NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 13, 2019

LETTER OPINION

Mr. Zach Miller
McClanahan Powers, PLLC
8133 Leesburg Pike, Suite 130
Vienna, Virginia 22182

Counsel for Petitioner

Mr. David G. Drummey
Senior Assistant Attorney General
Mr. Eli S. Schlam
Assistant Attorney General
George Mason University
Office of University Counsel
4400 University Drive, MS 2A3
Fairfax, Virginia 22030

Counsel for Respondent

Re: *Megan M. Harbison v. George Mason University*
Case No. CL-2019-7022

Dear Counsel:

This cause comes before the Court on the Petition for Review of Administrative Decision of Megan M. Harbison ("Petitioner" or "Ms. Harbison"). Ms. Harbison twice applied for in-state tuition from George Mason University ("Respondent" or "GMU"). The

OPINION LETTER

Petition before the Court raises the question of whether the April 19, 2019, rejection of Ms. Harbison's final appeal was arbitrary, capricious, or otherwise contrary to law. The Petitioner has the heavy burden to establish by clear and convincing evidence domiciliary intent pursuant to the requirements of Virginia Code section 23.1-502, which may not be based on the performance of acts which are merely auxiliary to fulfilling educational objectives or routinely performed by temporary residents of the Commonwealth. This Court sitting in review of the administrative denial of in-state status to Petitioner is not free to make its own independent factual determinations, but must instead base its decision solely on review of the final administrative decision as supported by the filed record. The Court must further limit its assessment to whether Respondent's decision could reasonably be said, based on such record, not to be arbitrary, capricious, or otherwise contrary to the law. Thus, Petitioner has the burden in her appeal to show by clear and convincing evidence that the conclusion of Respondent denying her in-state status was unsupported by sufficient indicia in the record that suggests the primary basis of Petitioner's relocation to Virginia was to gain benefit of an education in Virginia institutions. The Court, having considered the filed administrative record and the applicable statutory law and precedent, holds that GMU's decision to classify Ms. Harbison as an out-of-state student was neither arbitrary, capricious, nor contrary to law. As such, the Petition is hereby denied.

BACKGROUND

Ms. Harbison moved to Virginia from South Carolina in December 2016 and applied to GMU as a transfer student on or about January 22, 2017, after attending Trident

Technical College in South Carolina from August 2013 to May 2016 as an in-state student. Ms. Harbison's application for admittance to GMU initially reflected an interest to begin in the Spring 2017 semester but was later changed to the Fall 2017 semester. GMU accepted Ms. Harbison's application on or about February 14, 2017, and Ms. Harbison indicated her intent to enroll on or about April 13, 2017. Ms. Harbison began her studies at GMU in August 2017.

Since moving to Virginia, Ms. Harbison has: obtained employment, working anywhere from twenty-five (25) to forty (40) hours per week at various establishments across Fairfax County; claimed Virginia residency for income tax purposes, first filing in Virginia in 2018 for the tax return year 2017; obtained a Virginia driver's license; registered her vehicle in Virginia; registered to vote in Virginia; rented property in Virginia; and opened a bank account in Virginia. Further, Ms. Harbison claims she does not receive any type of financial aid from a source outside of Virginia, and that she was not claimed as a tax dependent on her parents' income tax return for the tax year prior to her first day of class for the Spring 2019 semester. In her Request for Tuition Reclassification dated January 9, 2019, Ms. Harbison indicated that she initially moved to Virginia "[t]o assist family in need and finish [her] degree," and that she intends to remain in Virginia following graduation "[t]o work locally," though not for any specific employer.

Petitioner applied for and was refused in-state tuition by GMU on or about January 30, 2018. Ms. Harbison applied for reconsideration of such decision on or about March 12, 2018, which application was denied. Ms. Harbison appealed and was again rejected on or about June 20, 2018. On or about January 9, 2019, Ms. Harbison applied a second time for in-state tuition, which application was refused on or about February 8, 2019. Ms.

