The A.T.O. Case

Judge Forer's Opinion

After issuing her ten-point order of November 17 (Almanac *November 29, page 2), the Hon. Lois Forer of the Court of Common Pleas furnished the written opinion below, dated December 13. In accordance with the November 17 order, and with clarifications received, the University is now going forward with a rehearing of the withdrawal-of-recognition case involving the fraternity as a whole, and expects to complete the hearings this week. NOTE: The opinion below, and the rehearings now in progress, have to do with the recognition status of the fraternity as a whole, and not with cases under the charter of the University student judicial system, concluded via settlement, involving individual members of Alpha Tau Omega.—Ed.*

Alpha Tau Omega Fraternity	: Court of Common Pleas
TAU Chapter Undergraduate Students	: of Philadelphia County
v.	: March Term, 1983
University of Pennsylvania and	: No. 6300
George S. Koval	: (Dated Dec. 13, 1983)
Acting Vice Provost for University Life	:

Opinion

The local chapter of Alpha Tau Omega Fraternity, sues to restrain the University of Pennsylvania and George Koval, formerly Acting Vice Provost for University Life, from enforcing a disciplinary order withdrawing recognition of plaintiff until September, 1984. On February 22, 1983, complaints were made to the University about an incident that allegedly occurred at a party held at the fraternity house on February 17, 1983. A hearing was held on March 23, 1983, by the Fraternity/Sorority Advisory Board. The recommendation of this body was that plaintiff be suspended. Defendant Koval ordered withdrawal of recognition.

On March 30, 1983, the Honorable Alfred J. DiBona, Jr. issued a temporary restraining order. On April 8, 1983, this order was dissolved by the Honorable Charles P. Mirarchi, Jr. on the ground that the Court had no jurisdiction over the affairs of the University of Pennsylvania because it is a private institution. From this Order plaintiff appealed. On August 19, 1983, the Superior Court held that the dismissal of the complaint was premature and reinstated Judge DiBona's Order. The matter was then assigned to this Court.

The Superior Court noted that even though there was a finding of no state action, such finding does not automatically deprive the Court of Common Pleas jurisdiction. Plaintiff alleged violations of both federal law and state law. The Court does not reach the federal question.[1]

A hearing was held on August 23, 1983, before this Court on the University's Motion to Dissolve the Temporary Restraining Order that had been reinstated by the Superior Court.

The University presented evidence (most of which was hearsay) with respect to a series of incidents preceding the alleged incident of February 17, 1983. These incidents involved excessive noise, throwing snowballs, throwing rockets (small explosives in bottles), possession of such rockets in plaintiff's house, dirt, trash and garbage on the premises, etc. With respect to two members who had thrown a molotov cocktail from the plaintiff's house, plaintiff itself expelled those members allegedly guilty of this conduct. That incident, therefore, is not before this Court. The Court finds that even if proved by competent evidence, excessive noise, throwing of snowballs and other objects did not individually or collectively warrant the extreme action of suspension or withdrawal of recognition. With respect to the dirt and unsanitary conditions, the record indicates that these conditions have been corrected.

This Court found that the fraternity would be irreparably harmed by the Order withdrawing recognition and that it had no adequate remedy at law. In order to protect the University from the possibility of further "incidents," an Order was issued August 23, 1983, permitting the local chapter to occupy the house which it leases from the University subject to the following conditions:

1) The posting of a $10,000.00 bond;

2) The restoration of its status from the National Fraternity, which had subsequent to the decision of Mr. Koval withdrawn recognition;

3) That two house monitors be obtained to reside on the premises at the expense of the fraternity and that the fraternity be responsible for the cleaning of the premises.

On November 7, 1983, the fraternity filed a Petition to hold Koval and the University of Pennsylvania in Contempt of Court for allegedly excessive charges for the monitors and for withdrawing money from plaintiff's account with the University. Action on this matter was deferred. Defendant University voluntarily restored the account of the fraternity and plaintiff agreed to attempt to find monitors acceptable to the University who would charge lesser fees than those charged by the monitors who had been obtained by the University. Plaintiff had submitted only one name of a possible monitor who was patently unacceptable.

At the request of both parties, action was deferred to permit discovery. Six depositions were taken and made part of the record before this Court. On November 10, 1983, oral argument was had limited to the following issues:

Did the hearing before the Advisory Board comport with standards of fair hearing under state law?

