacity as the second question.").

[163] ROR 1173-74.

[164] Appellant Interview with University Investigator (September 22, 2016) ("Appell. Int. with ASU"), 05:25.

[165] *Id.*, 06:15.

[166] *Id.*, 16:05

sought a statement on the underlying incident[167]—depriving him of the opportunity to prepare, a right recognized by the Department of Education.[168] Appellant's former counsel, participating telephonically, ended the meeting because neither he nor Appellant knew a statement would be taken.[169]

32. Appellant was unaware that, three days earlier, the investigator told Complainant the opposite of what she told him about investigative obligations. She told Complainant,

> It's going to be up to you to provide us with whatever documentation you think is relevant. Provide us names of witnesses, provide your own statements. It's going to have to be, unfortunately, on your shoulders to determine what it is you want me to know...It's going to be up to you to provide photos, text messages, receipts, or social media posts or whatever have you that you feel would be relevant for me know...It's going to be up to you to

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[167] Appell. Int. with ASU, 13:45.

[168] *Q&A on Campus Sexual Misconduct*, 4. ("Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview.")

[169] *Id.*

> submit information instead of me being able to go get it.[170]

She also said that "as soon as I have the green light, I will charge" Appellant with sexual misconduct[171]—a promise made before anyone spoke to Appellant or corroborated any of Complainant's allegations.

33. As the case proceeded, Complainant changed and added key details, including how her clothes were removed,[172] how the sexual encounter ended,[173] and how the sexual positions were switched.[174] The investigator never probed the numerous inconsistencies in Complainant's statements.[175] ASU interviewed Complainant twice more, including on October 27, 2016,[176] where Complainant added

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[170] Complainant Interview with University Investigator (September 19, 2016) ("Comp. Int. with ASU"), 0:07:05.

[171] Comp. Int. with ASU, 0:59:38.

[172] ROR 1187.

[173] *Id.*, 1189.

[174] *Id.*, 0515.

[175] While the investigator was obligated to gather all available evidence, her failure to gather exculpatory evidence is egregious, biased, and contravenes the Department of Education's guidelines for an "equitable investigation of a Title IX complaint," which requires investigators to "synthesize all available evidence—including both inculpatory and exculpatory evidence...". *Q&A on Campus Sexual Misconduct*, 4.

[176] ROR 1188.

previously undisclosed details. In that interview, she disclosed her previous sexual encounter with Appellant and added a statement about rejecting Appellant's advance earlier in the night of April 2[177] because she wanted to be with Girlfriend, who had just arrived.[178] Regarding the latter claim, Complainant told ASU's investigator[179] and testified at the hearing that she told Appellant on April 2 she did not want to have sex with him.[180] But the day after, April 3, Complainant told Tempe PD she told Appellant "earlier" than April 2, referring to the March 31 encounter, that she did not want to have sex—even though she voluntarily engaged in oral sex that day (the first day they ever met in person) while sober and despite saying no sex would occur.[181] Similarly, in her confrontation call to Appellant, Complainant claimed she told him she did not want to have sex.[182] Taking her comment to mean she said it that night, Appellant replied, "I didn't know that."[183]

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[177] *Id.*, 1188-89.

[178] *Id.*, 1584-85.

[179] *Id.*, 0513.

[180] *Id.*, 1584.

[181] Comp. Int. with Tyrrel (2), 06:23.

[182] ROR 1598.

[183] *Id.*

Complainant disagreed, saying he should remember because she told him when they were sober.[184] Appellant asked if she was talking about when she told him on March 31, the day she initially met him and performed oral sex. Complainant replied, "Yeah," meaning her "no sex" statement occurred two days before. In trying to validate her point, she never claimed to have said it on April 2.[185]

34. Complainant even changed her story about how the sexual encounter ended, belatedly contending the males did not stop when she said no.[186] Under oath, however, Complainant reverted to her initial statement that the males stopped when she said, "stop."[187] ASU's investigator never asked Complainant to explain the inconsistencies in her story.

35. During the investigation, ASU's investigator requested that Complainant produce the Tempe PD report and video.[188] When Complainant provided the police report, it was missing key, exculpatory

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[184] *Id.*

[185] *Id.*

[186] ROR 0515.

[187] *Id.*, 1705.

[188] Comp. Int. with ASU, 0:26:25.

sections, including the screenshot pictured above and the SANE results.[189] The investigator never examined why or how this material went missing and never obtained an independent copy of the report. She made no effort to procure the video Complainant claimed showed her saying she did not want to have sex, notwithstanding Lucas's statement to the contrary.[190] She never requested Complainant's text messages, despite requesting and receiving texts from other witnesses.[191] And both the investigator and her supervisor knew hours of police interview and call recordings existed and were available, but "did not take the time" to obtain them.[192]

36. Appellant was interviewed twice after his initial meeting and submitted two written responses to ASU.[193] ASU failed to interview Participant, making no effort to obtain his contact information after Appellant said he did not have it.[194] The investigator never contacted

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[189] ROR 1755.

[190] *Id.*, 1189.

[191] *Id.*, 1207-11.

[192] *Id.*, 1739.

[193] *Id.*, 1190-93.

[194] *Id.*, 1199.

the individual who gave Complainant and Girlfriend a ride home from the get-together, despite Complainant telling her he would reachable soon.[195] She failed to gather other basic available, exculpatory information. She never confirmed the alcohol content of the liquor Complainant drank; never investigated the source of the unknown male DNA found inside Complainant's mouth the next afternoon; never considered Complainant's social and romantic situation, even though fear of disapproval by friends or romantic interests are common reasons accusers might misrepresent events.[196] Despite being asked to investigate these matters and provided at least one potential lead, the investigator gathered nothing.[197]

37. On December 11, 2016, Complainant, per the Procedures, reviewed and commented on a letter[198] submitted by Appellant's counsel

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[195] *Id.*, 1250.

[196] Risk Research Bulletin, *Best Practices in Student Sexual Assault Investigations*, May 2012, at 4. Available at https://www.edurisksolutions.org/WorkArea/DownloadAsset.aspx?id=1255.

[197] ROR 0557-58.

[198] *Id.*, 1393.

on December 8, 2016.[199] On December 20, the investigator told Appellant she had sent her investigative file to the Dean's Review Committee for review.[200] Appellant's counsel inquired whether Complainant provided input on Appellant's letter, as counsel had asked to be notified so he could respond. ASU was obligated to provide such an opportunity.[201] The investigator revealed Complainant did respond but denied she gave any new evidence.[202] Appellant nevertheless asked to see it. When ASU finally provided the response (by phone, because ASU will not provide a written copy) early on December 21, he found that, *contrary to the investigator's representations*, it contained substantial new evidence,[203] as his response demonstrated.[204] Within 24 hours, Appellant responded, late on December 21, with an understanding ASU would consider the response before acting.[205] But by this time the Dean's Review Committee had already decided to expel Appellant.

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[199] *Id.*, 1215.

[200] *Id.*, 1417.

[201] *Id.*

[202] *Id.*, 1416.

[203] *Id.*, 1213.

[204] *Id.*, 1418-26.

[205] *Id.*, 1418.

Emails sent on December 21 by the supervisor—a member of the Dean's Review Committee—reveal Appellant's expulsion letter was signed on December 20, before Appellant learned about Complainant's December 11 comments.[206] The supervisor, after learning of Appellant's response, had the letter's date changed to the day after Appellant's submission.[207] No one on the Dean's Review Committee viewed the submission before finding against Appellant and signing his expulsion letter.[208] Contrary to the Procedures, Appellant was denied the opportunity to respond before a disciplinary decision was rendered.[209]

38. By December 20, 2016, the Dean's Review Committee—which included the supervisor—concluded that Appellant violated the SCC's alcohol and sexual misconduct policies.[210] The Committee's incapacitation finding was grounded in the police report's description of the video and the screenshot,[211] which states Complainant could be

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[206] ROR 0474.