Harbison submitted a Reconsideration Appeal Form on February 13, 2019, which was denied on or about February 27, 2019. Ms. Harbison's final appeal with the Final Review Committee was rejected on or around April 19, 2019. Petitioner instituted the present action in the Fairfax County Circuit Court on May 17, 2019, within thirty (30) days after the rejection of her final appeal.[1]

ANALYSIS

In order to qualify for in-state tuition at a Virginia public institution of higher education, Virginia Code section 23.1-502(A) requires an individual establish by clear and convincing evidence "(i) domicile in the Commonwealth for a period of at least one year immediately succeeding the establishment of domiciliary intent pursuant to subsection B and immediately prior to the date of the alleged entitlement and (ii) the abandonment of any previous domicile, if such existed." Subsection B in turn provides:

> In determining domiciliary intent, institutions of higher education shall consider the totality of the circumstances, including the following applicable factors: continuous residence for at least one year prior to the date of the alleged entitlement, except in the event of the establishment and maintenance of a place of residence outside the Commonwealth for the purpose of maintaining a joint household with an active duty United States military spouse; state to which income taxes are filed or paid; driver's license; motor vehicle registration; voter registration; employment; property ownership; sources of financial support; military records; a written offer and acceptance of employment following graduation; and any other social or economic relationships within and outside the Commonwealth.

Va. Code § 23.1-502(B).

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[1] While both Ms. Harbison's Petition and the Administrative Record provided by GMU note an earlier application and rejection for in-state tuition, this Court is only permitted to determine whether the second rejection, for the Spring 2019 semester, was arbitrary, capricious, or contrary to law. *See* Va. Code § 23.1-510(C) ("Any party aggrieved by a final administrative decision has the right to review in the circuit court for the jurisdiction in which the relevant institution is located. A petition for review of the final administrative decision shall be filed within 30 days of receiving the written decision.").

The General Assembly delegates to the State Council of Higher Education for Virginia the duty to issue guidelines regarding eligibility for in-state tuition to ensure the application of uniform criteria in making such determinations. Va. Code § 23.1-510(D). The most recent Domicile Guidelines state, in relevant part, that residence primarily for educational purposes does not confer domiciliary status, and "[i]n questionable cases, the institution should *closely scrutinize* acts, aside from those that are auxiliary to fulfilling the student's educational objective, performed by the individual which indicate an intent to become a Virginian." Domicile Guidelines, §§ 05.A, C (2018) (emphasis added). Moreover, the guidelines reiterate the standard that an individual who claims Virginia domicile must support her claim by clear and convincing evidence, and defines clear and convincing evidence as "that degree of proof that will produce a firm conviction or a firm belief as to the facts sought to be established." *Id.* § 04.D.

A student can challenge a university's decision pursuant to Virginia Code section 23.1-510(C). On appeal, the circuit court's only function is "to determine whether the decision reached by the institution could reasonably be said, on the basis of the record, not to be arbitrary, capricious, or otherwise contrary to law." *Id.* Virginia agency actions are "arbitrary and capricious when they are 'willful and unreasonable' and taken 'without consideration or in disregard of facts or law or without determining principle.'" *Sch. Bd. of City of Norfolk v. Wescott*, 254 Va. 218, 224, 492 S.E.2d 146, 150 (1997) (quoting Black's Law Dictionary 105 (6th ed. 1990).[2] "The reviewing court may reject the agency's findings

[2] While "[i]t is clear that GMU qualifies as an agency of the Commonwealth," jurisdiction over in-state tuition cases appealed from circuit courts lies directly with the Supreme Court of Virginia, which has delineated the "difference between and administrative agency, and an agency [like GMU] with the power to make administrative decisions." *George Mason Univ. v. Floyd*, 275 Va. 32, 37, 654 S.E.2d 556, 558 (2008). "The primary goal of every university is to educate, not regulate, its students . . . . [T]he Court of Appeals only

of fact only if, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion." *Id.* (internal citations omitted). Finally, this Court may not reweigh the evidence nor may it substitute its own judgment for that of GMU. *See George Mason Univ. v. Malik*, 296 Va. 289, 297, 819 S.E.2d 420, 423 (2018) ("We hold that the circuit court exceeded the scope of its review under Code § 23.1-510(C) by reweighing the evidence and substituting its judgment for that of GMU rather than reviewing only whether the institution's decision 'could reasonably be said, on the basis of the record, not to be arbitrary, capricious, or otherwise contrary to law.'"). It is thus not within the Court's power to make an independent credibility or weight determination of the evidence in this administrative appeal. Stated more bluntly by GMU, "The court's task is not to determine if the University made the *correct* decision, rather, its task is to determine if the University had some reasonable basis for its decision." Opp. Br. at 1 (emphasis in original). To do otherwise would mean this Court would abuse its discretion, which "when applied to a court of justice, means sound discretion guided by law. It must be governed by rule; it must not be arbitrary, vague and fanciful, but legal and regular." *Harris v. Harris*, 31 Gratt. (72 Va.) 13 (1878). *See Richmond v. County of Henrico*, 185 Va. 859, 868, 41 S.E.2d 35, 41 (1947).