Was the Order withdrawing recognition from plaintiff based on competent evidence?

Was the Order arbitrary or capricious?

The only options of this Court were to dissolve the modified Restraining Order or to remand the matter to defendant University for further proceedings.

The Court did not hear evidence with respect to the substance of the charges.

On November 17, 1983, after a hearing and oral argument the Court entered the following Orders:[2]

1) Plaintiff's Petition to Hold the Defendants in Contempt is denied with prejudice;

2) Defendants' Motion for Summary Judgment is denied;

3) The plaintiff before having its recognition withdrawn or being subject to disciplinary action is entitled to a fair hearing before an impartial tribunal or hearing officer designated by the University of Pennsylvania pursuant to the Recognition and Governance procedures of the University. Such hearing shall include at a minimum:

a) At least five days notice of the charges including a detailed statement of the activities that allegedly violate the Recognition and Governance Document.

b) A hearing officer or tribunal, none of whose members shall have participated in the investigation and/or preparation of the charges and evidence against the plaintiff.

c) Presentation of oral and documentary evidence against the plaintiff in the presence of its representatives.

d) An opportunity for the plaintiff to present witnesses and documentary evidence on its behalf.

e) The right of members of plaintiff to consult with counsel during the procedures.

f) The right of plaintiff to be informed of all evidence against it unless the defendant asserts reasons for not disclosing such evidence. In such case a hearing shall be conducted to establish the validity of the grounds for failure to disclose such information and the prejudice, if any, to the plaintiff.

g) A transcript of the proceedings.

h) The hearing officer or tribunal shall make written findings of fact and conclusions of law.

i) The final decision maker, who shall not have participated in the investigation or preparation of charges, shall enter a written order adopting or rejecting the findings and conclusions of the hearing officer or tribunal in whole or in part and stating his reasons therefor. The final decision maker shall be limited to consideration of the evidence presented at the hearing.

4) The Court retains jurisdiction.

The Court makes the following

1. Defendant, the University of Pennsylvania, is a non-profit corporation, chartered by the Commonwealth of Pennsylvania. It receives substantial support from the Commonwealth of Pennsylvania, from tax exempt charitable funds and the Federal Government. *See Rackin v. University of Pennsylvania*, 386 F. Supp. 992 (E.D. Pa. 1974). Many of its students and faculty receive federal grants. It is also subject to regulations as are state institutions of higher education and state affiliated institutions, such as Temple University. Providing higher education has traditionally been a state function. *cf. Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). At least since 1862, pursuant to the First Morrill Act, 7 U.S.C.S. §§301 et seq., it is a matter of national policy that higher education is a public function.

2. No appeal was taken by either party.

FINDINGS OF FACT

1) Plaintiff is a Philadelphia chapter of a national Fraternity, Alpha Tau Omega, a non-profit corporation.

2) Defendant University of Pennsylvania (hereinafter "The University") is a private university located in Philadelphia, Pennsylvania.

3) Defendant George S. Koval was the Acting Vice Provost for University Life at the University in February and March, 1983 (Deposition of Koval p. 4).

4) Prior to the actions involved in this litigation plaintiff was a recognized fraternity in good standing at the University of Pennsylvania. The chapter house of plaintiff located at 225 S. 39th Street in Philadelphia, Pennsylvania is wholly owned by defendant University.

5) The fraternity pays an annual rent for the premises of $8,800.00. Each resident pays to the fraternity rent of $810.00 per semester.

6) Fraternities and sororities are recognized by the University pursuant to the Code of Recognition and Governance of Undergraduate Social Fraternities and Sororities (hereinafter "Recognition Policy").

7) Defendant University as a matter of policy considers that fraternities "complement the academic and non-academic aspects of the University's community life not only by offering a vital residential alternative for undergraduate students, but also by serving as a source of academic and social support as their members pursue their educational goals." (Exhibit "B", p. II-37, to Plaintiff's Complaint).

8) Despite previous disciplinary charges against members of plaintiff (D-9), the Capital Council of defendant University and its Board of Trustees approved an allocation of $100,000 in 1981 for extensive structural repairs of ATO's chapter house commencing in the fall of 1981 (P.-20).

9) Under the Recognition Policy defendant University grants recognition to fraternities and sororities that agree to observe certain standards of behavior.