[207] *Id.*

[208] *Id.*, 0467.

[209] *Id.*, 1447.

[210] *Id.*, 1246.

[211] *Id.*, 1246.

tired or possibly intoxicated based on the way her voice trails off.[212] ASU concluded without analysis that Appellant knew of Complainant's incapacitation,[213] though such knowledge is required.[214] ASU notified Appellant on December 22 of the Committee's decision and sanction—expulsion.[215] The supervisor made these decisions knowing that available, "helpful" material (*e.g.*, Tempe PD investigative recordings) went uncollected and unconsidered.[216] The expulsion letter also finds Appellant responsible for violating F-15 but, unlike the other charges, does so without explanation.

39. Two days ***after*** ASU's finding of responsibility, the supervisor finally provided the basis for the alcohol charge: "Referencing university policy SSM 106-03, ASU's alcohol policy prohibits giving alcohol to a person under the age of 21. Specifically, it states: 'No person or organization may sell, furnish, or give alcoholic

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[212] *Id.*, 0373. *See also* SOF ¶ 25 (Complainant described herself as a "mumbler" during hearing).

[213] *Id.*, 1247.

[214] *Id.*, 1247.

[215] *Id.*, 1175-76. The letter was originally signed on December 21; *see* SOF ¶ 37.

[216] *Id.*, 1746.

beverages to any person under the age of 21, except as otherwise permitted by law.'" The supervisor noted that ASU found Appellant "gave" Complainant alcohol, which he "received []with the intent to give it to Complainant," violating A.R.S. § 4-241(P).

40. Before the decision, ASU's investigator threatened a permanent notation on Appellant's record if he appealed his discipline but said he could avoid this by voluntarily withdrawing from school.[217] Appellant proceeded with an appeal anyway, and a hearing was scheduled for March 10, 2017, before the three-member University Hearing Board ("UHB"). The Notice of Hearing circulated to the parties stated the proceedings would focus on the charges (that Complainant was incapacitated during the sexual encounter with Appellant and unable to consent and the alcohol violations) and sanctions imposed.[218] When Appellant arrived, UHB officials informed him that the Board was unable to proceed. A rescheduled hearing was set for May 23, 2017, with a similar Notice of Hearing sent May 1, 2017. Again, the Notice

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[217] Appellant Interview with University Investigator (November 18, 2016), 06:10.

[218] ROR 0039.

stated the hearing would focus on the charges (sex with an incapacitated person and alcohol violations) and penalties.[219] The University official presenting ASU's case at the hearing confirmed the charges in his opening: "Due to [Complainant's] intoxicated state, [ASU] believes that she did not have the capacity to give [Appellant] consent to engage in sexual activity."[220] The supervisor did the same in her testimony, clarifying that Appellant was charged only with engaging Complainant without consent.[221] Neither alleged force.

41. Before the hearing, Appellant filed motions regarding three issues: The time allotted for the hearing, ASU's definition of "incapacitation," and a request that Complainant help obtain the video of the sexual encounter. The UHB refused to direct Complainant to cooperate in obtaining this evidence despite the Student Disciplinary Procedures ("Procedures") granting it broad authority to issue "request[s] and directive[s]...[to members of the University community]

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[219] *Id.*, 0330.

[220] *Id.*, 1558. The word "force" was not used during ASU's opening or closing statements.

[221] *Id.*, 1725.

in connection with a disciplinary proceeding."[222] The UHB conceded the video contained materials that would assist in the Board's determinations,[223] and found that Complainant had refused to cooperate with both the Dean of Students[224] and Appellant in efforts to obtain it.[225] Complainant declined several times to jointly petition the Maricopa County Attorney's Office for a protected release of the video, despite having offered to assist ASU's investigator in obtaining this evidence by "asking the Maricopa County Attorney's Office or emailing her victim advocate."[226] The UHB refused to sanction Complainant or establish an adverse inference.[227]

42. Similarly, the Board failed to explain ASU's standard of "incapacitation," which is undefined in the SCC.[228] Appellant only learned the standard—the inability to make rational and informed

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[222] ROR 1450.

[223] *Id.*, 0277 and 0326.

[224] The Dean of Students has the same authority to issue directives in connection with an inquiry or investigation. *Id.*, 1447.

[225] *Id.*, 0326.

[226] *Id.*, 0310 (cleaned up).

[227] *Id.*, 0277.

[228] *Id.*, 0568.

decisions and judgments[229]—during the hearing, preventing him from collecting and presenting the most favorable evidence.

43. And while the UHB Chair granted several incremental extensions to the time allotted for the hearing,[230] the UHB's time restraints prevented Appellant from examining four key witnesses. Appellant's attempt to supplement the record with his alcohol expert's written report—submitted before the start of the UHB's deliberations—was also denied.[231] The Board's refusal to grant additional time was exacerbated by other issues, including that Appellant spent substantial time moving key statements uncovered in Tempe PD's recordings (which ASU did not obtain) into the record. The UHB's counsel also gave inaccurate time updates to Appellant, causing confusion.[232] Further, ASU's procedures required Appellant's counsel to direct all questions for Complainant through the UHB Chair.[233] In practice, this amounted to Appellant's counsel either whispering questions to the

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[229] *Id.*, 1775.

[230] *Id.*, 0305.

[231] *Id.*, 0610.

[232] ROR 1626-28.

[233] *Id.*, 1451.

Chair for him to relay to her, or pointing to written questions for the Chair to repeat. This inefficient and ineffective process, which only applied to Appellant's cross-examination of Complainant (ASU could directly cross-examine Appellant[234]), extended the length of Complainant's examination significantly. And a technical problem with ASU's audio-video equipment cost Appellant more than an hour of his presentation time, further decreasing his opportunity to present the case's "vast evidence."[235]

44. The hearing was held on May 23, 2017. Although ASU disclosed the investigator and Girlfriend as witnesses,[236] it did not make either available for testimony. Unlike the authority given to the Dean of Students,[237] the Procedures did not give Appellant the right to compel testimony. The time constraints imposed by the UHB prevented Appellant from calling Resident-1 or his alcohol expert, and the UHB Chair cut off his sexual-assault expert's testimony as the hearing ran

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[234] *Id.*, 1814-41.

[235] *Id.*, 0642.

[236] *Id.*, 1167.

[237] *Id.*, 1447.

short on time.[238] Appellant requested the hearing be continued to allow him to present the remainder of his case, but the UHB Chair refused.

45. At the hearing, ASU argued, for the first time, that Appellant had *influenced* Complainant to consume alcohol, which would be a violation of A.R.S. § 4-241(P) if he had misrepresented her age in the process.[239] ASU's supervisor could not provide a concrete definition what it meant to "provide" alcohol. When asked whether passing a beer from a refrigerator constituted a violation, the supervisor said it "depends on the situation."[240]

46. The UHB could not determine whether Complainant was incapacitated by a preponderance of the evidence,[241] concluding, "***Accounts of the encounter provided by all parties indicate that the Complainant was lucid and able to verbally communicate.***"[242]

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[238] *Id.*, 1918.

[239] *Id.*, 1752.

[240] *Id.*, 1778.

[241] ROR 0641.

