No. A24A0321

In the
Court of Appeals of Georgia

Board of Regents of the University System of Georgia,
Appellant,

v.

Elijah D. Drake,
Appellee.

On Appeal from the Superior Court of Athens-Clarke County
Superior Court Case No. SUCV0512

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Drake's response to the Board of Regent's brief concedes several key points that should lead this Court to reverse the superior court's decision. First, Drake presents no real argument that this Court's decision in *Board of Regents of University System of Georgia v. Houston,* 282 Ga. App. 412 (2006), is not actually controlling precedent. Instead, Drake relies upon a strained argument that he suffered a "deprivation of major proportion" sufficient to warrant the exercise of jurisdiction over a matter that would otherwise not present a justiciable controversy. But Drake fails to show that such a deprivation actually occurred, and this Court should therefore follow *Houston's* holding that Drake's suspension is simply another disciplinary decision that falls within the ambit of university officials' decisions of university officials that are beyond the scope of judicial review.

Arguing that his suspension is reviewable by petition for certiorari, Drake claims that the hearing panel's decision was final because of a UGA Code of Conduct provision that permits the hearing panel's decision to become final when a student opts not to seek further review. This, Drake claims, makes the hearing panel's decision final, despite the fact that he did in fact seek review at every available level. Drake is wrong. Allowing an initial

hearing decision to become final without the need for further administrative action when a student does not request further review—which is commonplace in agency proceedings and is expressly incorporated by the Georgia Administrative Procedure Act—does not somehow transform an initial hearing decision into a final decision binding an agency without regard to whether further review actually does take place. There is no credible argument that Drake's suspension became final and binding immediately upon issuance of the initial hearing panel decision and not at the conclusion of his several subsequent appeals. As such, the decision to suspend Drake was administrative, not quasi-judicial, and it was improper for the superior court to review that decision upon a petition for writ of certiorari.

Finally, Drake appears to concede that Georgia's self-defense statute, O.C.G.A. § 16-3-21, does not require that its provisions be expressly incorporated into every law, rule or regulation that purports to address physical violence or misconduct. Georgia law clearly states that where school disciplinary codes are concerned, no express provision for self-defense claims is necessary so long as those claims are in fact presented and considered. Drake makes no claim that he was prevented from presenting his self-defense claim and does not appear to claim that there is a lack of evidence

to support a finding that his actions were not in fact taken in self-defense. Instead, he takes issue with the fact that a reviewing official used the term "mitigating factor" rather than "justification" in discussing his self-defense claim. However, this Court has often used both terms in defining self-defense claims, and describing self-defense as a "mitigating factor" does not somehow create a conflict with O.C.G.A. § 19-3-21. The superior court's conclusion that UGA's conduct regulations are in "conflict" with O.C.G.A. § 16-3-21 is therefore entirely incorrect and is another reason for reversal of the superior court's decision.

ARGUMENT

I. *Houston* controls and mandates dismissal of this action for lack of jurisdiction.

This Court's holding in *Houston* is controlling authority and establishes that university disciplinary decisions are one of the many types of administrative decisions that are beyond the scope of judicial review in the absence of a "deprivation of major proportion." 282 Ga. App. at 414. And although Drake attempts to distinguish *Houston* by pointing to one factual difference between the two cases, that single distinction is immaterial to *Houston's* holding. Nor is there any merit to Drake's argument that he has suffered a "deprivation of major proportion" that could warrant

judicial intervention. As such, Drake's action presents a nonjusticiable controversy and it was error for the superior court to exercise jurisdiction over his petition.

A. This case is indistinguishable from *Houston*.

Drake attempts to avoid *Houston's* jurisdictional bar by claiming that the university student in *Houston* admitted that his suspension "arose from the telephone call he made to facilitate a drug sale." 282 Ga. App. at 415; Resp. at 10. Drake offers no explanation as to how this factual difference materially distinguishes his case from Houston. Pretermitting the fact that Drake also made significant admissions regarding his own actions, the *Houston* student's admission to having made the phone call was of no import to this Court's ultimate holding that university student disciplinary proceedings fall within the ambit of decisions made by public institutions of learning that present no justiciable controversy.

