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VICE PRESIDENT FOR STUDENT AFFAIRS  
TWAMLEY HALL ROOM 307  
264 CENTENNIAL DRIVE STOP 7140  
GRAND FORKS ND 58202-7140  
(701) 777-2724  
FAX (701) 777-2596

October 11, 2011

Mr. Nathan M. Hansen, Esq.  
2440 North Charles Street, Suite 242  
North St. Paul, MN 55109

Dear Mr. Hansen:

As you were notified on September 2, 2011, I requested Provost Paul LeBel to serve as my designee for Caleb Warner's appeal. Enclosed is his decision. In support of the Provost's decision, the sanctions for Caleb Warner have been lifted immediately. Please let me know if you have any additional questions. Thank you.

Sincerely,



Lori Reesor, Ph.D.  
Vice President for Student Affairs

Cc: Caleb Warner  
Julie Evans, General Counsel  
Cara Halgren, Dean of Students  
Kathy Sukalski, SRC Chair  
Bonnie Solberg, SRC Advisor

LR/jf

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PROVOST & VICE PRESIDENT FOR ACADEMIC AFFAIRS  
 TWAMLEY HALL ROOM 302  
 264 CENTENNIAL DRIVE STOP 8176  
 GRAND FORKS ND 58202-8176  
 (701) 777-2167  
 FAX (701) 777-4139

***In re* Caleb Warner**  
**Appeal from Student Relations Committee Decision**

**Decision on Appeal by Paul A. LeBel**  
**Provost and Vice President for Academic Affairs**

On February 11, 2010, a panel of the Student Relations Committee (SRC) conducted a hearing to consider allegations that Appellant Caleb Warner had violated four provisions of the University of North Dakota Code of Student Life (*Code*). The hearing resulted in a finding that the accused student was in violation of three provisions of the Code and was not in violation of a fourth. The accused student was provided written notification of the findings in a letter dated February 16, 2010. The letter described the sanction imposed on the accused student as a suspension from the University, a ban from campus property and UND activities, and disenrollment from classes in the Spring 2010 semester. The accused student was given an opportunity to apply for reinstatement to UND on or after February 11, 2013, with such reinstatement to be effective in Fall 2013.

On July 28, 2010, the accused student, through his attorney Steven M. Light, requested a rehearing of his case based on new information that had recently become available. The Vice President for Student and Outreach Services at that time, Dr. Robert H. Boyd, responded to the request in a letter dated August 26, 2010, which stated that the request was denied. The denial letter cited a provision of the Code of Student Life specifying the limited time period within which an appeal could be filed.

On July 26, 2011, UND President Robert O. Kelley asked me, in my role as Provost, to examine the record and determine what options, if any, existed for dealing with this case. That review led me to determine that an opportunity to appeal should be extended to the accused student. I wrote to the accused student on July 27, 2011, stating that an appeal petition, under Code Appendix VII(IV)(F), could be filed with Dr. Lori Reesor, the Vice President for Student Affairs, within thirty calendar days of receipt of that letter.

The accused student's new counsel, Nathan M. Hansen, wrote to me on August 10, 2011, indicating that he was representing the accused student and that an appeal would be filed. That appeal petition was filed in a timely manner on August 31, 2011. Acting pursuant to Code Appendix VII (IV)( F)(5), Dr. Reesor notified me on September 2, 2011, that she was naming me her designee on this appeal.

I have listened to the audio recording of the February 11, 2010, hearing and reviewed the documentation that was part of that hearing, as well as the correspondence previously cited in this opinion. I recognize that it is impossible to say with certainty what actually happened during the incident that led to the charges against the accused student. The inability to know what happened between the complainant and the accused student, however, does not prevent a full and fair consideration of the accused student's petition and an administrative resolution of the matter. Code Appendix VII(F)(6)(a). Based on my review of the record, and for the reasons described below, I have concluded that the sanction of the SRC should be vacated.

