JUDICIARY of the DUKE STUDENT GOVERNMENT

Thomson et al. v. Head Line Monitors

Office of the Justices

Docket No. 00032
Case No. 32

Filed on
February 22, 2022

Heard on
February 23, 2022

Decided on
March 1st, 2022

Overview

On the evening of February 19th, 2022, at approximately 11:11pm, the Petitioner's tent missed their second tent check of the White Tenting season. The Petitioner was part of a "Flex" tent, Tent [Redacted]. On the morning of February 20th, the Head Line Monitors informed the Tent Captain and tent members that Tent [Redacted] had been removed from the line per the 2021-2022 Official Krzyzewskiville (K-Ville) policy.

Petitioner offered digital evidence to demonstrate their presence in K-Ville during the time of the missed check. The K-Ville Policy is clear that digital evidence may not be used to demonstrate presence in K-Ville instead of a tent check. The Judiciary found for Respondents on this matter.

In contesting this missed check, the Petitioners raised issues with the implementation of the K-Ville Accessibility policy. The Petitioner alleged first that the tent member present at the time of the check had missed it because of a situation requiring accommodations; second, that the member of the tent had been prevented from requesting accommodations that would have allowed the check to be completed; and third, that the reason he could not request accommodations was because of the lack of anonymity in the accessibility policy. Under said policy, students needing accommodations were asked to self identify via email to an SDAO staff member and the Head Line Monitors.

In response, the Respondents argued that they had followed all K-Ville policies, including during the time of the check and in regards to the 2021-2022 Accessibility Policy, which they testified had been employed by multiple students. They also alleged that the policy had been recommended and approved by the Judiciary.

On March 1, the Judiciary found in favor of the Petitioners on the grounds that the policy as written was unconstitutional because it violated a

fundamental right to equal protection guaranteed in Article VI, Section 5 of the DSG Constitution, seen below.

SECTION 5
"All students have the right to equal protection under the law. No student may be subjected to discrimination on the basis of race, ethnicity, gender identity, sex, religion, national origin, sexual orientation, disability, or socioeconomic status; but this enumeration shall not be construed to condone other violations of equal protection."

- Duke Student Government Constitution, Article VI, Section 5

In a standard case of this sort, the Judiciary would seek to determine whether there existed a causal link between the action of the respondent and the harm done to the petitioner. This determination typically takes the form of the question "but for the action in question, would the harm have occurred?" If the answer is no, then the Judiciary would find in favor of the respondent even if the action taken was a violation of law. However, this is not a standard case. Due to the reasonable privacy concerns at the heart of this case, it is impossible to be certain that the existence of a properly written policy would have resulted in John Doe seeking accommodations, and it is improper for the Judiciary to evaluate whether John Doe would have qualified for accommodations. The proper bodies to handle such a case may have included SDAO or the Office of Institutional Equity, but after consultation in the week prior to March 5, it was determined they were unable to provide recourse due to the retroactive nature of the case. Therefore, for the reasons contained below, the Judiciary ordered that Tent [Redacted] be reinstated and either (1) provide the members of the tent the ability to participate in Personal Checks (P-Checks) in a reasonable and accommodating manner prior to the UNC Game on Saturday, March 5 or (2) waive the requirement that the Petitioner's tent participate in P-Checks to attend the UNC game.

Parties

Parties of the Petitioner

Zach Thomson et al., *Petitioner*

Parties of the Respondent

Head Line Monitor Caroline Bower, *Respondent*

Head Line Monitor Cameron Jarnot, *Respondent*

Held

The Head Line Monitors faithfully executed their duties under the 2021-22 Official Krzyzewskiville Policy.

The Policy violates the DSG Constitution's guarantee of equal protection under the law.

The Judiciary finds in favor of the Petitioner in part and orders the Head Line Monitors to reinstate Tent [Redacted] before the Duke-UNC game.

OPINION of the COURT

Delivered by Chief Justice Weston Lindner

Written by Clerks Randi Jennings and Caroline Cornett

Joined by

Associate Chief Justice Carlee Goldberg

Associate Justice Emma Coleman

Associate Justice Jonathan Griffin

Associate Justice Andrew Griffin

Associate Justice Brian Peng

Further assisted by

Clerk Hanna Bigal

Clerk Heera Rajavel

Clerk Erin Yu

Note: Associate Justice Marc Chmielewski was absent.