[242] *Id.*

47. The UHB added a new basis for liability—use of impermissible force[243]—without giving Appellant notice and doing so only ***after the close of evidence***. The UHB found force because of minor interior vaginal abrasions and knee bruising reported in Complainant's SANE report and her statements about pain and crying. Complainant disclaimed to Tempe PD that force was used,[244] and explained repeatedly that her pain and crying resulted from the un-lubricated, unprotected sex.[245] Because force was not at issue at the hearing, evidence of force was not presented, as that term is construed under ASU's standard. Nor is there evidence tying the alleged abrasions to Appellant or excluding Participant or the male who left DNA on Complainant's body, which was found the next day. The only testimony on these issues came from Appellant's sexual assault expert, whose un-rebutted testimony was that Complainant's injuries were consistent with consensual sex.[246]

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[243] *Id.*, 0639-40.

[244] *Id.*, 1298.

[245] Complainant Interview with University Investigator (October 27, 2016), 16:26.

[246] ROR 1919.

48. The UHB referred its recommendation to ASU Senior Vice President, Dr. James Rund ("Rund"). Rund overruled the Board's findings on incapacitation, relying on Complainant's alleged alcohol consumption, her own claims of drunkenness and the accompanying physical symptoms to conclude she was unable to make rational judgments and informed decisions.[247] Ignoring that Procedures' Section G.2. required him to explain any variance from the recommendation,[248] Rund never addressed the UHB's conclusion that Complainant was "lucid and able to verbally communicate." Nor did he mention anything relating to mental capacity at the time of the event, including Complainant admitting to awareness and mental capacity at the time of the sex in the Tempe PD recordings.

49. Under ASU's standards, drunkenness does not equate to incapacitation.[249] ASU acknowledges that drunken sex is not sexual

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[247] *Id.*, 0650-51.

[248] *Id.*, 1452.

[249] Whitepaper, 16 ("What is confusing about incapacity is that it may have nothing to do with an amount of alcohol...In fact, some drunk people will be incapacitated, and others will not."). ATIXA equates incapacitation and drunkenness only once—when someone's incapacity reaches the equivalent of sleep. *Id.*

misconduct[250] and the other gradations on the alcohol consumption spectrum—influence, impairment, intoxication, and inebriation—cannot support sexual misconduct violations.[251] Yet Rund based his reversal on estimates of alcohol consumption—and then, only those of the very person he concluded was incapacitated. From there, Rund inferred incapacitation.

50. Rund also adopted without analysis the recommendation regarding force.[252] ATIXA advises that the "literature of the field tells us that force is fairly uncommon in college investigations . . . it won't typically be an issue in your investigations, but when it is, it's the only construct that matters,"[253] and "usually, you can rule force in quickly, and focus on it, or rule it out and move on to the incapacity analysis."[254] This is precisely what the Dean of Students did, as explained by the

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[250] ROR 1768.

[251] Appellant Interview with University Investigator (September 26, 2016), 01:54 (Investigator: "Do we recognize the difference between drunk sex and incapacitated sex? Yes."); Whitepaper, 15 ("...there is no reason why [universities] should have a problem with drunk sex, legally.").

[252] ROR 0650-51.

[253] Whitepaper, 8.

[254] *Id.* (cleaned up).

investigator's supervisor in her testimony at the hearing: "we look at was there force? Was there coercion? If neither of those are able to be determined, then we look at was there incapacitation? And in this case, that is the factor that we then looked at."[255] Despite this, and the ATIXA standards eschewing review of incapacity if force is determined, Rund affirmed on force and returned to reverse the UHB's incapacitation finding.[256] He upheld the UHB's recommended sanction of expulsion.[257]

51. Appellant moved for Review and Rehearing on August 2, 2017.[258] Rund denied the motion on August 30, 2017, expanding on his analysis of Complainant's alleged incapacitation.[259] Rund again used Complainant's alcohol consumption as a proxy for incapacitation,

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[255] ROR 1726.

[256] Rund's simultaneous finding of "force" and "incapacitation" misapprehends their scope. *See* SCC definitions; *cf. State v. Armstrong*, No. 4621, 2002 WL 31185806, at *2 (Alaska App. Oct. 2, 2002) (discussing the mutual exclusivity between force and incapacitation, and recognizing that force may not include incapacitation where the force did not cause the incapacitation), *overruled on other grounds by Michael v. State*, 115 P.3d 517 (Alaska 2005).

[257] ROR 0651.

[258] *Id.*, 0653-97.

[259] *Id.*, 1101-07

wrongly claiming Complainant's alcohol consumption was uncontroverted and ignoring other witnesses' conflicting testimony on Complainant's consumption. He was oblivious to the reduced alcohol content of the vodka she consumed. He ignored Complainant's concession during the hearing that she "recalled a lot about the night"[260] and other evidence of mental capacity.

52. Rund erroneously concluded Complainant cried because of her belated claim she had just realized she was having sex—but Complainant herself told Tempe PD and ASU's investigator she cried because of the vaginal discomfort caused by the unprotected, un-lubricated sex.[261] Yet Rund found that Appellant, in his testimony at the hearing, "had no credible explanation for why Complainant ended the sex abruptly, started crying, and left the room."[262] Appellant did not personally know why sex stopped because Complainant left the room without explanation. It is no mystery, though, as Complainant explained to Tempe PD that the sex ended abruptly because the lack of

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[260] *Id.*, 1637 (cleaned up).

[261] *Id.*, 0513, 1298.

[262] *Id.*, 1103 (cleaned up).

condoms or lubrication made the sex hurt, and she told the males to stop.[263] At the hearing, Appellant, using Complainant's own words, presented this "credible explanation" why the sex ended suddenly.

53. Rund's decision denying rehearing also relies on Resident-2's statement to Tempe PD regarding Complainant's intoxication level upon leaving the house, without discussing his clarification that Complainant only appeared more intoxicated because she seemed emotional and upset.[264]

54. Again, Rund never truly evaluated or even mentioned the published signs of ***incapacity***,[265] and failed to consider the evidence demonstrating Complainant's mental, physical, and verbal capabilities during the sexual encounter.[266] Instead, he focused on Complainant's alcohol consumption. His only attempt to assess Complainant's ability to make reasoned, rational decisions was his statement on the

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[263] *See* fn. 60-61; ROR 1298.

[264] ROR 1102-03.

[265] *Id.*

[266] The combination of Complainant's self-claimed awareness, dialogue, actions, and other capabilities during the sexual encounter show she was not incapacitated, which ASU and ATIXA have defined as the inability to make rational and informed decisions and judgments.

threesome, which he found to be "outrageous behavior."[267] On this point, contrary to ATIXA standards,[268] Rund substituted preferred sexual mores for Complainant's,[269] and used her participation in a threesome to support his inference she could not make informed judgments. Rund refused to address Appellant's arguments about force, again upholding the UHB's recommendations.

55. Rund declined to review investigative failures, including the actions of the investigator or her supervisor, finding neither issue sufficient for review or rehearing. But the Procedures provide that irregularities committed by the Dean of Students that impede or prevent a fair and impartial disciplinary process *are* proper ground for review or rehearing.[270] His claim that Appellant never raised these issues is incorrect: In February, he submitted directly to Rund a prehearing memo outlining the problems with ASU's investigation.[271]

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[267] ROR 1103.

[268] *Id.*

[269] Whitepaper, 9 ("...you have no basis to second-guess their sexual mores anymore than they have a right to question yours.").

[270] ROR, 1452-53.

[271] *Id.*, 0013-20.

56. This was ASU's final administrative ruling.

57. This action was initiated on September 29, 2017, to reverse or vacate ASU's expulsion decisions and restore Appellant's standing at ASU.