10) The University has no policy governing rules of conduct or behavior regarding consumption of alcoholic beverages in fraternity houses, hours of parties or presence of house parents, monitors or chaperones at such parties or sexual conduct in fraternity houses.[3]

11) The Recognition Policy provides for the convening of a Board to hear charges or complaints against a fraternity or sorority.

12) The Recognition Policy does not contain specific procedures for the conduct of such hearings.

13) A University memorandum dated August 17, 1980, entitled "Development of the Fraternity/Sorority Advisory Committee: A Working Paper" (D-17), proposing judicial review procedures for the Board, was never formally adopted or published by the University. (Deposition of Koval, p. 75-76).

14) On February 17, 1983, plaintiff held a party at the chapter house open to members and non-members. (D-6).

15) A young woman (hereinafter, "complainant") arrived at the chapter house at approximately 10:30 p.m. (D-2) and remained until approximately 7:00 a.m. the following morning (D-6).

16) On February 22, 1983, five days after the incident, complainant filed a complaint with Ann Hart, the University Judicial Inquiry Officer,[4] and with the Philadelphia Police Department, alleging that she had been raped by several men at the chapter house (D-2). Complainant's specific allegations have not been disclosed.[5]

17) To date no criminal charges have been filed against anyone allegedly involved in this incident.

18) Seven employees of the University participated in the investigation of the alleged events: Ann Hart (Dep. of Koval, p. 25), Mary Beermann (Dep. of Vaughan, p. 10; Dep. of Koval, p. 39), Kevin Vaughan (Dep. of Vaughan, p. 10; Dep. of Koval, p. 38), Shelley Green (Dep. of Koval, p. 39), Connie Goodman (Dep. of Vaughan, p. 16), Kim Morrison (Dept. of Vaughan, p. 9-10), Alan Thomas (Dep. of Koval, p. 36-37; Dep. of Barrett, p. 8), and the Office of Public Safety (Dep. of Koval, p. 31-32). In addition, six other officials or employees of the University were involved in activities related to the alleged incident: Sheldon Hackney, President of the University (Dep. of Koval, p. 66), Carol Tracy, Director of the Penn Women's Center (Dep. of Koval, p. 48), Thomas Ehrlich, Provost for University Life, (Dep. of Koval, p. 66), Dr. Jacob Abel, Faculty (member of the Board), Pamela Johnson, Director of Penn Children's Center (member of the Board) and George Koval, Acting Vice Provost for University Life.

19) On February 24, 1983, the University informed plaintiff that it had begun an investigation of the alleged events (Affidavit of Alan Thomas, attached exhibit).

20) Between February 18, 1983, and March 10, 1983, defendant Koval met with a number of representatives of campus women's rights organizations which sought a University response to the alleged events (Dep. of Koval, p. 41-49).

21) Prior to the hearing on March 23, 1983, the University had received complaints from the Interfraternity Alumni Council as to whether the Board's recommendation would be a final decision or merely a suggestion to the Vice Provost. (Dep. of Koval, p. 76).

22) On March 10, 1983, Alan Thomas, then Assistant Director of the Office of Fraternity/Sorority Affairs, delivered to Bruce Barrett, ATO Chapter Advisor, a letter informing plaintiff that it would have a hearing before the Board during the week of March 23, 1983 (Dep. of Barrett, p. 8-9).

23) The "Summary of Incident of 17 February 1983" received by plaintiff six days prior to the hearing did not set forth specific allegations of violations of the collective responsibility requirements of the Recognition Policy. (D-2). Plaintiff was never given a list of the specific charges against it.

24) On March 17, 1983, Mr. Barrett received from the University a report of the Office of Public Safety (D-1), summary of the incident prepared by Ms. Beermann (D-2) and a chapter profile (D-3), (Dep. of Barrett, P. 14).

25) In a letter dated March 18, 1983, plaintiff requested a continuance. Defendant Koval denied the request (Dep. of Koval, p. 121-122).

26) A hearing was held on March 23, 1983, before the Fraternity/Sorority Board. The following members of the Board were present: Mary McMonagle, Chairperson (Interfraternity Alumni Council), Pamela Johnson (Interfraternity Alumni Council), Dr. Jacob Abel (Faculty), Jeff Hoover (Interfraternity Alumni Council), Danna Sigal (Panhellenic Association), Vic Wolski (Undergraduate Assembly), Mary Beermann (Assistant Executive Director of Student Financial and Administrative Services). Also Kevin Vaughan (Substitute for the Director of Fraternity/Sorority Affairs), a non-member, was present. Ann Hart (Judicial Inquiry Officer) was a guest of the Board (D-9). Alan Thomas (Assistant Director of Fraternity/Sorority Affairs) took minutes of the hearing. It is unclear whether Thomas was a member of the Board.