Clerk Sajan Singh recused himself.

Relevant Facts of the Case

On the evening of February 19th, 2022, at approximately 11:11pm, Petitioner's tent missed their second tent check of the White tenting season. This tent–Tent [Redacted]–was designated as a Flex tent. The Official K-Ville Policy allows for one missed check. After the second missed check, a tent will be bumped to the end of the list of all registered tents. Tent [Redacted] was subsequently bumped to the end of the waitlist.

The Petitioner raised three primary issues. First, they allege that the tent member responsible for the check, John Doe, was present in the tent, but missed the tent check due to a situation requiring accommodations. Doe had not applied for accommodations at the time of the check.

Secondly, the Petitioner alleges that the Line Monitors did not complete the required number of laps to alert missing tents during the warning period of a tent check. Petitioner claims that three laps are required to call missing tents. Respondent refutes this and claims that only three warning calls are required for missing tents.

Thirdly, Petitioner also raises a claim that the accessibility policy creates an undue burden for students in that it requires tenters requesting accommodations to disclose their identity to the Head Line Monitors. Respondent claims that this issue is immaterial, as the student could have gone directly to SDAO, despite the language of the K-Ville policy.

Member(s) of Petitioner's tent may have been eligible for accommodations for reasons that the Judiciary is unable to publicly discuss in the interest of protecting student privacy. For the sake of maintaining the privacy of the relevant member(s), this opinion will refer simply to "John Doe."

SDAO and OIE were unable to provide recourse due to federal law and the short timeline of this case, respectively. (In 2009, the US Court of Appeals held in 2009 that the Americans with Disabilities Act (ADAAA) does not

apply retroactively (Lytes v. District of Columbia Water and Sewer Auth., D.C. Cir., No. 08-7002 (7/21/2009)).

Application of Power of the Judiciary

The DSG Judiciary is authorized to rule in this case pursuant to DSG Constitution Article V, §5, Clause (a):

The Judiciary shall decide all cases arising under this Constitution or By-Laws and all cases in which jurisdiction has been granted to it by the By-Laws or by the Senate.

Relevant Law

DSG Constitution

Article V. The Judiciary, §5. Powers of the Judiciary, Clause (a):

The Judiciary shall decide all cases arising under this Constitution or By-Laws and all cases in which jurisdiction has been granted to it by the By-Laws or by the Senate.

Article VI. Bill of Rights, §5:

All students have the right to equal protection under the law. No student shall be subjected to discrimination on the basis of race, ethnicity, gender identity, sex, religion, national origin, sexual orientation, disability, or socioeconomic status; but this enumeration shall not be construed to condone other violations of equal protection.

Article VI. Bill of Rights, §9:

Any student or group whose rights under this Bill, or under other provisions of the Constitution and By-Laws, have been violated has the right to seek a statutory or equitable remedy from the Judiciary. And every student or group suffering punitive action from DSG, beyond removal from office and enforcement of civil obligations, has the right to an impartial trial by the Judiciary before such punishment may be imposed. No conviction shall be sustained except on clear and convincing evidence that the defendant

committed an offense which, before its commission, had been defined in By-Law.

Krzyzewskiville Policy

General Rules and Etiquette, City Limits (pp. 5)

Krzyzewskiville is formally defined as the grassy lawn area in front of Card and Wilson gyms, their surrounding sidewalks, and the plaza in front of Cameron and the Schwartz-Butters Building.

General Rules and Etiquette, Accessibility (pp. 9)

Duke University encourages persons with disabilities to participate in its programs and activities. If students with disabilities would like to take part in the regular Walk-Up Line or Tenting procedures, The Head Line Monitors will work in conjunction with the Disability Management System to ensure that Walk-Up Line and Tenting accommodations are made for the individual's needs. If you anticipate needing any type of reasonable accommodation or have questions about the physical access provided, please contact Leigh Fickling in the Disability Management System at leigh.fickling@duke.edu and the Head Line Monitors at headlinemonitor@gmail.com as soon as possible.

