

BEFORE THE HONOR CODE REVIEW COUNCIL
OF THE
NORTHWESTERN UNIVERSITY SCHOOL OF LAW FACULTY

No. 88-1

NORTHWESTERN UNIVERSITY SCHOOL
OF LAW STUDENT BAR ASSOCIATION,

Plaintiff,

vs.

NORTHWESTERN UNIVERSITY SCHOOL
OF LAW STUDENT,

Defendant.

Review of Findings of the Judicial Council

February 13, 1990

Martin H. Redish, Chairman, For the Honor Code Review Council:

The Judicial Council of the Student Bar Association found the defendant in this case guilty of violating two provisions of the Honor Code for creating and distributing a combined grade form that simultaneously reported his first year-first semester shadow grades and his second semester grades. The matter is now before the Honor Code Review Council pursuant to Section 8.03 of the School Rules. Specifically, the defendant was convicted of violating or attempting to violate Honor Code Article I, sections 2(g) and 2(h), which provide:

A violation occurs when a student knowingly:

- (g) engages in any conduct with the purpose of avoiding or circumventing other Law School rules governing academic life;
- (h) undertakes an activity or course of conduct with the purpose of creating an unfair advantage over other students.

Honor Code, Article I, Sections 2(g) and 2(h).

The Honor Code prosecutor clarified the charge under section 2(g) by stating that the Law School rule defendant was accused of having avoided or circumvented was Rule 2.04, which provides in pertinent part as follows:

First Semester Grading: Examinations of first semester students will be graded and informal evaluation of those examinations will be given to the students. The letters "CR" will be entered upon the official record of each student who completes the course

indicating that he or she has received credit for the course. A student who fails to complete the work of any course will receive a notation of No Cr. and must repeat the course.

Rules of Northwestern University School of Law, § 2.04(a).

We reverse both grounds for conviction. We hold, by a vote of five to nothing, that the conviction for violation of Article I, section 2(g) is improper, and, by a vote of four to one, that the conviction under section 2(h) must be reversed. One member of the Council recused himself from the entire proceeding.

I. Conviction Under Section 2(g):

In order to violate section 2(g), a student must knowingly engage in conduct "with the purpose of avoiding or circumventing other Law School rules governing academic life. . . ." The Council believes that the defendant's behavior in no way falls within the terms of this provision.

Rule 2.04(a), upon which the Judicial Council relied to support its conviction, merely describes the procedure for recording shadow grades on the permanent transcript. It imposes no obligation on the student concerning how he or she will display grades to a prospective employer, or even concerning the student's defacement of the transcript. By its terms, then, it is wholly irrelevant to the defendant's behavior. Since no other rule has been pointed to which imposes limitations on the method by which a student displays his or her transcript during the hiring process, we are compelled to conclude that no violation of section 2(g) has occurred.

One member agrees that the conviction should be reversed as to section 2(g), because section 2.04(a) of the Law School Rules and Regulations lacks the crisp prohibitions that would make the student's conduct an offense punishable under the Honor Code. This member would note, however, that the student effectively disregarded rather specific prohibitions contained in memoranda by the director of career counseling, Ms. Rold, and by Assistant Dean Peters.

II. Conviction Under §2(h)

Somewhat more complex is the defendant's conviction for "undertak[ing] an activity or course of conduct with the purpose of creating an unfair advantage over other students", as proscribed by section 2(h). At the outset, we note the potential open-endedness of a provision prohibiting the creation of so nebulous a concept as "unfair advantage." Thus, while the provision plays a vital role in regulating student behavior, it is important in interpreting the provision to place appropriate limitations on its scope, lest a student effectively be subjected to punishment for violation of what amounts to an ex post facto law.

The argument in support of defendant's conviction on this ground is that he placed his first semester shadow grades on the same piece of paper containing his second semester grades, in violation of two directives to the contrary issued by school administrators. It is relevant to note, however, that neither by school rule nor administrative directive were students prohibited from displaying their shadow grades to prospective employers. Rather, the

sole limitation concerned displaying them on the same page. Moreover, the defendant testified -- and there is no evidence in the record to the contrary -- that at no point did he in any way suggest or imply to a prospective employer that his shadow grades (which were higher than his second semester grades) counted towards his law school record. Thus, the only conceivable advantage he could have obtained over his fellow students was that prospective employers would see both sets of his grades on the same page, while they would see the grades of other students on two separate pages. Two members of the four-person majority believe that such an "advantage" -- if, indeed, it can be called that -- is so small as to be de minimis, not rising to the level of a truly "unfair advantage". Those two members believe that an activity is not automatically rendered an "unfair advantage" for purposes of section 2(h) simply because it contravenes an administrative directive. Such a practice would improperly transform an administrative directive into the equivalent of a school rule, even though no member of the faculty had been involved in its inception or promulgation.

While two members of the majority dissent from this reasoning, all four agree that there is a total absence of evidence in the record to support the necessary factual inference that the defendant was actually aware of the two directives. In the absence of such actual knowledge, the defendant could not be convicted of having "knowingly" sought an unfair advantage by engaging in conduct beneficial to him when he was aware that other students had been prohibited from undertaking the same conduct.

The two directives were included as small parts of much longer memoranda, placed in student mailboxes. The defendant testified that he did not recall reading either memorandum.

No evidence appears in the record to contradict this assertion, and the defendant's assertion is certainly not unreasonable on its face. While one might theoretically impute constructive notice to the defendant, we hold that the rule requires a showing of actual knowledge, in order to prevent it from acting as a trap for the unwary. To be sure, the existence of widespread dissemination of clearly articulated standards of conduct could go far towards refuting a defendant's assertion of lack of actual knowledge. But the actual method of dissemination employed here does little to refute the defendant's denial of actual knowledge. Thus, to the extent a finding of actual knowledge was made by the Judicial Council, we find it to be "against the manifest weight of the evidence", and therefore subject to reversal under § 8.04 of the School Rules.

It is also relevant to note that the Judicial Council's finding of a violation of section 2(h) was based on the logic that defendant's advantage was "unfair in that it was gained by altering a transcript in violation of Sec. 2.04(a). We thus find the defendant guilty of the second charge of the Complaint." Since this Council has unanimously found that no violation of section 2.04(a) occurred here, it inescapably follows that no conviction can be derived indirectly from the assumption of such a violation.

We understand the Judicial Council's reaction to this case. The defendant undeniably altered a document which employers had a right to assume was a true copy of an official transcript. He replaced official grades of "CR" with letter grades. Ordinarily, altering a transcript is serious business. However, where, as here, the alteration does not provide the student with an unfair competitive advantage, the alteration does not appear to violate any

provision of the Honor Code. Accordingly, with appreciation for the concern and the efforts of the Judicial Council, we respectfully set aside the conviction.

Though we reverse the conviction in this case, we wish to emphasize that we in no way intend to undermine the important work performed by the students as enforcers of the Honor Code. It is only in the relatively rare instance that the student organs unambiguously stray from the limits of the Honor Code's directives or from the clear weight of the evidence that reversal is proper. However, this case represents one of those rare instances.

One member dissents on the reversal of the conviction under section 2(h), believing that the student did undertake a "course of conduct with the purpose of creating an unfair advantage over other students." Besides being inclined to give some deference to the decision of the student tribunal, this member believes that even if the student never saw the relevant administrative memoranda, he must be taken to have been sufficiently knowledgeable about practice in this area that he must be held to have violated section 2(h). He notes further that had the rules announced in the administrative memoranda been part of the official Rules of the Law School, the student tribunal legitimately could have found a violation of I(2)(g) and could have imposed a significantly more severe penalty than the tribunal assessed.