Indeed, the material facts of this case are nearly identical to those that this Court considered in *Houston*. Both cases involved students attending University System of Georgia schools. Both students were charged with violating university codes of conduct after the schools learned that the students had been arrested and charged with crimes. 212 Ga. App. at 413. Both students received

an initial hearing before an undergraduate judiciary panel, and both panels voted to suspend the students. *Id.* Both students appealed their suspensions to their University's Vice President for Student Affairs, and both Vice Presidents concurred with the hearing panels' decisions to suspend the students. *Id.* And, while Houston admitted that he made a phone call to facilitate a drug purchase, Drake admitted many key facts regarding his actions, as his self-defense challenge centered more on the intention behind his actions than disputing what had occurred. Any differences between the admissions made here and in *Houston* are "differences in degree, and not in kind," and do not form a basis for distinguishing the cases. *Cobb County v. Ga. Transmission Corp.*, 276 Ga. 367, 368 (2003).

Further, *Houston's* reference to the student's admission appears in the Court's discussion of whether or not the decision to suspend Houston could be found to be arbitrary and capricious, not the discussion of the principle that certain university decisions are beyond judicial review. 282 Ga. App. at 415. Having already concluded that the case would be nonjusticiable in the absence of a "deprivation of major proportion," *Houston* relies on the student's admission for the proposition that it "forecloses a characterization of his suspension as clearly erroneous or arbitrary and capricious

for lack of supporting evidence," and therefore could not establish that he had suffered a "deprivation of major proportions" on those grounds. *Id.* at 414–15. *Houston*'s holding that university disciplinary decisions are not subject to judicial review in the absence of a "deprivation of major proportion" is therefore clearly applicable to this case and dismissal for lack of jurisdiction is required unless Drake can show that he suffered such deprivation.

B. Drake did not suffer a "deprivation of major proportion" sufficient to invoke the jurisdiction of the superior court.

Both *Houston* and *Woodruff v. Georgia State University*, 251 Ga. 232 (1983) (upon which *Houston* relies), recognize that although a university's academic decisions (including disciplinary decisions) do not generally present a justiciable controversy, review may nonetheless be had in cases of a deprivation of major proportion. *Houston*, 282 Ga. App. at 414; *Woodruff,* 251 Ga. at 234. Yet here, as in *Houston,* there was no such deprivation involved in Drake's suspension, and the superior court's exercise of jurisdiction was therefore error.

Drake claims that his suspension violated his "statutory rights" by basing his suspension on conduct regulations that "prohibited mandatorily protected self-defense conduct." Resp. at 12. As discussed in Part III, *infra*, there is no actual prohibition of

self-defense conduct to be found in UGA's Code of Conduct. Nor has there been any violation of a "statutory right" granted to Drake. To the extent that O.C.G.A. § 16-3-21 could be construed as granting any "statutory right" to Drake, such right would extend only to permitting Drake to present a claim that his actions met O.C.G.A. § 16-3-21's standards for self-defense claims. Drake did have the ability to present evidence and argument supporting his self-defense claim at each and every level of review.

Just like in *Houston*, the rejection of that self-defense claim was not "arbitrary or capricious." Drake does not establish that it would be arbitrary or capricious to find that his actions fail to meet O.C.G.A.§ 16-3-21's standards for self-defense. Instead, he rests his claims entirely on the absence of self-defense language incorporating O.C.G.A. § 16-3-21 directly within UGA's Code of Conduct itself to claim a violation of his "statutory rights." Resp. at 12. Nor does Drake argue that any of the other factors recognized by *Houston* as potentially supporting a claim of a deprivation of major proportions apply. *See* 282 Ga. App. at 415 (*citing* O.C.G.A. § 51-13-19(h) (1)-(6)). As such, none of the potential deprivations of major proportion that *Houston* identified can be said to apply to Drake's disciplinary proceedings.

Unable to argue that any of the deprivations recognized in *Houston* apply to his case, Drake instead relies on other theories of deprivation that are not expressly recognized by *Houston* or any other relevant authority. He claims that by disciplining him, the Board somehow "violated Drake's protected liberty interest in his reputation" and "unreasonably interfered with Drake's pursuit of the profession of his choice." Resp. at 12. Neither claim has any merit. None of Drake's authorities for these propositions establish that Drake has a protected liberty interest in his reputation or occupational interest that was implicated in his disciplinary proceedings. But even if Drake could establish that he had a protected interest that was implicated by the disciplinary proceedings, that interest would merely give rise to basic due process requirements such as notice of the charges against him and, "if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss v. Lopez,* 419 U.S. 565, 581 (1975). UGA's disciplinary procedures provided all that and more.