General Tenting Policy, Tent Checks (pp. 28)

To ensure that each tent is appropriately representing its place in line, the Line Monitors will call tent checks. The Line Monitors may announce a tent check at their discretion. A check will be signaled by the sounding of a bullhorn siren. A Line Monitor will circle the entirety of K-Ville with the horn to ensure that it is heard by all tenters. To check in, gather all members of your tent and go to the Morton plaza. Please wait until the required number of tenters are present to check in with a Line Monitor — this allows us to more quickly check in entire groups. We cannot check in your tent until all required members are present. Tents who have yet to be checked but appear to be missing will — at a minimum – be given three warning calls over the bullhorn before being marked as absent. After the final warning call, two

minutes will be given to allow for tenters to check in. After this time elapses, the check is officially over. Line Monitors cannot be held responsible for checks missed due to tenters using the bathroom, failing to hear the siren due to the use of noise-canceling headphones, being asleep in the tent, or similar related circumstances. Cellular data/location services/texts cannot be used as proof of being in K-Ville.

General Tenting Policy, Missed Checks (pp. 29)
In order to make a tent check, the correct number of tent members for the designated period must be present within the defined boundaries of K-Ville at the start of the check and check in with a Line Monitor during the duration of the check. Checking in entails each present group member presenting their Duke Card to a Line Monitor. If the tent fails to complete this, the check will be counted as a missed check for that tent. Each tent is allowed one missed check per tenting period. This first missed check is meant to accommodate for any unfortunate circumstances or accidents wherein Line Monitors cannot verify that a tent made a check. Missing a second check will result in the tent being bumped to the end of the line, behind all registered tents.

Relevant Precedent
Pearlman et al. v. Head Line Monitors (2018)

Questions Raised
<u>Can digital evidence be used to reverse a missed tent check?</u>
Petitioner presented digital evidence to assert that a member of their tent was present during the check. The preponderance of the evidence suggests that John Doe was present during the check; however, this is not enough to reverse the missed check. The Official K-Ville Policy clearly states that "[c]ellular data/location services/texts cannot be used as proof of being in K-Ville," on page 28. On the same page, the K-Ville Policy further states "[t]o check in, gather all members of your tent and go to the Morton plaza. Please wait until the required number of tenters are present to check in with a Line

Monitor…" Tent checks do not fulfill the purpose of simply making sure tenters are present in K-Ville, they also embody the rich traditions of K-Ville, including being woken up at odd hours. This policy presents no constitutional issues, and this opinion shall not be construed to propose any legal issues with this policy. So long as no undue, discriminatory barriers are put in place, the K-Ville Policy has discretion to define and execute tent checks in whatever way and with whatever restrictions the Senate approves.

<u>How many rounds are line monitors required to make for missing tents, and were sufficient rounds made during the tent check in question?</u>
The Official K-Ville Policy only requires Line Monitors to make *one* lap during the initial tent check and *three* warning calls to warn missing tents. To be clear, the text of the policy that outlines the procedure for missing tents does not require any laps for missing tents:

> "Tents who have yet to be checked but appear to be missing will — at a minimum – be given three warning calls over the bullhorn before being marked as absent." (page 28 of the Official K-Ville Policy)

While it is impossible to know with certainty, based on the testimony and affidavits of Line Monitors that were present, we find by preponderance of the evidence that the necessary number of rounds were made on the night of February 19th. Therefore, the conduct of the line monitors during the course of the tent check in question did not constitute a violation of K-Ville Policy.

<u>Was the accessibility policy within the Official K-Ville Policy properly executed?</u>
The Head Line Monitors executed the accessibility policy to the best of their ability. The student in question did not come forward, so the line monitors had no way of knowing that there was a need to provide Tent [Redacted] with accommodation. Under the current accessibility policy, the Head Line Monitors did not err.

Is the accessibility policy constitutional?

Given that the policy was executed properly, the remaining question is if the policy itself is constitutional. As written, it is reasonable for students to assume that they must disclose their disability (or situation requiring accommodations) and/or identity to the Head Line Monitors in order to obtain reasonable accomodations.