58. This Court has appellate jurisdiction under A.R.S. § 12-901, *et seq.*

IV. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellant presents the following issues for review under A.R.S. § 12-910(E):

a) Whether ASU's disciplinary decisions dated June 27, 2017, and August 30, 2017, ("the Decisions") were supported by substantial evidence;

b) Whether ASU's Decisions were arbitrary and capricious;

c) Whether ASU's Decisions were contrary to law; and

d) Whether ASU's Decisions were abuses of discretion.

V. ARGUMENT: ASU'S DECISIONS ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE, ARBITRARY AND CAPRICIOUS, CONTRARY TO LAW, AND THE PRODUCT OF ABUSES OF DISCRETION AND MUST BE OVERTURNED.

A. The Standard of Judicial Review of Administrative Decisions.

Under A.R.S. § 12-910(E), the "court shall affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion." Reviewing courts must scrutinize each prong of A.R.S. § 12-910(E) and determine whether the law and substantial evidence support the decisions, and whether they are arbitrary, capricious or an abuse of discretion. *Sanderson Lincoln Mercury, Inc. v. Ford Motor Co.*, 205 Ariz. 202, 205, 68 P.3d 428, 431 (App. 2003).

1. The *Substantial Evidence* Standard

The essential question answered factually by a reviewing court is whether substantial evidence exists, and that question is itself one of law. *Havasu Heights Ranch and Development Corp. v. Desert Valley Wood Products, Inc.*, 167 Ariz. 383, 807 P.2d 1119 (App. 1990). In addressing that question, determinations of law are *de novo*, and the court is free to reach its own legal conclusions. *J.L.F. v. Arizona Health*

Care Cost Containment Sys., 208 Ariz. 159, 161, 91 P.3d 1002, 1004 (App. 2004); *Eshelman v. Blubaum*, 114 Ariz. 376, 378, 560 P.2d 1283, 1285 (App. 1977). This allows a reviewing court to substitute its judgment for the agency's on questions about the legal effects of the underlying facts or findings, *Gardiner v. Arizona Dept. of Economic Security*, 127 Ariz. 603, 606, 623 P.2d 33, 36 (App.1980). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Margolis v. University of Arizona*, Dkt. 07-nvw-09782, 2007 WL 5334858, (D. Ariz. July 4, 2016).

Courts cannot determine the substantiality of evidence supporting an agency decision "merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951). They must consider "whatever in the record fairly detracts" from the evidence supporting the agency's decision. *Id.* at 488. Such a review does not negate the "respect" with which courts are to review decisions based on agency expertise. *Id.* In *Pasternack v. Nat'l Transp. Safety Bd.*, 596 F.3d 836,

839 (D.C. Cir. 2010), the agency ruled a pilot's behavior precluded an agency official from informing him that leaving a drug-testing facility would result in failed test. The court evaluated testimony and concluded that, because it would have taken only seconds to explain the point and the official was able to relay other information, the ruling was "utterly implausible" and not supported by substantial evidence.

2. The *Abuse of Discretion* Standard

An agency abuses its discretion when its discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons," *Torres v. N. Am. Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 841 (App.1982), and when it fails to conduct an adequate investigation into the relevant facts. *Avila v. Arizona Dept. of Economic Sec.*, 160 Ariz. 246, 248, 772 P.2d 600, 602 (App. 1989). It also abuses its discretion when it misapplies the law or fails to consider the relevant facts. *Id.* The standard is often used for discretionary decisions involving nebulous or ambiguous supporting judgments. 3-15 Federal Standards of Review § 15.08 (*citing* Charles H. Koch, Judicial Review of Administrative Discretion, 54 G.W. L. Rev. 469, 471 (1986)).

The critical concern when reviewing the exercise of discretion is whether the agency provided a coherent, reasonable explanation. *See Iowa State Commerce Comm'n v. Alaska Natural Gas Transp. System*, 730 F.2d 1566 (D.C. Cir. 1984). Three elements are central in this review: (1) were all relevant factors considered, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), (2) was the decision rational and not so "implausible that it could not be ascribed to a difference in view," *Motor Vehicle Manufacturers Assn v. State Farm Ins.*, 463 U.S. 29, 43 (1983), and (3) can you rationally connect the evidence, the legal interpretation, and the choice made. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); 3-15 Federal Standards of Review § 15.08. A reviewing court must determine the propriety of which factors were assessed and compare the outcome. If the outcome is not within the bounds of rationality, then the decision maker has abused its discretion. 3-15 Federal Standards of Review § 15.08 (citing Koch, 49 Mo. L. Rev. at 214–17).

3. The *Arbitrary and Capricious* Standard

Here, the reviewing court assesses whether there has been "unreasoning action, without consideration and in disregard for facts

and circumstances...." *Maricopa Cty. Sheriff's Office v. Maricopa Cty. Employee Merit Sys. Comm'n*, 211 Ariz. 219, 223, 119 P.3d 1022, 1026 (2005) (citations omitted). Even where "there is room for two opinions," an action is arbitrary or capricious if not exercised honestly and upon due consideration. *Id.*

An "arbitrary" action is one taken "capriciously or at pleasure" or "without adequate determining principle." *Maricopa Cty. Sheriff's Office*, 211 Ariz. at 222, 119 P.3d at 1025 (citing Black's Law Dictionary 104 (6th ed.1990)). When an agency fails to consider an important aspect of the problem, *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992), or does not scrutinize the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made, 463 U.S. at 43, it has acted arbitrarily and capriciously.

4. The *Contrary to Law* Standard

In determining whether an action is contrary to law, a court reviews whether the agency's acts remained within constitutional and statutory bounds, which usually ensures fairness and substantive and

procedural due process. 3-15 Federal Standards of Review § 15.08.

Reviewing courts can reverse when the agency,

- uses unfair procedures, *City of Phoenix v. Superior Court In & For Maricopa Cty.*, 110 Ariz. 155, 515 P.2d 1175 (1973);

- abdicates its rules and regulations, *Clay v. Arizona Interscholastic Ass'n*, 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989) (en banc);

- pursues matters other than those charged, *Carlson v. Arizona State Personnel Board,* 214 Ariz. 426, 433, 153 P.3d 1055, 1062 (App. 2007);

- uses an erroneous and improper theory or reaches a finding not reasonably supported by the evidence, *Hobson v. Twentieth Century Fox Film Corp.* 71 Ariz. 41, 44, 223 P.2d 399, 401 (1950);

- lacks competent evidence, *City of Tucson v. Mills*, 114 Ariz. 107, 111, 559 P.2d 663, 667 (App. 1976);

- fails to provide an opportunity to be heard in a meaningful manner and at a meaningful time, *Comeau v. Ariz. State Bd. of Dental Exam'rs*, 196 Ariz. 102, 106-07, 993 P.2d 1066, 1070-71 (App. 1999); or

- prevents cross-examination of the investigator or other adverse witnesses, *Webb v. State ex rel. Ariz. State Bd. of Med. Exam'rs*, 202 Ariz. 555, 560, 48 P.3d 505, 510 (App. 2002).

B. ASU's Finding that Appellant Used "Force" Against Complainant is Contrary to Law and Unsupported by Substantial Evidence.

Due process requires notice of the charges before a hearing, so the individual has a meaningful opportunity to explain and defend. *Carlson*, *supra*; *Elia v. State Board of Dental Examiners*, 168 Ariz. 221, 228, 812 P.2d 1039, 1046 (App. 1990). The notice must state the nature of the wrong charged and explain the specific acts relied on. *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 438, 215 P.3d 1114, 1119 (App. 2009). If action is based on an erroneous, improper theory, *Hobson*, *supra*, or an agency deviates from its own procedures, the decision may be set aside. *Clay*, *supra*. Under this standard, this Court may substitute its judgment on questions about the legal effects of the underlying facts or findings. *Gardiner*, *supra*.