27) Vaughan, a non-member of the Board who was present while the Board deliberated (Dep. of Vaughan, p. 36) had participated in the investigation. (Dep. of Vaughan, p. 10; Dep. of Koval, p. 39). Beermann, a member of the Board, had prepared the profile.

28) Vaughan presented the University's case against plaintiff at the hearing (Dep. of Abel, p. 21).

29) Ann Hart, who conducted an investigation of the alleged incident, was present with the Board before plaintiff was allowed into the room.[6] (D-9).

30) Plaintiff submitted to defendant University a written list of persons who would be attending and available to testify as witnesses on its behalf, consisting of 30 brothers and 11 other witnesses (including plaintiff's counsel). (D-23).

31) The Board allowed only 8 witnesses to testify on behalf of plaintiff (Brothers Bierly, Willner, Davison, Graber, Gill, and Reina, and outside witnesses Alexander and Schlitt.) (D-9).

32) Plaintiff's counsel was permitted to advise members during the

3. Questions By The Court at the hearing of November 10, 1983: At Penn, about a student body having an all night open house party, is there any standard about consumption of alcoholic beverages? Are there any rules or regulations about having visits by members of the opposite sex? Are there any rules and regulations about anything like that? (Snicker from the audience).

   Mr. Schoener (Counsel for Plaintiff): He says no, Your Honor. The only thing in the University Code of Conduct says members of the University community shall not act immaturely, whatever that means. (Mr. Sprecher, on behalf of the University, assented to these answers).

4. Although Ms. Hart has the job title, Judicial Inquiry Officer, it appears that her functions are similar to those of a private guard or police person.

5. Plaintiff alleges in its amended complaint that complainant presented various stories about the incident after she talked with individuals at the Penn Women's Center.

6. Ms. McMonagle stated that Hart addressed the Board. (Dep. p. 27). However, other members denied that Hart had addressed the Board in the absence of plaintiff's representatives. (Dep. of Abel, p. 29; Dep. of Johnson, p. 15).

hearing. He was not permitted to question witnesses or to address the Board (D-9, p. 16).

33) Defendant University introduced into evidence a report from a pharmacologist at Thomas Jefferson University indicating that an average person who took four hits of LSD and drank 12 cans of beer "would exhibit severe difficulties in motor activity and control; would be extremely (illegible) in his/her emotions and would show irrational, distorted and confused thought processes!" (D-22).

34) There was not a scintilla of evidence presented to the Board that Complainant had taken any quantity of drugs or alcohol.

35) Extensive reference was made to alleged "Minutes" of plaintiff purportedly referring in slang to the incident. This document was examined by a handwriting expert retained by the University. (D-9, p. 5, 6).

36) The document was not offered in evidence to the Board.

37) Alan Thomas took minutes of the six hour hearing which are not verbatim. No other record of the hearing was made. (D-9).

38) The "Minutes" of the hearing are replete with inaccuracies and vague statements:

a) The minutes of the hearing state, "three more witnesses entered" but mentions only two witnesses, Schlitt and Reina. (D-9, p. 14-15);

b) In a letter of May 16, 1983, Ms. McMonagle complained to Mr. Thomas that the minutes inaccurately stated that she favored withdrawal of recognition. (D-14);

c) The minutes contain broad generalizations of statements made at the hearing. ("After a brief discussion of some of the witnesses," p. 10; "After more brief discussion on some clarifying points . . . " p. 15) (D-9).

39) The Board did not make findings of fact or reach conclusions of law but by "consensus" recommended a penalty of suspension, not withdrawal of recognition. No vote was taken. (Dep. of Vaughan, p. 36).

40) The only standard of conduct allegedly violated by ATO was the statement in the University Code of Conduct: "All students of the University must conduct themselves at all times in a mature and responsible manner." (Exhibit "C" to Plaintiff's Amended Complaint).