The policy directs students to "contact Leigh Fickling in the Disability Management System at leigh.fickling@duke.edu **and** the Head Line Monitors at headlinemonitor@gmail.com." (page 9 of the Official K-Ville Policy, emphasis added).

Asking a student to provide another student with information about a deeply personal matter is not only bad practice–it is a violation of a student's right to equal protection and freedom from discrimination. This is especially true when the receipt of that information by a student is in no way necessary to carry out the objective of the policy.

Respondent claimed that because the Judiciary had reviewed the accessibility policy, it is either immune from review or cannot be unconstitutional. This assertion is based on an advisory opinion released by the Chief Justice of the Judiciary during the Fall 2021 semester. Advisory opinions are *non-binding*–that is, the Judiciary is not required to rule in the same vein as any advisory opinion. In this instance, President Pro Tempore Devan Desai asked the Chief Justice if the current language addressed the issue raised in the advisory opinion.

The advisory opinion addressed the lack of an explicit accommodations process within the Official K-Ville policy, and the language added to the policy seemed to remedy the lack of a process; however, the outlined process was neither confidential nor constitutional. Confidentiality was not mentioned in the policy or the advisory opinion on account of all parties involved, including the Judiciary, failing to foresee the potential issues that

neglect of it could bring. This lack of foresight does not, however, make the policy constitutional.

The ideal remedy would be to ask SDAO to issue a retroactive accommodation that does not require the student to disclose their identity to the Head Line Monitors. Unfortunately, SDAO is unable to do this, as the Americans with Disabilities Act prohibits retroactive accommodations in higher education settings. Alternatively, the student could file a claim with the Office for Institutional Equity, which would lead to an investigation. This process would be lengthy, and it would likely not remedy the harm done in this case. The relief requested would no longer be available by the time such an investigation would conclude. Thus, the decision rests with the Judiciary.

This case centers around the fundamental rights to privacy and equal protection. This is based in the DSG Constitution and overarching legal and institutional guidelines for accessibility and equal protection. As such, the Judiciary was forced to decide between standard evidentiary rules and John Doe's right to privacy. This case presents an especially acute example of the fact that the DSG Judiciary, while seeking to emulate the practices and procedures of the US court system, is a body composed of undergraduate students acting under the jurisdiction of a student government. While a state or federal court may rightfully subpoena evidence and testimony to expose all relevant information in a legal dispute, the DSG Judiciary would be stepping far beyond its authority to do so in the face of a student's right to privacy. Navigating this barrier will always be a part of the job of the Judiciary. In this case, the Judiciary, through much deliberation, determined that sufficient evidence had been presented to reach the decision contained in this opinion in the context of a student government judicial proceeding, given the privacy issues presented by the case.

We order the Head Line Monitors to reinstate Tent [Redacted]. We order the Duke Student Government Senate to change the Accessibility Policy to ensure equal protection in future years.

Recommendations

In order to make the policy constitutional and equitable, two things ought to happen: the policy must direct students to SDAO and protect individuals' identities.

First, the policy should direct students to contact *only* SDAO in seeking accommodations. This prevents a situation arising where a Line Monitor is made aware of intimate details about another student, and it also aligns with disability practices across the university. For instance, SDAO will contact a professor on behalf of a student with academic accommodations. There, the process begins and ends with SDAO, with individual adjustments made between the student and a faculty or staff member. One important distinction between tenting and other areas of student life at Duke is that Head Line Monitors are not legally bound by the same confidentiality agreements as faculty and staff, per the Family Educational Rights and Privacy Act (FERPA). As such, it would be best practice for *all* communications to take place through SDAO officers.

Second, in order to protect the identity of individual students, the Head Line Monitors should consult with SDAO and formulate a process that, whenever possible, only discloses Tent Letter/Number to the Line Monitors, not the names of any individual student. This change would protect the individual student, while still providing them with accommodations.

Conclusion

The Judiciary finds that the lack of a confidentiality provision in the Accessibility Policy of the Official K-Ville Policy violates the DSG Constitution and institutional guidelines. This portion of the policy is unconstitutional.

Therefore, the Judiciary orders the Head Line Monitors to reinstate Tent [Redacted] and to revise the Policy before the 2022-23 basketball season.

It is so ordered.