### **A. The Charges Against The Accused Student.**

The hearing notification letter of February 10, 2010, charged the accused student with four violations of Code provisions found in §2, Article IV (Prohibited Acts). They are, first, violation of criminal or civil laws (§2, art.IV(A)), second, sexual assault (§2, art.IV(A)(d)), third, interference (§2, art.IV(C)(2)), and fourth, sexual misconduct (§2, art.IV(C)(6)). The accused student was found to be in violation of the first three provisions and not to be in violation of the fourth.

The first two charges against the accused student should not have been treated as separate violations. Code §2, Article IV(A) identifies "violations of criminal or civil laws" as the first general category of prohibited acts. The provision then goes on to list and define seven specific subcategories, including sexual assault, as examples of laws that could fall into this category. The general category and the specific example do not constitute two separate offenses, and should have resulted in only one charge, namely, violation of the criminal law against sexual assault.

There is no basis in the record to conclude that the finding of violation on three as opposed to two charges affected the sanction imposed on the accused student. In his closing argument, the Judicial Officer based the recommendation of the length of the suspension on the time that the complainant might be likely to remain a student on the UND campus, and the sanction imposed by the SRC was consistent with that recommendation.

Accordingly, the charging of the accused student with two separate violations of the general provision and the specific example constituted harmless error in this case.

### **B. The Conduct of the Hearing.**

Three of the bases of appeal identified in the Code as items to be reviewed are related to errors occurring during the SRC hearing. Code Appendix VII(F)(3)(a)-(c).

The first two grounds of appeal in the Code refer to deviation from the procedures for a full hearing and more generally to procedural error. Nothing in the audio record of the hearing calls

into question the procedural regularity of that hearing. The requirements of Code Appendix VII(IV)(C) were followed.

The third ground of appeal in the Code is the lack of an adequate opportunity to make a presentation. The accused student was accompanied by counsel, who acted as the personal advisor of the accused student. The accused student called witnesses on his behalf, and posed questions to the complainant. At the conclusion of the evidence, the accused student made a closing statement to the SRC. Nothing in the record suggests the lack of an adequate opportunity for the accused student to make his presentation.

The second ground for appeal in the Code also refers to a violation of rights. Code Appendix VII (F)(3)(b). One could infer that the provision either is a limitation on the procedural error as a basis for appeal (i.e., the procedural error must have violated the rights of the accused) or is an expansion of the rights to include a substantive review of the hearing record. Taking the reading most favorable to the accused student, the question becomes whether the accused student's rights were violated by the decision being based on insufficient evidence. The hearing record demonstrates that there was substantial evidence to support the SRC's finding that the accused student more likely than not violated the Code. The members of the SRC heard all the witnesses, asked questions of witnesses, and had the opportunity to observe the demeanor of the parties and the witnesses. Based on the testimony that was presented at the hearing, a reasonable person could conclude that a violation had been established by a preponderance of the evidence.

Accordingly, there is no basis to conclude that either the conduct of the hearing or the decision reached by the SRC based on the totality of the information presented at the hearing provide a basis for overturning the decision of the SRC.

### **C. Post-hearing Developments.**

#### *1. Timeliness of Review.*

The accused student's petition of August 31, 2011, cites Code Appendix VII(F)(3)(d) as a basis for appeal. That provision refers to "additional information that was unavailable at the time of the hearing and that may have affected the outcome of the hearing and/or the sanctions."

Grounding an appeal on the acquisition of material new evidence is treated by the Code as indistinguishable from the other bases of appeal. All appeal bases are subject to a requirement of filing a notice of appeal within five class days of receipt of receipt of the SRC's hearing decision letter. Code Appendix VII((F)(2).

Whatever one might conclude about the fairness of such a limited time period for an appeal that is based on errors that occur during the SRC hearing itself, and this decision does not require such a conclusion, the time limit is unreasonable when applied to the discovery of new information that is material to the outcome.

