


DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	OCT 02 2003  ▲ COURT USE ONLY ▲
NOELLE E. LEAVITT, et al., Plaintiffs, v. ELYSE YAMAUCHI, et al., Defendants.	Case No.: 03CV2718 Ctrm.: 3
COURT'S ORDER RE: FINDINGS OF FACT AND CONCLUSIONS OF LAW	

Introduction

On April 16, 2003, Plaintiffs Noelle E. Leavitt, Lindsay E. Sandham, and Daniel T. Holland ("Plaintiffs"), staff members of the College newspaper, *The Metropolitan*, filed a complaint against Elyse Yamauchi, Sandra Haynes and the Judicial Board appointed by Ms. Yamauchi ("Defendants"). The complaint alleged that Defendants violated Colorado's Open Meetings Act, § 24-6-402, C.R.S. (2003) ("OMA") by conducting a student disciplinary hearing at the Metropolitan State College of Denver ("Metro State" or "College") on February 28, 2003 that failed to comply with the requirements of the OMA. Plaintiffs seek a declaration that Defendants violated the OMA, an injunction requiring Defendants to comply with the OMA and an award of attorney fees and costs. The case was tried on the merits May 16, 2003 and July 18, 2003. The evidence presented and the exhibits submitted are sufficient for the Court to decide the issues, which involve primarily questions of statutory interpretation. The Court accepted as post-trial briefs, the parties' pleadings on Defendants' motion to dismiss.

Plaintiffs assert that the historically private student discipline hearings at the College should be open to the public and the press under the OMA because the public has a right to know the types of conduct for which students are being disciplined. The College favors (and policies permit) private hearings, on the basis that the process is more effective when conducted in private.

The College can be required to conduct its student discipline hearings in accord with the requirements of the OMA, only if the Judicial Board that conducts the hearings is subject to the OMA. Bodies that meet the definition of "state public body" are subject to the OMA, but only when such bodies are convened for the purpose of discussing "public business." The parties have competing interpretations of the terms "state public body" and "public business," as those terms are used in the OMA. Plaintiffs maintain that the Governing Board, as the ultimate authority for all College actions, has indirectly delegated its authority to the Judicial Board, rendering the Judicial Board a "state public body" under the OMA. They further contend that either all formal actions of a "state public body" are "public business" or, alternatively, that student discipline hearings are "public business." Defendants maintain that the Judicial Board is an administrative body of the College, not a body of the Governing Board and thus not a "state public body". They further contend that the Judicial Board does not discuss "public business", but rather conducts hearings on private disciplinary matters between the College and the student.

For the reasons set forth below, this Court concludes that the Judicial Board is not covered by the OMA because it is not a "state public body" and its hearings are not "meetings" convened to discuss "public business." Nonetheless, Plaintiffs can realize their objective of reporting on the types of conduct for which students are being disciplined, as they did in this case, through information garnered from appropriately redacted records.

Findings of Fact

The Challenged Hearing

1. On February 28, 2003, a student disciplinary hearing took place at Metro State. Consistent with internal College policy and usual practice, the hearing was conducted in private.
2. The Judicial Board that conducted the hearing, existed only for the duration of the disciplinary hearing in question. It was a body of three persons appointed by Defendant Elyse Yamauchi pursuant to the Metropolitan State College Student Conduct Code ("Student Conduct Code"), in her capacity as the College Judicial Officer. She appointed the Judicial Board to hear disciplinary charges against Brotha Seku (a.k.a. Steven Evans), then president of the Metro State Student Government Assembly. Under the Student Conduct Code, Ms. Yamauchi had discretion to appoint as the Judicial Board (identified in the Student Conduct Code as "the judicial body"), a single individual or individuals of her choosing, or to hear the charges herself. She chose three people to hear this case; one student, who was an employee of the College, one administrator, and one faculty member who also held an administrative position.
3. In accordance with the Student Conduct Code, Ms. Yamauchi set a hearing date for February 28, 2003. She gave notice of the hearing to the participants only. Under the Student

Conduct Code, it is within her discretion to conduct the hearing in private and she consistently did so, believing that the process was better served by such privacy.

4. Mr. Seku requested by letter that the hearing be conducted in public. This request was denied. Nonetheless, Mr. Seku opened the door on the hearing date and beckoned Plaintiffs to enter. Upon Plaintiffs entering the room, Ms. Yamauchi directed them to leave. They did not leave until college security was called.

5. As a result of the hearing, the Judicial Board found that Mr. Seku had violated the Student Conduct Code, and recommended sanctions to the Judicial Officer. Plaintiffs requested that the hearing be held anew in compliance with the Open Meetings Act. Ms. Yamauchi declined the request.

The Hearing Process

6. Students at the College are governed by the Student Conduct Code. The Student Conduct Code is contained in the Student Handbook, promulgated by the College pursuant to the directive of Section 6.1 of the Trustee Policy Manual ("Policy Manual")¹, which states:

6.1 Disciplinary Action Policy and Student Due Process (fn. omitted)

A. Disciplinary Action Policy

Acts by students which interfere with the rights of others, disrupt or impair the normal functioning of the college, damage property, impair the health or safety of others, or otherwise violate college regulations may be grounds for suspension or expulsion from the college pursuant to college disciplinary procedures.

B. Student Due Process

Each college governed by the Trustees shall establish procedures ensuring due process to students against whom the college initiates disciplinary action.

The Policy Manual does not require that the student discipline procedure be submitted to the Trustees for approval. This is the only language in the Policy Manual that references student

¹Until July 1, 2002, the College was part of the State Colleges in Colorado. Part of the legislation creating the current Board of Trustees provided: "...Policies, procedures, and agreements previously approved by the trustees of the state colleges and applicable to Metropolitan State College of Denver shall remain in force and effect unless and until changed by the board of trustees [of Metropolitan State College of Denver]." §23-54-102(6), C.R.S. (2003).

discipline. As this section indicates, it is the *College*, not the Governing Board that establishes behavioral regulations and due process procedures. It is the College that initiates and decides disciplinary action.

7. Proscribed student conduct is set forth in Article III of the Student Code. It provides that the Student Conduct Code is administered by the Judicial Officer, who is appointed by the College president. Article I.8. When, as in this case, there is an alleged violation of the Student Conduct Code which cannot be resolved informally and there is the need for a hearing, the Judicial Officer constitutes a "Judicial Body", which is defined as:

any person or persons authorized and identified by the judicial officer to determine whether a student has violated the Student Conduct Code and to recommend imposition of sanctions.

Student Conduct Code, Article I.10.

8. The Judicial Board (or Body) can be a single person or a group, in the discretion of the Judicial Officer. In addition, the Judicial Officer may appoint a Judicial Advisor, who is:

a College official authorized on a case-by-case basis by the judicial officer to impose sanctions upon students found to have violated the Student Conduct Code. The judicial officer may authorize a judicial advisor to serve simultaneously as a judicial advisor and the sole member or one of the members of a judicial body. Nothing shall prevent the judicial officer from authorizing the same judicial advisor to impose sanctions in all cases.

Student Code, Article I.9. (No Judicial Advisor was appointed in this case.)

9. The Student Conduct Code addresses the composition and the leadership of the Judicial Board (or Body- hereafter only referred to as Board) as follows:

1. The judicial officer shall determine the composition of judicial bodies and determine which judicial body or judicial advisor shall be authorized to hear each case.

2. The judicial officer shall appoint a chair to the judicial body for each case.

Student Code, Article II.

10. The hearing process is set forth in Article IV, which provides, among other things:

a) Hearings shall be conducted in private.

- b) Admissions of any person to the hearing shall be at the discretion of the judicial [board] and or its judicial advisor.

Student Code, Article IV.A.5.

11. Following the hearing, the Judicial Board determines whether the conduct alleged occurred, and if so, whether the conduct violated the Student Code. Article I.10. The Board makes a recommendation for sanctions to the Judicial Officer. *Id.* The potential sanctions are set forth in Article IV.B of the Student Code and range from a warning to expulsion. The Judicial Officer determines the sanction to be imposed. Article IV.B.5. Where a Judicial Board consisting of persons other than the Judicial Officer has been convened, the Judicial Officer must consider, but is not bound by, the recommendation of the Judicial Board. *Id.*
12. Decisions of the Judicial Board and the Judicial Officer are final unless appealed as provided in Article IV.D. Any appeal is directed to the Vice President of Student Services, as the College president's designee. Article IV.D.1. The Vice President's review is limited to the record of the hearing except as required by new evidence. Article IV.D.2. No further appeal is provided. The Trustees and the president do not consider student disciplinary cases.
13. The Student Handbook, including the Student Conduct Code therein, is an administrative tool promulgated by the College president for managing students. It was not created, reviewed or approved by the College's Governing Board. The College's Governing Board at the time of the February 28, 2003 hearing was operating under the State Colleges in Colorado Trustee Policy Manual. *See fn. 1.*
14. Subsequent to the hearing in question, the Governing Board adopted a new Trustee Policy Manual entitled the Metropolitan State College Trustees Policy Manual. The Trustees' direction to the College with respect to student discipline remains in section 6.1, but now reads, "The President shall develop policies establishing standards for student conduct, sanctions for violations of such standards, and procedures for the administering of sanctions. Meetings and hearings conducted pursuant to those procedures shall not be considered meetings of the Board, or any committee thereof, and shall not be open to the public unless all participants agree otherwise." This is the sole direction from the Trustees to the College on the issue of student discipline.
15. The Student Conduct Code has not been changed and remains in effect.

Conclusions of Law

16. The threshold provisions of the OMA are to be interpreted broadly and the exemptions narrowly construed so as to carry out the statute's remedial purposes. *See Costilla County Conservancy Dist. v. Board of County Com'rs, Costilla County*, 64 P.3d 900, 902-03(Colo. App. 2002). Even under the broadest interpretation of the OMA, a "body" must be a "state public body" and be engaged in a "meeting" in order to be subject to the OMA. The purpose of the OMA is "to give citizens an expanded opportunity to become fully informed on issues of public importance, so that meaningful participation in the decision-making process may be achieved." *Id.* at 903. Interpreting the OMA to draw within its scope the Judicial Board's hearing of student discipline matters does not advance this purpose.

17. Interpreting the OMA so as to apply to the Judicial Board would ignore definitions of "state public body" as defined in § 24-6-402(1)(d) and "meeting" as defined in § 24-6-402(1)(a), both of which contain limitations that exclude the Judicial Board from their purview. The term "state public body" is defined in the Open Meetings Act as:

...any board, committee, commission, or other advisory, policy making, rule-making, decision-making, or formally constituted body of any state agency, state authority, Governing Board of a state institution of higher education including the regents of the university of Colorado, a non-profit corporation incorporated pursuant to section 23-5-121(2), C.R.S., or the general assembly, and any public or private entity to which the state, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the state public body.

§24-6-402(1)(d), C.R.S. (2003). The first requirement for application of the OMA to the Judicial Board, therefore, is whether it is a "board, committee, commission, or other advisory, policy making, rule-making, decision-making, or formally constituted body of" the College's Governing Board, the Board of Trustees for Metropolitan State College of Denver ("Board of Trustees" or "Trustees"),² or a public entity to which the state or a state official has "...delegated a governmental decision-making function...." §24-6-402(1)(d), C.R.S. (2003). The Judicial Board is neither "of" the Board of Trustees nor a "public entity". Accordingly, it is not a "state public body" subject to OMA. *See A.S. Abell Pub. Co. v. Board of Regents of University of Maryland*, 68 Md. App. 500, 514 A.2d 25, 28 (1986) The Judicial Board does not make rules or policy, so in order to be a state public body it must be an advisory, decision-making, or formally constituted body of the Trustees. The Judicial Board has none of the attributes of a body of the Trustees that would draw it within this definition. It does not advise the Trustees in any fashion,

² §23-54-102, C.R.S. (2003).

it makes no decisions on matters on which the Trustees take formal action and it is not formally constituted by the Trustees.

18. It is clear from the Trustees Manual and the Student Conduct Code that the Judicial Board is not formally constituted by the Trustees. The Judicial Board was convened by Elyse Yamauchi, a staff member of the College, in her role as the College Judicial Officer. It is likewise clear that the Judicial Board was not appointed at the direction of the Trustees. The Trustees' Policy Manual directive to provide due process in student discipline does not require that the matter be heard by a Judicial Board. The creation of the Judicial Board is an administrative decision, strictly at the discretion of the Judicial Officer. Likewise, the promulgation of the policies authorizing the Judicial Officer to convene a Judicial Board is wholly a College function, with no involvement from the Trustees. Therefore, the Judicial Board cannot be said to be composed, originated or made from the Trustees. Thus it can not be a "formally constituted" body of the Trustees.

19. It is equally clear that the Judicial Board is not an advisory body of the Trustees. There is no interaction between the Judicial Board and the Trustees. The Judicial Board's decisions as to whether a violation of the Student Conduct Code occurred and its recommendations as to sanctions do not go to the Trustees nor are the final sanctions reviewed by the Trustees.