41) The Board had no rules of procedure. The minutes of the hearing state: "Ms. McMonagle began the discussion by noting that she and Mr. Vaughan had spoken several times before this meeting to discuss the suggestion that time limits and other board hearing procedures be adopted for this case. Ms. McMonagle suggested that it would be inappropriate to adopt such procedures at this time. She noted that she has been asking that such procedures be adopted for quite some time and perhaps the Board could adopt some for the future. But as far as tonight was concerned, the Board should conduct the hearing as they always have: The Board would decide how it would run things as it went along." (D-9, p. 1).

42) At 12:30 a.m., March 24, 1983, the Board recommended suspension of University recognition of ATO through January, 1984 (D-9, p. 18).

43) No University rule or regulation required the Board to conduct a hearing, deliberate and arrive at a decision all on the same day. Nothing compelled the Board to limit hearing and deliberation time to approximately six hours.

44) The decisions of the Board and defendant Koval were based partially on hearsay and double hearsay. The Summary of Incident of 17 February 1983 (D-2) is based on the out of court statements of an undetermined number of plaintiff's members as well as other persons. The report refers to them as "witnesses," but there is no evidence that they were eyewitnesses to the alleged events. The University presented no eyewitnesses at the hearing. (D-9).

45) The Board did not make written findings of fact or conclusions of law.

46) Koval in reaching his decision considered evidence not presented to the Board or ATO (Ann Hart's report, for example) (Dep. of McMonagle, p. 49-51; Dep. of Koval, p. 84-86).

47) After conferring with Vaughan, Beermann, Morrison and McMonagle on March 24, 1983, defendant Koval ordered withdrawal of recognition until September, 1984, at the earliest. (Dep. of Vaughan, p. 37-44).

48) Plaintiff was informed of Koval's decision by letter of March 24, 1983. (D-18). There was no explanation of his rejection of the Board's recommendations.

DISCUSSION

Jurisdiction

A Court of Common Pleas pursuant to its equity jurisdiction has power to enjoin a breach of contract when the injured party has no adequate remedy at law. *Blenko v. Schmeltz*, 67 A.2d 99, 362 Pa. 365, 372 (1949); *Stryjewski v. Local Union No. 830*, 451 Pa. 550 (1973); *Pye v. Com. Ins. Dept.*, 372 A.2d 33, 35, 29 Pa. Cmwlth. 545 (1977), aff'd 387 A.2d 877, 479 Pa. 146 (1977). It is undisputed that plaintiff[7], as a fraternity in good standing, had a contract with defendant to remain on campus so long as it complied with the duly promulgated rules and regulations of the University. In addition, plaintiff had a lease with defendant University for the chapter house and in turn leased rooms to its members (students at the University) and others. As part of this agreement both parties must be assumed to have promised to abide by the Recognition Policy including the provisions for the procedures pursuant to which recognition could be withdrawn.

There is no question that defendant could as a matter of policy choose to abolish all fraternal organizations. It did not take such action. Instead it purported to act under the Recognition Policy, hold a hearing pursuant to its provisions and withdraw recognition because plaintiff violated the Recognition Policy.

Standards of Fairness

A university in undertaking internal discipline of students and student bodies is not held to the procedural standards of either criminal prosecutions or civil litigation. A university has broad discretion in interpreting and enforcing a contract between itself and its students. *Napolitano v. Princeton Univ. Trustees*, 186 N. J. Super. 548, 584 (1982); *Gabrilowitz v. Newman*, 582 F.2d 100, 103 (1st Cir. 1978). In 1969, Mr. Justice Blackmun, then Judge of the Court of Appeals of the Eighth Circuit, held:

> . . . that a college has the inherent power to promulgate rules and regulations; that it has the inherent power to properly discipline; . . . *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1089 (CA. 8 1969), cert. denied, 398 U.S. 965 (1970).

Healy v. James, 408 U.S. 169, 192 (1972).

1. Prohibited Conduct

The standard of conduct promulgated by defendant is broad and undefined. In other contexts a definition of conduct as loose as "mature and responsible manner" would be held void for vagueness. *See* Note, The Void-For-Vagueness Doctrine of the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). However, this Court has ruled that defendant must give plaintiff notice of specific acts allegedly committed or omitted by its members acting not as individuals but as members of the fraternity that constitute violations of the policy. Such allegations, contained in the new notice of charges filed against plaintiff, supply the specificity lacking in the Code.