Although a proceeding under the Code is intentionally different from a legal proceeding, it is nevertheless true that a challenge of this nature to the finding and sanctions is more a collateral attack rather than an appeal strictly defined. As such, the appropriate limitations period should begin to run when the information is or should have been discovered, not when the notification of the decision of the SRC is received.

The accused student's first counsel filed a challenge to the finding and the sanction in July 2010. That challenge was framed as a request for a rehearing under Code §2, Article III(7)(b). The rehearing was requested on the basis of new information that was relevant to the alleged violation. The Code provision states that a "senior student conduct administrator" (e.g., the Dean of Students or the Director of Residence Services) or the SRC may grant a rehearing. The August 26, 2010, response by then Vice President Boyd described this challenge to the decision as an appeal and invoked the five class-day time limit for filing an appeal.

The Code provision treats the grant of a rehearing as a discretionary decision ("may grant a rehearing"). The decision would thus have to stand unless it constituted an abuse of discretion. That standard of review precludes a substitution of my own judgment of the merits of the July 2010 challenge to the SRC decision for that of then Vice President Boyd.

What I can do, however, is determine that an application of the Code in a way that rules against the accused student for not raising within a short period of time a challenge that draws on information about events that had not yet even occurred is inconsistent with the minimum demands of fundamental fairness that every student must be afforded.

I conclude that invoking the five class-day time limit within which to appeal a decision based on the specific information that is proffered by the accused student in this case would constitute a violation of the accused student's rights, under Code Appendix VII(F)(5)(a). Accordingly, the August 31, 2011, appeal petition of the accused student is entitled to a review on its merits.

## *2. Sufficiency of After-Acquired Evidence.*

Evaluation of the specific information provided by the accused student's petition requires a careful description of precisely how that information operates as a basis for vacating the sanction. It would be erroneous to infer that I find that the accused student's account of the events in question is more credible than the complainant's account. That conclusion cannot be drawn from the available information.

The new information consists of four documents:

- an Affidavit of Probable Cause filed by a Grand Forks police officer on May 3, 2010, attesting to information and belief that a criminal offense has been committed by the complainant, with an attached Incident Summary identifying the offense as a false report to law enforcement
- an Information filed by the Grand Forks County States Attorney Office on May 13, 2010, charging the complainant with the Class A misdemeanor of False Report to Law

Enforcement, in violation of North Dakota Century Code §§ 12.1-11-03(1) and 12.1-32-01(5), in that complainant “provided false information to [a Grand Forks police officer] that inferred [*sic*] with a sexual assault investigation or materially misled a law enforcement officer”

- a Warrant for Arrest of complainant on May 14, 2010, indicating that the complainant would not be extradited
- a copy of the Register of Action in the criminal action against complainant, indicating an affidavit of service by mail on July 7, 2011.


It is important to recognize that there has been no adjudication of the misdemeanor charge against the complainant. Given the arrest warrant’s indication of no intent to extradite the complainant, it is highly unlikely that there ever will be such an adjudication. The presumption of innocence is fully applicable to the complainant. I reach no conclusion that the complainant actually provided false information to law enforcement.

The compelling piece of evidence in the information that was not, and could not have been, available at the time of the hearing is the professional judgment of a trained law enforcement officer that there was probable cause to doubt the veracity of the information provided to the officer by the complainant. It is the fact of that professional judgment having been reached, rather than any conjecture about the truth or falsity of what the complainant said, that calls into question the decision of the SRC.

Based on the specific fact of a law enforcement officer filing an affidavit of belief that complainant had provided false information to him in his investigation of the incident leading to the disciplinary proceeding against the accused student, I conclude that the continued finding of a violation of the Code is not substantiated by the information that now includes this information that was not, and could not have been, made available to the SRC at the time of its decision. Code Appendix VII(F)(5)(b).

**D. Conclusion.**

The February 2010 sanction of the SRC against Caleb Warner is vacated.

  
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Paul A. LeBel  
Provost and Vice President for Academic Affairs

10 Oct 2011  
Date