When considering the Administrative Record and the decision reached by GMU, it is clear the university took account of the facts at hand and the controlling law in making its determination regarding Ms. Harbison's in-state tuition application.

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has jurisdiction over an appeal from an administrative agency, not over an administrative decision made by an entity [like GMU] that is not purely an administrative agency." *Id.*, 275 Va. at 37–38, 654 S.E.2d at 558.

In a letter dated February 8, 2019, the Domicile Appeals Administration Office of the University Registrar made its determination that Ms. Harbison would remain an out-of-state student for the Spring 2019 semester. It was explained in that letter Ms. Harbison did not qualify for in-state tuition because "[she] ha[d] not successfully rebutted the presumption that [she is] in Virginia for the primary purpose of attending school." GMU further cited applicable Virginia Code sections governing in-state tuition and explained how Ms. Harbison had failed to meet the burden established by the Code. For example, GMU cited Virginia Code section 23.1-503(A), which provides, "Students shall not ordinarily establish domicile by the performance of acts that are auxiliary to fulfilling educational objectives or are required or routinely performed by temporary residents of the Commonwealth. Students shall not establish domicile by mere physical presence or residence primarily for educational purposes." GMU then went on to explain Ms. Harbison's statement on her application that she intended to remain in Virginia indefinitely, though favorably considered, was alone not determinative. The letter then detailed the factors GMU must consider pursuant to Virginia law and how Ms. Harbison had met some of those factors. GMU then found that while the totality of the circumstances was considered, because Ms. Harbison had indicated in her application, she was in Virginia to both assist a family member as well as finish her degree, she had not overcome the presumption that she was in Virginia primarily for educational purposes.

The February 27, 2019, Reconsideration Appeal Decision, also demonstrates that GMU considered the facts and applicable law in making its determination regarding Ms. Harbison. The Reconsideration Appeal Decision again reminded Ms. Harbison of her heavy burden in establishing her eligibility for in-state tuition, cited applicable Code

sections, namely Virginia Code section 23.1-503(A), reiterated the facts as provided by Ms. Harbison on her application, and gave an explanation why and how Ms. Harbison failed to meet her burden. The reasons in this letter include that Ms. Harbison failed to provide documentation regarding her intended assistance to a family member, that she indicated on her application she intended to move to Virginia to finish her education, and that the steps Ms. Harbison took to demonstrate domicile are those typically performed by temporary residents of Virginia. GMU emphasized the timeline of applicable events supported the conclusion Ms. Harbison is "currently in Virginia primarily for educational purposes."

In treating the issue of the timeline, GMU further delineated in its February 27, 2019, Reconsideration Appeal Decision, that because of Ms. Harbison's status "as a continuously enrolled student," the presumption her original classification continues must be rebutted by clear and convincing evidence before she would be entitled to in-state tuition.

Finally, in the April 19, 2019, letter from the Chair of the Domicile Appeals Committee, GMU yet again laid out facts and law considered in concluding Ms. Harbison did not qualify for Virginia domicile at that time. In that letter, GMU noted "the chief obstacle to [Ms. Harbison] becoming a Virginia domiciliary is the presumption of educational purpose, which was mentioned prominently in the letters sent to [her] in response to [her] earlier appeals." For instance, GMU responded previously to Ms. Harbison in an email dated June 20, 2018, wherein GMU stated,

> No steps were taken to demonstrate your domiciliary intent until you started part-time employment, at least two months after you had already applied to Mason . . . . Except for your physical presence at a home in Virginia, there

> were no other factors achieved prior to your application to Mason. Only after Mason accepted your application did you start taking the necessary steps to demonstrate your intent to reside in Virginia indefinitely, such as obtaining a Virginia driver's license and voter registration.