Here, ASU alleged Appellant engaged in sexual intercourse when Complainant lacked capacity. Statement of Facts (SOF) ¶¶ 30, 38. Appellant was not charged with using force toward Complainant, and under its standards, ASU would only address incapacitation if it negated use of force. SOF ¶¶ 30, 50. ***Two university officials testified there was no allegation of force.*** SOF ¶ 40.

ASU's standard defines "force" as physical violence, threats, intimidation, or coercion.[272] Complainant denies she had sex with Appellant because of threats or intimidation, SOF ¶ 18, and never alleged "unreasonable pressure for sexual activity." The remaining basis is physical violence employed "to gain sexual access."[273] The UHB, with no testimony on the issue, found force existed because of Complainant's pain, crying, and the physical issues outlined in the SANE report.[274] The UHB never excluded Participant or the owner of the unknown male DNA found on Complainant's circumoral swab as causing those issues. SOF ¶ 47. Rund summarily upheld this finding. SOF ¶ 50.

This conclusion is unsustainable. Un-rebutted testimony concluded the reported symptoms were consistent with consensual sex, SOF ¶ 47, and nothing connects the symptoms to Appellant or Participant (or excludes the unknown male DNA owner). Complainant disclaims force or physical restraint by the males during the sex, and

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[272] ROR 0839.

[273] Whitepaper, 38.

[274] ROR 1081-83. The SANE notes minor abrasions and bruising.

never alleged violent acts employed with intent to gain sex. SOF ¶¶ 18-19. Her pain arose from the un-lubricated sex and cannot be tied to force, if any even was used. SOF ¶ 11.

The UHB misapprehended the legal effect of the SANE observations, unreasonably concluding they prove force and supersede the lack of evidence of physical violence to gain sex. It unreasonable to conclude that abrasions only come from force, particularly when the sole expert testimony found the abrasions consistent with consensual sex. Assuming *arguendo* force existed, nothing showed that it caused the specific abrasion/bruise; that Appellant, and not another exercised it; or an intent to gain sex accompanied it.

Because force was not alleged and since nothing shows *Appellant* used force to gain sex or caused the symptoms, the decisions are contrary to law and unsupported by substantial evidence and must be set aside.

C. ASU's Finding that Complainant was "Incapacitated" is Contrary to Law, Not Supported by Substantial Evidence, and an Abuse of Discretion.

Agencies must follow their own policies and procedures; to do otherwise is contrary to law. *Clay*, *supra*. An agency's acts are arbitrary

and capricious when they are without adequate determining principle, *Maricopa Cty. Sheriff's Office*, *supra*, or not rationally connected to the facts, *Motor Vehicle Mfrs. Ass'n of U.S.*, *supra*. ASU's SCC prohibits sex with *incapacitated* persons where one knows or should know of the incapacity. SOF ¶ 38. "Incapacitation," as defined by ASU and ATIXA, is the "inability to make rational and informed decisions and judgments." SOF ¶ 42. Under ASU's standard, inebriation, intoxication, impairment, and influence do not equal incapacitation. SOF ¶ 49. Yet Rund evaluates incapacity solely on alcohol consumption. SOF ¶¶ 48-49.

1. ASU Applied an Incorrect Standard to Find Complainant Incapacitated.

Entering the bedroom, Complainant was coherent, oriented to time and place, and just minutes removed from kissing and "grinding" with each male. SOF ¶¶ 6-8, 17, 19. She participated in the oral sex and intercourse for over 25 minutes, plus the sex act depicted in the screenshot. SOF ¶¶ 9-10, 25. She made rational decisions and was situationally aware, knew the chronology of their sex acts, and described the bedroom down to the sheets' color. SOF ¶ 17. Knowing neither male wore a condom, SOF ¶ X, she exercised enough control to

prevent ejaculation. SOF ¶ 24. When the un-lubricated sex became uncomfortable, she quite logically told the males she did not want to have sex anymore. SOF ¶ 11. When Participant began recording, she—despite engaging in a sex act—asked him what he was doing, rebutted his statement that he was not recording, and told him she did not want to be recorded because the recordings could be distributed on social media. SOF ¶ 12. She left the room to find and tell Girlfriend she wanted to leave, walked outside and dialed another friend, knowing he could pick her up after midnight. SOF ¶ 15. The crux here is capacity ***at the time of the sex***. *Lamont v. State*, 934 P.2d 774, 782 (Alaska App. 1997) (reversing an incapacitation-based conviction because the only incapacitation proven was after the fact, and the evidence of capacity during sex was that the female was conscious just before going to the bedroom, no one saw her approach the point of incapacitation, and witnesses heard her voice coming from the bedroom).

Rund ignores ATIXA's "context clues" for incapacity, Complainant's undisputed ability to make rational decisions, and the

UHB finding Complainant "lucid."[275] SOF ¶¶ 48-49, 54. He omits any mention of the recordings demonstrating Complainant's mental, verbal, and physical capacity before, during, and after sex with Appellant.[276] *Id.* Other than those played during the hearing and thus in the transcript, ***not one statement*** attributable to the Tempe PD recordings appears in Rund's decisions. He never acknowledges Complainant's reasonable dialogue regarding Participant's camera or that she knew neither male ejaculated during the sex because she would not "let" them, both of which came from the recordings. Rund cites to Complainant's claim of using a wall for support, an event reported only by her.[277]

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[275] Although Rund is the ultimate fact-finder, his decision is vulnerable when it does not consider the findings of the UHB, which heard live testimony from Complainant. *Morall v. Drug Enf't Admin.*, 12 F.3d 165, 180 (D.C. Cir. 2005). The significance ascribed to the UHB's findings depends largely on the importance of credibility on the issue. *Universal Camera*, 340 U.S. at 496. Obviously, Complainant's credibility is central because her self-reported capacity is at issue. The UHB heard directly from her and concluded she was "lucid" throughout the night. This cannot be ignored. *Morall*, 412 F.3d at 180.

[276] Agency decisions that do not consider relevant contradictory evidence, including evidence that led to contrary findings of fact and credibility, inappropriately insinuate a conclusion not supported by the evidence, and therefore cannot stand. *Morall*, 412 F.3d at 180.

[277] ROR 0650.

Violating ASU's standards, Rund treats alcohol consumption as a proxy for incapacity. Even then, Rund omits the reduced alcohol content of Complainant's drinks, SOF ¶ 51, refusing to adjust Complainant's consumption accordingly—despite that information being readily available online and in the expert's report. By assessing only intoxication, SOF ¶¶ 48-49, 51, Rund deviated from ASU's definition of incapacity. The law recognizes a fundamental distinction between incapacity and intoxication. In contract law, a party can avoid agreements made when incapacitated but not when intoxicated. *Wright v. Waller*, 127 Ala. 557, 562–63, 29 So. 57, 58 (1900) (unlike incapacitation, the test for intoxication "has no relation to mental capacity."). The Arizona Supreme Court has frequently found in diminished capacity cases that intoxication does not show incapacitation—intoxication must overwhelm the ability to control one's behavior. *State v. Kiles*, 222 Ariz. 25, 41, 213 P.3d 174, 190 (2009).

Rund uses Complainant's participation in a threesome to support his conclusion, declaring it "outrageous behavior" indicating incapacity. SOF ¶ 54. But that logic fails. First, as the supervisor conceded, three-

way sex is not itself unreasonable.[278] Second, Complainant foreshadowed her decision by "grinding" on and kissing both males. SOF ¶ 6. Third, participation in a threesome proves nothing about incapacity; if Complainant were sober, it would not indicate incapacity, rendering Rund's point circular—the decision is "outrageous" only if she is incapacitated. By substituting his preferred sexual mores for Complainant's, Rund violates ATIXA standards, SOF ¶ 54, improperly inferring that Complainant could not make rational decisions. Last, Complainant does not even purport to be *mentally* incapacitated—she told Tempe PD she was coherent and understood what was occurring before entering the bedroom. SOF ¶ 19.