20. The Trustees' own policy makes the function of the Judicial Board strictly a college administrative function, not a Trustee function. The Judicial Board was convened by the Judicial Officer, who could have heard the proceedings herself or appointed a single person to conduct the hearing, in lieu of appointing a Judicial Board. Had the matter been heard by an individual, the OMA would be inapplicable because even assuming that one person could be a "state public body" there would be no "meeting" as defined in OMA. Were the matters heard by the Judicial Board subsequently reviewed by the Trustees, the conclusion might be different. However, since matters of student discipline are exclusively within the College's authority, the Judicial Board is not a decision-making body of the Trustees.

21. The Trustee Policy Manual establishes where the line shall be drawn between Trustee functions and College functions. The Policy on Shared Decision Making, § 1-13, ¶1 states, "[i]n order to clarify its expectations for proper decision-making processes, the Board distinguishes between its own responsibilities for policy making ... and the institutional prerogatives for administration, procedures development, and operation."³ The notion that every decision made by the College pursuant to a policy adopted by the College is tantamount to a decision of the Governing Board does not comport with § 1.13, ¶1.

³ The correlative passage in the Policy Manual adopted subsequent to the challenged hearing appears in § 1.10 and states "The Board distinguishes between its own responsibilities for policy making and the implementation of those policies through administration, procedures development, and operation."

22. By drawing a line between policy-making functions reserved to the Trustees and administrative/operational functions accorded to the College, the policy provides an answer to the question of where to draw the line with respect to those bodies that are "of" the Governing Board for purposes of the OMA, and those that are not. If the Trustees delegate to a body, Trustee responsibilities for policy making, that body is subject to the OMA. When the College appoints a body to exercise administrative and operational responsibilities within the general policy framework established by the Trustees, such a body is not subject to the OMA. The Judicial Board is an administrative body and is thus not subject to the OMA.

23. The "administrative staff" exemption from the definition of "state public body" further establishes of the General Assembly's intent that not every committee convened in every state entity to make decisions is subject to the OMA by the statement that "...persons on the administrative staff of the state public body" are not subject to the COML. §24-6-402(1)(d), C.R.S. (2003). It would be impossible for the state to conduct business if every meeting, regardless of how attenuated its connection to the Governing Board, were subject to the requirements of the OMA. The Trustees and any group convened by the Trustees or at the behest of the Trustees to do the business of the Trustees are appropriately covered by the OMA. However, the OMA is not structured so that a group performing administrative business of the College is subject to its provisions. Such a construction of the OMA ignores the plain intent of the legislature that not all work of state entities be subject to the Act. The members of the Judicial Board are administrative staff of the College who are assisting the College to operate. As such they are not covered by the COML.

24. The delegation question is similar to that addressed under Florida's open meeting law in *Bennett v. Warden*, 333 So.2d 97 (Fla. App. 1976).⁴ The *Bennett* court held that a president of a junior college was not subject to the open meetings act and that his meetings with employees, on ways of improving employee working conditions, were not open meetings. The mere fact that

⁴ Colorado's 1972 OMA was modeled after the Florida open meetings law. Both Florida and Colorado have amended their open meetings laws numerous times since 1972, making direct analogies difficult. Nonetheless, Florida courts have repeatedly concluded that it is delegation of traditional functions of the covered state public body, or decisions on which the delegating body would be expected to take formal action that render a body subject to the law. *Memorial Hospital.-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373 (Fla. 1999). (Surrogate public bodies exercising the function of a public body come under the constitutional open meetings law. *Id.* at 382-83.); *Town of Palm Beach v. Gradison*, 296 So.2d 473, 474 (Fla. 1974)(Town council itself selected planning committee and "delegated to the committee much of their administrative and legislative decisional zoning formulation authority which is ordinarily exercised by a city-governing body itself..." (emphais added) *Id.* at 474-75.); *News-Press Pub. Co., Inc. Co. v. Carlson*, 410 So.2d 546 (Fla.App. 1982)(where hospital Governing Board required by statute to adopt an annual budget, court noted "[w]hen public officials delegate de facto authority to act on their behalf in the formation...of plans on which foreseeable action will be taken by those public officials, those delegated that authority stand in the shoes of such officials insofar as the application of the Sunshine law is concerned." (emphasis added) *Id.* at 547-48); *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353(Fla.App. 1973)(same as *News-Press Pub.Co., Inc. Id.* at 365).

the president carried out the day-to-day administration of the school did not render him the "alter ego" of the school's Governing Board, and his frequent meetings with advisors, consultants, staff or personnel, for the purpose of "fact finding" to assist him, were not meetings within the meaning of the Florida Sunshine law.