Further, to the extent Drake claims that the initial hearing panel failed to properly consider his self-defense claim, *see* Resp. at 31, any such failure does not constitute a deprivation of major proportions because Drake was able to allege this as error in his

subsequent appeals to the UGA Vice President for Student Affairs, the UGA President, and the Board of Regents. As this Court noted in *Burke v. Emory Univ.*, 177 Ga. App. 30, 32 (1985), there is no deprivation of major proportion where a student's ability to appeal an initial hearing decision gives the student "the opportunity to correct any erroneous information underlying his dismissal, and the appeal was considered." There is simply no credible argument that Drake suffered any deprivation of major proportion during his disciplinary proceedings, and as such those proceedings are outside the scope of decisions that are subject to judicial review. It was therefore error for the superior court to exercise jurisdiction over Drake's petition.

II. Drake's suspension was not a quasi-judicial decision subject to review by petition for certiorari.

Drake acknowledges that certiorari review of the decision to suspend would be proper only if such decision was a quasi-judicial and not administrative in nature. *See* Resp. at 13. He also concedes that in order for the superior court to properly exercise certiorari jurisdiction, the "final decision" to suspend Drake must rest with the initial hearing panel, and not with any UGA or Board of Regents officials that subsequently review that panel's decision. *Id.* at 20. The viability of Drake's petition for certiorari

therefore hinges entirely upon Drake's argument, which the superior court accepted, that the hearing panel's decision is final and binding without regard to any subsequent review by University or Board of Regents officials.[1]

Drake claims that because the Code of Conduct provides a limited time period to request review of the hearing panel's decision, and that the failure to make a timely request will result in the initial decision of the hearing panel becoming a final decision, the hearing panel's initial decision should be construed as the "final" decision even if an appeal from that decision is taken. No case law supports such a proposition. Though Drake attempts to use language in *Housing Authority of City of Augusta v. Gould,* 305 Ga. 545 (2019) to support his theory, *Gould* relied on three factors to find that the hearing officer's decision was not final and binding on the agency. 305 Ga. at 556-557. The first

[1] If Drake were correct that the hearing panel was final and binding, that would mean his petition for certiorari was untimely. Former O.C.G.A. § 5-4-6 required that writs of certiorari "shall be applied for within 30 days after the final determination of the case in which the error has been committed." Drake's petition was filed within 30 days of the Board of Regents' September 14, 2022 denial of his application for discretionary review. Drake's petition expressly alleges that the filing of the petition within 30 days of the Board of Regents' decision is "within 30 days after the final determination of the case." V2-28, ¶42.

factor, that "the enumerated circumstances in which an agency is not bound strike us as broad," (*Id.* at 556) is even more applicable here. While the housing authority could overturn the hearing officer's decision only if it found that the officer exceeded authority or the decision was contrary to law, UGA's Code of Conduct gives the Vice President for Student Affairs and the President discretion to remand, reverse or dismiss the hearing panel's decision based solely on their review of the record submitted. V.2-111. This factor therefore weighs heavily against a finding that the hearing panel's decision was final and binding.

Second, *Gould* found that the regulations "leave it to the agency itself to decide whether legal error exists sufficient for the agency to disregard the decision of the hearing officer." *Id.* at 556. UGA's Code of Conduct goes even further, allowing either the Vice President for Student Affairs or the President to reverse, remand or dismiss the case at their discretion, not just in cases of "legal error." V2-111. This factor also weighs heavily against a finding that the hearing panel's decision was final and binding in this case.

Gould does then go on to note that the regulations "provide no time limit" for the agency to determine that it will not be bound by the hearing officer's decision decision. However, *Gould* goes on to

explain that the housing authority "did not treat the decision as final," (305 Ga. at 557), which is equally true here. Drake's suspension was not treated as final until President Morehead had completed his review. *See* V2-26, ¶34 ("Under the COC, Drake was allowed to continue attending classes at UGA until the final resolution at UGA of his appeal.") Therefore, despite the existence of a time limit for appeal in UGA's procedure, the *Gould* factors collectively weigh heavily in favor of finding that the decision to suspend Drake was administrative, not quasi-judicial.

In any event, *Gould* does not set forth a rule that agency decisions are quasi-judicial whenever an agency sets a time period to appeal an initial hearing decision and permits the initial decision to become final in absence of an appeal. Administrative agencies frequently set deadlines for requesting agency review of initial decisions and provide for those decisions to become final in uncontested cases. The Administrative Procedure Act itself contains provisions setting deadlines for requesting review and providing that an initial decision may become the final decision of an agency in absence of a request. O.C.G.A. §§ 50-13-17(a), 50-13-41(d)). Yet these provisions do not operate to transform agency administrative decisions expressly subject to review under the

APA to into quasi-judicial decisions that may be reviewed only via petition for certiorari.