Like the UHB on force, Rund never addresses the material question, "Was Complainant unable to make rational decisions when she had sex?" He uses an inference about something that might cause incapacity (alcohol) to override *demonstrated* capacity—logic, reason, mobility, communication skills, and awareness inside the bedroom—never weighing this capacity against the alcohol's effects.[279] Direct

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[278] ROR 1767-68.

[279] Rund's failure to show a weighing is significant, because evidence substantial in isolation may become insubstantial when contradictory

evidence of capacity—such as the finding that, "by all accounts," including her own, Complainant was lucid—cannot be undermined by unreliable (misapprehension of alcohol content) and indirect evidence of intoxication. Appellant asks not that the evidence be reweighed; rather, he asks this Court to determine the legal effect of the facts under the proper standard. *Gardiner*, *supra*.

2. Assuming, Arguendo, Complainant Was Incapacitated, ASU Did Not Prove The Required Elements of Incapacity.

ASU also had no evidence that Appellant knew or should have known Complainant's could not make rational decisions. ASU's action cannot stand without such proof, even if Complainant were incapacitated. To prove Appellant's knowledge, ASU pointed to his proximity to Complainant just before the sexual intercourse, his knowledge Complainant was drunk, and Complainant's claim she "use[d] a wall" to hold herself up.[280] But these do not establish that

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evidence is considered. *Landry v. FDIC*, 204 F.3d 115, 1140 (D.C. Cir. 2000).

[280] ROR 0650.

Appellant should know Complainant could not make reasoned, rational decisions when the sex occurred.

First, proximity's value arises from the inference that one will see that which is there to see, giving it utility only when incapacity actually exists. Because Complainant, as the hearing revealed, was "lucid," proximity would prove that Appellant would *know* Complainant had capacity. With no proof of other "context clues," SOF ¶¶ 6, 21, proximity is useless. Second, whatever Appellant knows must show incapacity, not drunkenness, because incapacity goes beyond drunkenness. SOF ¶ 49. Last, Complainant's claim she "used a wall" refers to something that could only occur between her dancing and kissing and entering the bedroom, a period of approximately 5-10 minutes. The "selfie" she took twenty minutes earlier negates incapacitation, and anything close to it.[281] SOF ¶ 4, Fig. 1. Girlfriend, her close friend, interacted with her all night and walked directly past Complainant minutes before she entered the bedroom, and did not report anything amiss. SOF ¶ 7. The sober

[281] Similarly, although ASU disparages the photograph's probative value, its Dean's Review Committee found *incapacity* based on a substantially inferior screenshot, whereas Appellant uses the photo to show only what the photo itself reveals—her appearance, mood, and state, and physical ability to take it.

witness observed Complainant move normally between Appellant and Participant for over 20 minutes, stopping just minutes before entering the bedroom. *Id.* Though Complainant claims she used a wall, no one else saw her do so or observed any walking issues.[282] No one alleges that *Appellant* observed or should have observed any instability before sex. Absent evidence that Appellant would have and should have seen the alleged instance of instability occurring in that small window of time, Complainant's testimony alone does not suffice to *impute knowledge of incapacity*, especially when there is direct evidence of *capacity*. ASU's standard addresses incapacity, not drunk sex, and focuses on mental capabilities. The standard does not align with Complainant's admission of coherence and understanding of what was occurring. SOF ¶ 19. Nor can Complainant's claim about a single fleeting act that no one saw rationally support that Appellant knew or should have known she was mentally infirm.

Rund also relies on a statement allegedly made by Appellant that the males should stop having sex after Complainant asked them to stop,

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[282] Girlfriend Int. with Tempe PD, 08:10.

"so [they] don't get in trouble."[283] Rund concludes the statement is "clear evidence" Appellant knew what he was doing was wrong.[284] Even though Complainant said she did not want to have sex "anymore," Rund rejects the more reasonable explanation that the males believed they could get in trouble if they persisted after she said stop. But the point proves nothing. "I don't want to get in trouble for having sex with someone after she says stop" is not rationally connected to proving, "I know she is incapacitated." It is also not evidence of incapacity that a woman says she will not have sex but then does, as Rund seems to suggest. If that were true, it would falsely point to Complainant being incapacitated on March 31, when she did just that while admittedly sober. SOF ¶ 1.

There is no substantial evidence of incapacitation, nor is there any evidence of Appellant's knowledge of this alleged incapacity. ASU contravened its own procedures and acted arbitrarily and capriciously by ignoring facts demonstrating capacity and flouting its own standard, requiring reversal.

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[283] ROR 1303.

[284] *Id.*, 1104.

D. ASU's Failure to Investigate Fully and Gather Evidence is Contrary to Law, an Abuse of Discretion, and Arbitrary and Capricious.

ASU owed Appellant a complete, unbiased investigation of his case. Under its ATIXA standards, ASU must "engage in active accumulation of evidence,"[285] "turn over every rock,"[286] be "thorough in [its] analysis,"[287] engage in "active identification and strategic gathering of evidence,"[288] and "[ensure] that all evidence has been examined, and all leads exhausted."[289] Failure to investigate fully is a "serious mistake."[290] In the initial "support" meeting, ASU's investigator informed Appellant she would gather all available evidence. SOF ¶ 31. But when that same investigator met with Complainant three days earlier, ASU's role was to be passive and the burden to gather evidence

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[285] *Id.*, 0879.

[286] *Id.*

[287] *Id.*

[288] *Id.*, 0705.

[289] *Id.*, 1021.

[290] The 2016 ATIXA Whitepaper, *The Seven Deadly Sins of Title IX Investigations* ("2016 Whitepaper"), 7. Available at https://atixa.org/wordpress/wp-content/uploads/2012/01/7-Deadly-Sins_Short_with-Teaser_Reduced-Size.pdf.

on Complainant. SOF ¶ 32. ASU pursued the latter approach, allowing substantial exculpatory evidence to go uncollected and unconsidered.

ASU's investigator failed to gather information on the alcohol content of the low-proof "UV Blue" Complainant consumed (the foundation for the incapacitation finding), or information on Complainant's prior food intake. SOF ¶ 36. ASU had only an adulterated version of the police report, which Complainant provided. It lacked the video screenshot and the SANE report. SOF ¶ 35. Even after being informed of this, the investigator never sought, or verified she had, a complete report. Even so, the police report contained only excerpts of interviews and confrontation calls, which ASU acknowledged, "***don't have all of the information that you need***"[291] and the full recordings would be "helpful" in assessing capacity. SOF ¶ 38. Despite knowing Tempe PD taped its interviews, ASU did not request the recordings. SOF ¶ 35. As the limited portions Appellant was able to present show, the recordings contained powerful evidence of Complainant's capacity.

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[291] ROR 1738.

ASU's investigative failures were pervasive. ASU never sought Complainant's text messages or interviewed Participant (he was deemed "unreachable" after Appellant did not know the current contact information). SOF ¶¶ 35-36. ASU never interviewed Complainant's friend who took her home, despite Complainant telling the investigator when he could speak; never explored Complainant's motive to falsely report sexual misconduct; and never investigated Complainant and Girlfriend's falling out over a male shortly after April 2—this could explain why Complainant would not want the threesome known. SOF ¶ 36. It never investigated whether romantic attraction motivated Complainant, who was admittedly upset that Appellant did not comfort or pursue her after she cried, SOF ¶ 20, to misrepresent the encounter. And despite Complainant's story deviating materially from earlier statements, SOF ¶ 33, and knowing Complainant had lied to Tempe PD to conceal her prior sex with Appellant, ASU never investigated these inconsistencies. Rather, the investigator and her supervisor presumed credibility and accepted Complainant's statements. By never challenging her claims (*e.g.*, asking about the type of alcohol she drank or food consumption prior to get-together; the falling-out between her

and Girlfriend; or who she thought caused the bruising), ASU "engag[ed] in a negligent process."[292]

The investigator never pursued the most objective evidence of capacity—the five-second video, even though Complainant disclosed it and offered to assist in securing it. SOF ¶ 41. She was obligated to gather all evidence and could direct Complainant to cooperate in procuring under Procedures Section C.2, but never followed up.[293]

ASU denied Appellant his right to question the investigator. *Webb*, *supra*. Rund is wrong—under the Procedures, Appellant cannot compel testimony from anyone. ASU did not bring the investigator to the hearing. Instead, the supervisor testified, deflecting questions because, "[It wasn't her] role to be the investigator."[294]

The UHB rejected the report of Appellant's alcohol expert, who could not testify because of time restrictions. SOF ¶ 43. The expert explained that Complainant's alcohol consumption should be adjusted because of UV Blue's low alcohol content, but ASU refused to consider

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[292] 2016 Whitepaper, 10.

[293] ROR 1447.

[294] *Id.*, 1754-55.

the report. Yet, Rund found incapacity based almost exclusively on consumption of "UV Blue," a drink he was obligated to understand and not simply assume was regular vodka.[295]

ASU breached its own investigation standards and failed to consider important aspects of Appellant's case. It failed to identify, gather and consider significant, exculpatory evidence—and that is based just on what Appellant found after he realized ASU did not investigate as required, and not on other evidence now gone or compromised. By disregarding its obligations and relevant evidence, ASU acted arbitrarily, capriciously, and contrary to law.

E. ASU's Pervasive Bias Against Appellant Was Contrary to Law, Arbitrary and Capricious.

ASU promised Appellant an impartial disciplinary process, and owed him an honest exercise of authority, *Petras*, *supra*, and use of fair procedures, *City of Phoenix*, *supra*. But from the start, ASU's bias against Appellant was unmistakable. Its investigator decided to charge him before corroborating Complainant's claims or interviewing Appellant. At her first meeting with Appellant, she misled him about

[295] *Id.*, 1193 & 1297.

her investigative role, telling him she would be a neutral investigator. SOF ¶ 31. Yet, behind the scenes, she had already told Complainant it up to Complainant, instead of her, to investigate. SOF ¶ 32. Because the report did not mention the investigative approach, Appellant was unaware of ASU's tactics until April 2017, when he reviewed ASU's taped interviews. Meaning, when Appellant argued his case before the Dean's Review Committee and UHB, he did not have all available evidence, nor did he know anything was missing. What he found (Tempe PD recordings) was discovered late, constraining his ability to present it during a one-day hearing. Had all available, material information been gathered and included in ASU's file, Appellant could have defended himself as envisioned by the Procedures. Evidence ASU could and should have gathered is likely now no longer available or tainted, prejudicing Appellant.

The stated purpose of the first meeting with Appellant was to connect him to support resources. SOF ¶ 31. The investigator instead, and without notice,[296] sought a statement from Appellant, which she

[296] As ASU's standards establish, due process is required throughout the process, not just the hearing phase. 2016 Whitepaper, 12.

may have coerced if not for Appellant's counsel. *Id.* Although she had facts supporting alcohol charges against nearly all get-together attendees, ASU charged only Appellant, and even then, without providing a factual basis. Further, before responsibility was found, she told Appellant that appealing would cause a permanent notation on his academic record, which could be avoided by dropping out and not contesting the charges. SOF ¶ 40. ASU also frustrated Appellant's right to review and respond to its evidence by not disclosing new statements from Complainant and, after they were uncovered, trying to stave off a review by falsely assuring him there was "no new evidence." SOF ¶ 37. Under oath, the supervisor could not explain why Appellant only learned of Complainant's comments ***the same day the Dean's Review Committee rendered its decision.***

The supervisor advocated steadfastly for Complainant, contravening her ATIXA obligation to "have no side other than the integrity of the process."[297] She maintained her strong belief in

[297] 2016 Whitepaper, 10.

Complainant's claims[298] even though Complainant lied to Tempe PD, presented an incomplete police report, refused to cooperate in obtaining the video, and altered her narrative. The supervisor disregarded incontrovertible evidence of Complainant's admitted statements inside the bedroom. She believed that Complainant *did not* say to Participant, "But you are taking pictures"—when a Tempe PD *recording* shows Complainant says just that.[299] The supervisor testified that an attentive, coherent, and firm response[300] by Complainant was indicative of *incapacity*.[301] Similarly, she denied the screenshot depicted Complainant touching Appellant's penis,[302] despite Tempe PD's description to the contrary.[303] The supervisor testified it was "difficult to determine an assessment off one photo," undermining the entire basis

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[298] As the overseer of the investigation, it was the supervisor's duty to assess the evidence and reach a reasoned finding of responsibility, not "believe one story over another." *Id.*, 8.

[299] Comp. Int. with Tyrrel (1), 15:31.

[300] Complainant's statement, "I don't want to do this anymore. No. Stop," after Appellant inquired whether Participant could ejaculate.

[301] Comp. Int. with Lucas, 27:36.

[302] ROR 1776.

[303] *Id.*, 1489.

for the Dean's Review Committee's finding of incapacity—Tempe PD's description of the video screenshot.[304]

The UHB also refused to help secure the video, despite the ability to direct Complainant to assist in obtaining it.[305] SOF ¶ 41. Appellant twice requested the UHB exercise its authority to direct Complainant to cooperate in seeking a protected release of the video. *Id.* Complainant refused, and the UHB did nothing further—despite conceding the video would be helpful in resolving the "difficult issues."[306] The UHB contended it could not issue a directive because Complainant did not possess the video.[307] This misses the point: it could direct Complainant to *cooperate* in securing the video, especially since Complainant twice misrepresented its contents as part of the "evidence" she provided to ASU and disputed the detective's summary of the screenshot.[308] There was no legitimate reason not to direct cooperation.

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[304] *Id.*, 1770; SOF ¶ 38.

[305] Procedures, Section E.3.i. grants the UHB the authority to issue requests and directives in connection with disciplinary proceedings.

[306] ROR 0326.

[307] ROR 0277.

[308] *Id.*, 0513 & 0515.

F. ASU's Finding that Appellant Violated University and State Alcohol Regulations is Contrary to Law and Unsupported by Substantial Evidence, Arbitrary and Capricious, and an Abuse of Discretion.