2. Fair Hearing

The Recognition Policy provides for a hearing before the Fraternity/Sorority Board but it fails to establish any rules or procedures. This Court in its Order of November 17, 1983, established minimal procedural standards that have been imposed on other universities in similar student disciplinary proceedings. In other jurisdictions, it has been held that at a minimum a university before taking disciplinary action must:

a) Furnish the student or student organization specific notice of charges *(Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *State ex rel Sherman v. Hyman, et al.*, 180 Tenn. 99 (1943);

b) Provide an impartial hearing tribunal and final arbiter *(Wasson v. Trowbridge, supra);*

c) Afford an opportunity for the accused to present relevant documentary and testimonial evidence on its behalf, *(Wasson v. Trowbridge, supra; Napolitano v. Princeton University Trustees, supra);*

d) Be permitted presence of counsel at the hearing [*Gabrilowitz v. Newman, supra; French v. Bashful*, 303 F. Supp. 1333 (E. D. La. 1969); *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W. D. Mo.

7. Defendant does not question the standing of plaintiff as an association to bring this action on its own behalf and/or on behalf of its members. *See 1000 Grandview Ass'n., Inc. v. Mt. Washington Associates*, 290 Pa. Super. 365, 434 A.2d 796 (Pa. Super. 1981); *Action Alliance Sr. Cit. of Greater Philadelphia, Inc. v. Shapp*, 400 F. Supp. 1208 (E. D. Pa. 1975). We note that plaintiff's alumni also have an interest in maintaining the existence of the chapter on campus.

1967), aff'd 415 F.2d 1077 (8th Cir. 1969)]; (In the case at bar, plaintiff 's counsel was at the hearing);

e) Disclose all evidence against the accused [*Wasson v. Trowbridge*, 285 F. Supp. 936 (E. D. NY 1968) (remand of 382 F.2d 807 (2d. Cir. 1967))];

f) Supply an accurate transcript of the hearing [*Slaughter v. Brigham Young*, 514 F.2d 622 (9th Cir. 1975)];

g) The tribunal or hearing officer must make findings of fact *(French v. Bashful, supra.)*.

With the exception of the presence of counsel at the hearing, none of these requirements was met at the hearing conducted on March 23, 1983.

It is immaterial that many of these cases were decided under federal law. Pennsylvania's requirements of fairness in internal hearings are substantially similar to requirements of the Federal Constitution in the same context.[8] *See* Due Process and the University Student: The Academic Disciplinary Dichotomy, 37 La. L. Rev. 939 (1977); Common Law Rights for Private University Students: Beyond the State Action Principle, 84 Yale L. J. 120 (Nov. 1974); Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983 (1963).

It is undisputed that plaintiff was never furnished a specific list of charges. Even though the alleged happenings at the party in question were widely reported in the University press and mass media and were the subject of vociferous comment by many individuals and groups on campus, such rumors and hearsay do not meet even minimal requirements of notice.

The conduct of the Board was characterized not only by informality but also by a total lack of understanding of its functions and obligations. According to the minutes, Ms. McMonagle, a member of the bar, who presided stated, "The Board would decide how it would run things as it went along." (D-9). Dr. Jacob Abel, a professor of mechanical engineering, "suggested to Ms. McMonagle that the Board not let the hearing go too long because the Board would get tired . . ." (D-9). Neither statement indicates an intention to conduct an orderly hearing to determine facts.

The Board was never sure what conduct it was investigating. At one point it was stated that the Complainant's alleged consent to sexual relations was *not* the issue. On the other hand, the extensive discussion of Complainant's inability to control herself was relevant primarily to the issue of consent. The report from the pharmacologist was clearly irrelevant and highly prejudicial since there was no evidence at all with respect to Complainant's use of drugs or alcohol.

The Board apparently did not have in its possession the Recognition Policy.

There is no way of knowing what Ann Hart told the Board. The Summary of the Incident (D-2) states that Ann Hart "has found" that there was unrestrained drinking. Plaintiff was not able to question Ms. Hart to learn the basis of this highly prejudicial report.

There is no way of knowing what "evidence" was presented to the Board in the absence of plaintiff.

The entire discussion of "attitude" is apparently based on the alleged "minutes" removed from plaintiff's chapter house and subjected to handwriting analysis by an expert retained by defendant University. The minutes of the hearing contain the statement, "We were concerned that the Fraternity brothers showed no remorse." There is no evidence that any brothers were questioned with respect to their attitudes or permitted to explain their feelings. After apparently hearing evidence with respect to this document, the minutes indicate that it was not considered.