Rather, the Georgia Supreme Court has made clear that when an initial decision of a hearing officer does not come into immediate effect, but the aggrieved party is given notice and the opportunity to have that decision reviewed by the agency within a specified period of time, it is only when that time period has "elapsed without request for review that the initial decision automatically becomes enforceable as the decision of the agency." *Dep't. of Public Safety v. Maclafferty,* 230 Ga. 22, 26 (1973). This type of provision prevents an aggrieved party from keeping the initial decision in abeyance indefinitely, and "serves to activate *that* decision as the *final* agency action without requiring the agency itself to review all cases decided initially by a hearing officer, whether contested or not contested." *Id.* at 26–27 (emphasis added).

This is precisely what happens in student disciplinary proceedings under UGA's Code of Conduct. A hearing panel's decision expressly does *not* become final until the UGA Vice President's review is complete; in cases involving suspension, expulsion, or organization revocation, the decision is not complete until the UGA President has also reviewed the hearing panel's

initial decision. V2-111. However, if a student does not seek this review, the Code of Conduct frees UGA officials from having to conduct further review of non-contested hearing panel decisions by providing for them to become final upon the expiration of the deadline to request review. Affirming the superior court's reasoning on this point—i.e., that the mere existence of such a provision makes the hearing panel's decision final and binding in all cases even when the right of review is duly exercised—would at best require universities to expend needless time and effort to review each and every initial decision of a disciplinary hearing panel without regard to whether such review is actually desired by the student, and at worst could cause significant upheaval among the numerous agencies that rely upon similar provisions to manage their administrative decision-making process.

Because the decision of the hearing panel remained an initial, non-final decision until either the time period for appeal lapsed without a request for review or (as in this case) Drake's case was reviewed by the UGA Vice President for Student Affairs and UGA President, the superior court erred in finding that the decision to suspend Drake was a quasi-judicial decision subject to certiorari review. His claims are thus barred by sovereign immunity.

III. The superior court's order holding provisions of UGA's Code of Conduct null and void exceeds the scope of review permissible on writ of certiorari and violates sovereign immunity.

The superior court erred by ordering relief beyond that permitted by O.C.G.A. § 5-4-14. Drake argues that the relief ordered by the superior court is "comparable to the relief granted in *Allen v. City of Atlanta."* Resp. at 24 (citing *Allen v. City of Atlanta,* 235 Ga. App. 516 (1998)). *Allen* analyzed a policy of the Atlanta Police Department that, unlike UGA's Code of Conduct, contained language that directly conflicted with O.C.G.A § 16-3-21's provisions for justifiable use of deadly force by expressly prohibiting any discharge of a firearm in the presence of innocent bystanders without exception. Reasoning that department policy was in direct conflict with O.C.G.A. § 16-3-21, this Court reversed the decision of the superior court denying the petition for writ of certiorari. 235 Ga. App. at 518. In doing so, this Court did not order any specific relief, presumably leaving that task to the superior court on remand.

Here, however, the superior court did order relief, and the relief ordered exceeds the scope of relief permissible under O.C.G.A. § 5-4-14. Upon hearing a writ of certiorari, the supreme court's options are to either dismiss the writ or return it to the same court from which it came with instructions. O.C.G.A. § 5-4-

14(a). Only where the error complained of is a matter of law *and* the court is satisfied that there is no question of fact involved which makes it necessary to send the case back for a new hearing before the tribunal below may the superior court judge make a final decision in the case. O.C.G.A. § 5-4-14(b). The superior court engaged in no analysis whatsoever as to whether there were questions of fact that could be addressed using what it believed to be the proper legal standards on remand. The court's opinion contains no discussion whatsoever on whether the evidence in the record was or was not in fact sufficient to establish that Drake's use of force met the standards for justifiable use of force set forth in O.C.G.A. § 16-3-21. Its failure to do so renders its attempt to issue a final decision invalid.