Despite numerous requests, ASU only informed and explained the precise basis for the F-15 charge after the finding of responsibility, and then shifted the basis for the charge at the hearing itself. SOF ¶¶ 28-29, 45. ASU variously argued that Appellant *provided*, *gave*, or *received* alcohol, or *influenced* Complainant's alcohol consumption, making it impossible to prepare a defense because these terms were not raised or contained in the governing statutes or rules. This ambiguity violates due process in two ways—agencies must give notice of proscriptions so those regulated may act accordingly and establish standards providing guidance and precision to avoid arbitrary acts and discriminatory enforcement. *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

ASU's alcohol charge, as conceded by the supervisor during the hearing, was that Appellant received alcohol from the homeowner to give to Complainant.[309] But Appellant was not informed of this basis

[309] *Id.*, 1784.

until ***after*** his initial expulsion. SOF ¶ 39. The investigator repeatedly referred him to the University's generic alcohol policy, which does not specify any particular rules and on its face does not support a violation.[310] She also mentioned A.R.S. § 4-241(P), but did not outline which acts violated the statute.[311] The supervisor, ***two days after the finding of responsibility,*** explained the charge by citing, for the first time, to ASU's student services manual, which prohibits "providing" alcohol but only when prohibited under state law, and also to Section 4-241(P), which implicates two grounds: influence and receipt. She never provided the specific acts supporting the charge. She testified that because Appellant "poured shots," he *provided* alcohol to Complainant—despite Complainant nor Appellant never explaining *how* the alcohol came to be in her possession (*e.g.*, handing shots to her).[312] *Providing*, as noted, is not a term § 4-241 uses, nor is its meaning obvious, as evidenced by the UHB member's question of whether handing a beer from a fridge to a friend constitutes *providing* alcohol. The supervisor

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[310] *Id.*, 1388-89.

[311] *Id.*

[312] ROR 1785.

said, "It depends," SOF ¶ 45, then returned to section 4-241 by claiming (for the first time) Appellant "influenced the giving" of alcohol to Complainant.[313] Under the statute, influencing applies only when one obtains alcohol for an underage person "by misrepresenting the age of such person...,"[314] which is not present here.

Second, the statute also prohibits "ordering, requesting, receiving, or procuring" liquor with intent to give it to an underage person. *Id.* (cleaned up). Here, Appellant was a guest and received nothing beyond that given to all others; he did not occupy the home and never had a right to control the alcohol furnished by the homeowner. SOF ¶ 1. Appellant and Participant poured shots and left them out for others to consume if desired. ASU's argument centered on Complainant's consumption of those shots.[315] This glosses over two requirements. ASU must show Appellant ***received*** alcohol from another. In construing *received*, one must consider the statutory objective, which is to punish those who actively obtain alcohol (order/request/receive/procure).

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[313] *Id.*, 1778.

[314] Ariz. Rev. Stat. Ann. § 4-241.

[315] ROR 1933.

Broadly construing one term would render others superfluous. If *receive* means *possess*, there is no need for *procure*. Simply "pouring shots" is not what the statute contemplated for *receiving* alcohol, as it would then apply to anyone who touched alcohol.

ASU must also prove Appellant ***intended to give the alcohol to Complainant when received***. If Appellant *received* the alcohol on arrival, intent is missing. When the host offered the spirits, nothing supports that Appellant intended to receive one of them—UV Blue—to give to someone not present and who may drink something else.[316] If *received* when poured, Appellant still did not know whether or what Complainant would drink. If *received* when Complainant consumed her drinks, nothing demonstrates Appellant and not Participant poured those specific drinks. Section 4-241's goal is to penalize a "licensee, employee, or other person"[317] who arranges for alcohol with the intent to

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[316] Ariz. Rev. Stat. Ann. § 13-105(a) establishes that "with the intent to" means, with respect to a result or to conduct described by a statute defining an offense, a person's objective is to cause that result or to engage in that conduct.

[317] If broadly construed to mean anyone, "other person" would render the terms *licensee* and *employee* superfluous. The associated-words canon commonly limits "a general term to a subset of all the things or actions that it covers." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 196 (2012). Thus, "other persons"

"sell, give, or serve" to a minor, yet here, the host procured and served it. Nothing indicates Appellant sought to *receive* alcohol just to give to Complainant, and, under section 4-241, receipt and intent must exist simultaneously. The statute targets those who procure alcohol *intending* to furnish it to a minor and exempts those who, after obtaining it, decide to serve a minor. By pouring drinks for future consumption by other guests, Appellant did not *receive* alcohol nor did he intend to give it to another when he gained access to it.

G. The University Hearing Board Abused its Discretion and Acted Contrary to Law When it Denied Appellant's Request to Continue the Hearing.

An agency abuses its discretion when fails to consider the relevant facts, *Avila*, *supra*, or when it exercises its judgment on untenable grounds, or for untenable reasons. The UHB failed to consider relevant circumstances when it denied Appellant's request to continue the hearing. Realizing the five hours originally allotted for the hearing would be insufficient to present his witnesses and evidence, Appellant requested additional time before the rescheduled hearing. SOF ¶ 44.

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means those who—like licensees and employees—are customarily involved in the provision of alcohol.

The UHB granted some additional time, but time was lost during the hearing for issues out of Appellant's control. SOF ¶ 43. When time ran out with four witnesses yet to be examined, including the investigator and the only alcohol expert, the UHB refused to extend the hearing because of the difficulty in coordinating the UHB members' schedules. SOF ¶ 44. He did so despite the authority to extend the hearing for good cause, as he did in rescheduling the hearing to accommodate the UHB. The UHB even rejected Appellant's attempt to supplement the record with his expert's two-page report regarding key alcohol issues. *Id.* The proper remedy was another half-day of testimony when convenient for all. By refusing to consider the prejudice of excluding witnesses and evidence, ASU abused its discretion and deprived Appellant of a meaningful opportunity to be heard.

H. Under its Standards, ASU's Sanction was Excessive, an Abuse of Discretion, Arbitrary and Capricious, Contrary to Law, and Not Supported by Circumstantial Evidence.

Based on the foregoing facts and assuming the force finding is reversed, the sanction is excessive. ASU's standards outline mitigating factors, several which are present here: Complainant's self-

incapacitation (no one forced her to drink)[318], Appellant's behavior did not exhibit a deliberate disregard for the dignity and autonomy of Complainant (he believed, based on her words and actions, she was consenting)[319], and Appellant's lack of prior misconduct.[320] At most, Appellant proceeded where no one noticed the alleged incapacity, which does not satisfy the elements of the charge and is not the type of behavior warranting expulsion.

VI. CONCLUSION

For the foregoing reasons, ASU's disciplinary decisions are contrary to law, arbitrary, capricious, an abuse of discretion and not supported by substantial evidence, and should be reversed and set aside under A.R.S. § 12-910(E). If reversal is warranted only under Section V(G), this case should be remanded to the UHB for further proceedings.

Appellant requests the court make findings of fact and state conclusions of law on which its ruling on this appeal is based. Under

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[318] The 2018 ATIXA Whitepaper, *The ATIXA Guide to Sanctioning Student Sexual Misconduct Violations*, 7 ("2018 Whitepaper"). Available at: https://atixa.org/wordpress/wp-content/uploads/2017/02/ATIXA-2018-Whitepaper-FINAL-Jan-2018.pdf.

[319] *Id.*, 20.

[320] *Id.*, 9.

A.R.S. § 12-348, Appellant also asks this court to award reasonable fees and other expenses if he prevails.

Respectfully submitted this 9th day of February, 2018.

HAGENS BERMAN SOBOL SHAPIRO LLP

By _____

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THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JOHN DOE, Appellant, v. ARIZONA BOARD OF REGENTS, Appellee.	NO. LC2017-000365 (Assigned to Honorable Patricia Starr)

APPELLANT'S CERTIFICATION OF WORD COUNT

The undersigned certifies that the brief/motion to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 14,000 words.

The document to which this Certificate is attached does not exceed the word limit that is set by JRAD Rule 8 as applicable.

The information provided in this Certification is true and complete.

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APPELLANT'S CERTIFICATE OF SERVICE

I, Robert B. Carey, hereby certify that on February 9, 2018, I filed Appellant's Opening Brief with the Maricopa County Superior Court.

I further certify that I served Appellant's Opening Brief via hand-delivery on the following party:

Honorable Patricia Starr
Maricopa County Superior Court
Old Court House-309
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I further certify that I served Appellant's Opening Brief using via US First Class Mail on the following party:

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