Persons not members of the Board were present and apparently participated in its deliberations.

The statements of McMonagle that she felt the Board did not have enough information to decide the question of rape, (Dep. of McMonagle 43), that the information was "fuzzy," (Dep. of McMonagle p. 46) provide convincing evidence of the lack of fairness in the proceedings.

The statement submitted by plaintiff in its defense is garbled, semiliterate and incomprehensible. It lacks logic and coherence. It contains, for example, these sentences: "We were all so [sic] obliged to give an account of how the University's report might be such as it is . . . . Although the University's investigation is willing to make conclusions about such subtle questions, this is not a significant statement about what occurred . . . A non-member border [sic] and (Penn Alumnus) lives on the third floor and gets up for work at approximatley [sic] 6:30 a.m. . . . Although advocates and the University's report conclude that the young woman was 'incapable of controlling her own actions' this is a subtle question which they wrongfully concluded. . . . They were also unaware of the specific internal psychological effects and internal state of the woman. . ."

Nonetheless, the substance of this document indicates that there were a number of uninvolved parties who witnessed significant portions of this incident: the Fraternity brother identified as Brother C who declined complainant's alleged offer to have sexual relations, two other fraternity brothers and their two girlfriends who observed the complainant at various times of the night and morning, the boarder in the Fraternity house, the female guest who was present at 1:00 p.m. the following day when the victim voluntarily appeared at the Fraternity house. None of these people testified. Nor is there any evidence that they were questioned by Ann Hart, the Judicial Inquiry Officer, who made the findings previously quoted.

No stenographic transcript was made of the meeting. The minutes are the only record of the March 23, 1983, hearing before this Court.

The hearing was convened at 6:10 p.m. The Fraternity members were invited into the hearing at 6:45 p.m. The hearing concluded at 9:30 p.m. The Board members deliberated until approximately midnight and recommended that the Fraternity be suspended. No vote was taken. Apparently, the conclusion was reached by consensus.

The minutes of the meeting list Kevin Vaughan as Board member substituting for the Director of the Fraternity/Sorority Affairs. Mr. Vaughan, however, states that he was not a member of the Board. He was, however, there throughout the meeting and apparently participated in presenting the charges against the Fraternity and in deliberating and in reaching a conclusion.

The minutes also state that Mr. Bierly, a representative of the Fraternity, noted "that as far as he is concerned on the night in question no one had sex with anyone at the Fraternity party or in the Fraternity house who was incapable of controlling themselves." Dr. Abel, according to the minutes noted that "the issue of the victim's condition is very germaine [sic] in assessing that the Fraternity controls the development of the individual member." The minutes are almost as incomprehensible as the statement of plaintiff. Clearly no action could be properly predicated on such a record.

Finally, it is admitted that defendant Koval, the ultimate decision-maker, based his decision on "evidence" never disclosed to plaintiff (Dep. of Koval, p. 84-86). Also Koval was involved from the very beginning in the University's handling of the incident. As the United States Court of Appeals for the Second Circuit held in *Wasson v. Trowbridge, supra*, a University (the United States Marine Academy) may not proceed arbitrarily. The Court declared:

> It is too clear to require argument or citation that a fair hearing presupposes an impartial trier of fact and that prior official involvement in a case renders impartiality most difficult to maintain.

382 F.2d at 813.

Defendant University's own employees, members of the Board and defendant Koval admit engaging in procedures that violate the most basic, minimal and elementary standards of fairness.

The Court reaches the following

CONCLUSIONS OF LAW:

1) The proceeding before the Fraternity/Sorority Board did not comport with even the most minimal standards of fairness.

2) Defendant Koval who was involved in the investigation and based his decision on information not disclosed to plaintiff was not an impartial decision maker.

Accordingly, the modified injunction remains in effect until further action in accordance with the Orders of this Court.

BY THE COURT:

Lois G. Forer, J.

8. *English v. Northeast Bd. of Ed.*, 22 Pa. Comwlth Ct. 240, 348 A.2d 494 (1975); *Com. of Pa. v. American Bankers Insurance Co. of Florida*, 26 Pa. Cmwlth Ct. 189, 363 A.2d 874 (1976). *Com. of Pa. v. Bryant*, 367 Pa. 135 (1951).