To reverse the decision to suspend Drake without remanding the matter to UGA for rehearing or further findings, the superior court was required to "conclude that the record below lacked 'any' evidence to support the [University's] decision." *Macon-Bibb County Planning & Zoning Comm'n v. Epic Midstream, LLC*, 349 Ga. App. 568, 572 (2019). But the court made no such conclusion; it did not engage in any analysis whatsoever as to whether or not the record contained any evidence to find that Drake did, or did not, act in self-defense. Instead, it summarily reversed Drake's

suspension without any consideration as to whether he actually acted in self-defense or simply engaged in a drunken, angry assault against Ms. Bargouti.

The record is replete with evidence that would support a finding that Drake was not, in fact, acting in self-defense when he threw Ms. Bargouti to the ground and continued to hold her face down upon the men's bathroom floor while demanding that she retrieve his missing glasses. *See, e.g.,* V2-83–84 (Drake admitted that he "overreacted to Ms. Bargouti with inappropriate actions" and that he "needed to work on his anger management"); V2-118–120 (arrest report containing witness statements); V2-150–154 (photographs of Ms. Bargouti's injuries); V2-188 (Drake admitted that "intoxication may have played a role in his own reaction" and that he "was bothered by having a woman…who overreacted to him taking the hat"); V2-189 (describing testimony of witnesses disputing Drake's claim that Bargouti threatened Drake or waved her hands close to his face). The superior court's failure to account for this evidence warrants reversal.

IV. UGA's Code of Conduct is not in conflict with O.C.G.A. § 16-3-21.

Finally, Drake argues that UGA's Code of Conduct impermissibly conflicts with O.C.G.A. § 16-3-21, Georgia's self-

defense statute. *See* Resp. at 28–34. He reasons that UGA "cannot adopt rules which mandatorily prohibit physical violence as, under certain circumstances, physical violence is justified." *Id.* at 28. He is wrong, once again. UGA's Code of Conduct contains no language conflicting with O.C.G.A. § 16-3-21's self-defense standards; it is simply silent as to whether self-defense and other affirmative defenses may be presented in defense of charges of conduct violations, though it does broadly permit consideration of any evidence and arguments that a respondent may wish to present in response to a disciplinary charge. *See, e.g.* V2-104– 106. The absence of a specific directive requiring consideration of O.C.G.A. § 16-3-21's self-defense standards is not, without more, a "conflict" with that statute's provisions. *See generally Smith v. State of Ga.*, 366 Ga. App. 815, 817 (2023) (where act is silent as to whether or not a complaint may be amended, such act "cannot reasonably be construed to conflict with" amendment provisions of O.C.G.A. § 9-11-15(a)).

Further, as the Georgia Supreme Court made clear in *Henry County Board of Education v. S.G.*, 301 Ga. 794 (2017), students are permitted to raise self-defense claims in disciplinary proceedings regardless of whether or not the school's disciplinary codes make express provisions for such a defense. *Id.* at 799–800.

Rather than invalidate UGA's conduct regulations for failing to expressly incorporate O.C.G.A. § 16-3-21, the superior court should have applied the analysis set forth in *S.G.* by first determining whether or not Drake had been permitted to adequately present his claims (as to which there is no basis for Drake to dispute) and then considering whether, under the "any evidence" standard, the record supports the decision to suspend Drake in light of the evidence presented. 301 Ga. at 798. The superior court's failure to conduct such an analysis is in itself an error warranting reversal.

Drake makes no credible claim that the record lacks *any* evidence to support the decision to suspend him despite his presentation of a self-defense claim. Instead, he takes issue with the fact that UGA's Vice President for Student Affairs used the term "mitigating factor" rather than "justification" in discussing his self-defense claim, claiming that this itself somehow conflicts with O.C.G.A. § 16-3-21. Resp. at 32—33. But this Court has frequently used similar language in cases discussing self-defense claims. *See, e.g. Williams v. State*, 301 Ga. App. 731, 734 (2009) (explaining that by asserting self-defense, "the accused admits the elements of the crime, but seeks to justify, excuse or mitigate by showing no criminal intent.") (cleaned up); *Taylor v. State,* 327 Ga.

App. 882, 891 (2014)(same). There is no merit to Drake's claim that Vice President Wilson's use of the term "mitigating factor" rather than "justification" somehow creates a conflict with O.C.G.A. § 16-3-21. *See* Resp. at 32–33. The superior court's ruling that UGA's Code of Conduct conflicts with O.C.G.A. § 16-3-21 was error and should be reversed.

CONCLUSION

For the reasons set out above, this Court should reverse the judgment of the superior court.

Respectfully submitted.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I certify that on December 4, 2023, I served a copy of this brief by email, per prior agreement of the parties, to the following recipients:

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