25. The Judicial Board is a subordinate component of the College and not in and of itself a public entity as the term is used in the OMA. The definition of "state public body" confirms that the General Assembly intended to exclude internal bodies exercising administrative functions, by explicitly excluding delegations to "persons on the administrative staff of the state public body." Student discipline is delegated to the Judicial Officer of the College, an administrative staff member. When she appoints a Judicial Board, its members function as administrative staff, regardless of the individual Board members' status as College administrator, College faculty or College student, and thus fall outside the purview of the OMA.

26. The second requirement for determining applicability of the OMA is to determine whether the gathering is a "meeting" as that term is defined in the OMA. The OMA provides that "all meetings of two or more members of any state public body at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." § 24-6-402(2)(a), C.R.S. (2003)(emphasis added). Thus, a gathering must first be a "meeting" to fall within the purview of the Act. "Meeting" is defined in § 24-6-402(1)(b), C.R.S. (2003) as "any kind of gathering, convened to discuss *public business*, in person, by telephone, electronically, or by other means of communication." As indicated in § 24-6-402(2)(a), C.R.S. (2003), the gathering must be open to the public if it constitutes a meeting under this definition, whether the meeting is convened simply to discuss public business or to take formal action on such business.

27. The OMA does not define "public business." However, various courts have recognized that the discipline of students within an academic institution is an educational matter between the institution and the student and does not concern the public-at-large. See *U.S. v. Miami University*, 294 F.3d 797, 822-23 (6th Cir. (Ohio) 2002) ("student disciplinary proceedings govern the relationship between a student and his or her university, not the relationship between a citizen and 'The People'... As we noted earlier, student disciplinary proceedings exclusively affect the relationship between a particular student and the university..."). See also, *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 159 (Ala. 1961) *cert. denied*, 368 U.S. 930, 7 L. Ed. 2d 193, 82 S. Ct. 368 (1961)(due process rights of student subject to expulsion by public university do not entail need for a public hearing); *Hart v. Ferris State College*, 557 F. Supp. 1379, 1389 (W.D. Mich.1983)(due process rights of public college student adequately protected by a policy that did not provide for a public hearing). Hearings to make administrative decisions on student discipline do not involve the formation of public policy and do not constitute "public business" within the meaning of the term "meeting."

28. Courts have also recognized that the process of student discipline does not benefit from public participation, but rather functions best when it is undertaken without publicity. *U. S. v. Miami University*, 294 F. 3d at 823 (“We find that public access will not aid in the functioning of traditionally closed student disciplinary proceedings...”); *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d at 158-59 (a “full-dress judicial hearing” is not required because “such a hearing with the attending publicity and disturbances of college activities, might be detrimental to the college’s educational atmosphere and impractical to carry out.”); *Hart v. Ferris State College*, 557 F. Supp. at 1389 (“It is difficult to understand how the presence of such other students would decrease the risk of an erroneous expulsion, but it is easy to see how their presence could be disruptive.”) In recognition of the nature of academic discipline as a matter of private, not public concern, the Student Conduct Code, Article IV.A.5.a, permits private hearings.

29. The Court concludes that the Judicial Board is not subject to the OMA. First, the Judicial Board is not a body of the Governing Board of the College and is not a separate “public entity”. Therefore, it does not satisfy the definition of a “state public body” under the OMA. Second, the Judicial Board is an administrative body comprised of members of the College community acting as administrative staff and is therefore specifically excluded from the definition of “state public body.” Third, the Judicial Board is convened for one purpose only, to discuss and recommend administrative action on specific student disciplinary matters. This is not “public business.” Therefore, hearings of the Judicial Board are not “meetings” within the OMA.

For the foregoing reasons, the Court finds that the Judicial Board did not violate the OMA when it conducted a closed hearing on student disciplinary charges on February 28, 2003. The Court declines to issue the requested injunction, finding that hearings of the Judicial Board are not subject to the OMA. This decision is final.


Herbert L. Stern, III
District Court Judge

9/30/03

CC: Counsel