For the third time in the Administrative Record regarding Ms. Harbison's application for in-state tuition for the spring 2019 semester, GMU demonstrated how it considered the facts and law in reviewing Ms. Harbison's application. The implication from GMU's decision in the record is that one of the primary factors which causes Ms. Harbison to fall short of qualifying for in-state tuition is the timing and order of her efforts to establish statutory domicile and, potentially, the lack of a year's break between those efforts and her continuation of a Virginia education. GMU additionally posited Ms. Harbison only sparsely developed a record in support of her other stated purpose for moving to Virginia, which was to "assist a family member in need."

A review of relevant Virginia precedent reveals several decisions which declined to overturn an institution's in-state tuition determination when presented with a fact pattern similar to the case at hand. In *George Mason Univ. v. Malik*, the petitioner stated her reason for moving to Virginia was "for education and a better future," and presented evidence that she held a Virginia driver's license, part-time employment in Virginia, a Virginia property lease, and a Virginia bank account. *Malik*, 296 Va. at 293, 819 S.E.2d at 491. In *Malik*, the Supreme Court of Virginia found there was ample evidence to support the institution's conclusion the petitioner failed to overcome the presumption that she resided in Virginia primarily for educational purposes. *Id.*, 296 Va. at 297, 819 S.E.2d at 423. In *George Mason Univ. v. Floyd*, the petitioner admitted in his application he had moved to Virginia "[t]o attend law school and seek employment," and as such, the

Supreme Court of Virginia found "the many facts upon which [the petitioner] relies to support his purported Virginia domicile could likewise be deemed auxiliary to fulfilling his educational objectives or are routinely performed by temporary residents of this Commonwealth." *Floyd*, 275 Va. at 35, 39-40, 654 S.E.2d at 557, 559.[3] GMU conceded there may be additional things Ms. Harbison could do which, while not necessarily dispositive, may be of favorable influence to her cause in the future.[4] However, the record in the instant case is not sufficiently distinct from the aforementioned cases to excuse application of such precedent and overturn GMU's denial of in-state tuition status to Ms. Harbison.

Based on the administrative record and relevant precedent, this Court cannot conclude GMU's actions were "willful and unreasonable," or that they were taken "without consideration or in disregard of facts or law or without determining principle." *Wescott*, 254 Va. at 224, 492 S.E.2d at 150. Thus, Ms. Harbison's Petition for Review must be denied.

CONCLUSION

The Court has considered the Petition for Review of Administrative Decision of Megan M. Harbison. Ms. Harbison twice applied for in-state tuition from George Mason University. The Petition before the Court raises the question of whether the April 19, 2019,

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[3] In both of the aforesaid cases, the Supreme Court of Virginia reversed decisions in which judges of this Court held that GMU acted arbitrarily, capriciously, or otherwise contrary to law in denying in-state tuition to an individual who was deemed to reside in Virginia primarily for educational purposes.

[4] GMU's counsel listed factors such as obtaining commitments for long-term employment, enhancing social ties to Virginia, purchasing a home, or even taking a break of one year from her education yet remaining domiciled in the state.

rejection of Ms. Harbison's final appeal was arbitrary, capricious, or otherwise contrary to law. The Petitioner has the heavy burden to establish by clear and convincing evidence domiciliary intent pursuant to the requirements of Virginia Code section 23.1-502, which may not be based on the performance of acts which are merely auxiliary to fulfilling educational objectives or routinely performed by temporary residents of the Commonwealth. This Court sitting in review of the administrative denial of in-state status to Petitioner is not free to make its own independent factual determinations, but must instead base its decision solely on review of the final administrative decision as supported by the filed record. The Court must further limit its assessment to whether Respondent's decision could reasonably be said, based on such record, not to be arbitrary, capricious or otherwise contrary to the law. Thus, Petitioner's has the burden in her appeal to show by clear and convincing evidence that the conclusion of Respondent denying her in-state status was unsupported by sufficient indicia in the record that suggests the primary basis of Petitioner's relocation to Virginia was to gain benefit of an education in Virginia institutions. The Court, having considered the filed administrative record and the applicable statutory law and precedent, holds that GMU's decision to classify Ms. Harbison as an out-of-state student was neither arbitrary, capricious, nor contrary to law. As such, the Petition is hereby denied.

The Court shall enter an order incorporating its ruling herein, and until such time, THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER