IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

DANIEL CASKEY, CASE NO.: 2015-CA-000554-O

Petitioner,

v.

UNIVERSITY OF CENTRAL FLORIDA,

Respondent.
_____/

Petition for Writ of Certiorari
from the decision of the University
of Central Florida.

Warren W. Lindsey, Esq.,
for Petitioner.

Youndy C. Cook, Deputy General Counsel,
for Respondent.

Before S. KEST, LUBET, and H. RODRIGUEZ, JJ.

PER CURIAM.

FINAL ORDER DENYING AMENDED PETITION FOR WRIT OF CERTIORARI

Petitioner Daniel Caskey sought certiorari review of his suspension through Spring 2016 from the University of Central Florida. This Court has jurisdiction under Florida Rule of Appellate Procedure 9.030(c)(3). The Amended Petition for Writ of Certiorari is denied.

In October 2014, Petitioner was a nineteen-year-old freshman studying engineering at UCF in the honors college. He chose to attend UCF because his brother went there, Petitioner always enjoyed visiting UCF, and he liked the idea of the smaller classes within the honors college. Petitioner planned to become a pilot. Before this, Petitioner had never been in trouble.

On the night of October 10 and in the early morning hours of October 11, 2014, Petitioner and two other students—Jane Doe and John Doe[1] —were drinking alcohol together to the point of intoxication. As the night progressed, the three engaged in sexual conduct together. All of these events transpired in UCF's dorms.

Jane Doe subsequently complained to UCF that the sexual conduct occurred without her consent. Jane Doe submitted her incident report on October 22, 2014, and on October 23, 2014, UCF wrote a letter notifying Petitioner that he was charged with Sexual Misconduct as defined in UCF's Rules of Conduct.

UCF's rule states that Sexual Misconduct is "[a]ny nonconsensual sexual conduct which occurs on . . . the UCF campus." (Pet'r App. A-9 at UCF-5.008(5)(a).) The Sexual Misconduct rule continues, "A person shall not knowingly take advantage of another person who is . . . under the influence of . . . alcohol . . . or who is not conscious or awake, and thus not able to give consent as defined above." (*Id.* at UCF-5.008(5)(a)6.)

On October 28, 2014, UCF electronically sent Petitioner a letter again informing him of the charges. This letter also notified Petitioner of an appointment on that same day for him to review the information that would be presented at the hearing on the alleged violations. It advised Petitioner of the website where he could access UCF's Student Conduct Review Process. At this meeting, Petitioner was permitted to view the complaint and take notes, but he was not given a copy of the complaint.

On October 31, 2014, UCF sent another letter electronically to Petitioner advising him that an administrative hearing regarding the alleged violations was scheduled for November 4, 2014. The letter also stated that Petitioner could have an advisor of his choosing with him at the hearing, but the advisor would not be permitted to speak to anyone at the hearing except the

[1] Pursuant to the Court's Order in this case, these students are referred to by pseudonyms to protect their privacy.

Petitioner or participate in the hearing in any way. The letter ended by stating that Petitioner could call if he had any questions regarding the hearing. None of the documents Petitioner received regarding the charges against him referred him to rights he might have under Title IX.

The administrative hearing was held on November 4, 2014, and was presided over by a single hearing officer. Petitioner, Jane Doe, John Doe, and two other witnesses gave statements and answered questions. Petitioner chose his brother as his advisor. During the hearing, the hearing officer apologized to Petitioner, Jane Doe, and John Doe for the graphic nature of his questions.

At the hearing, Petitioner stated that Jane Doe was drinking, and when the sexual encounter began, she showed signs of inebriation. John Doe stated that during the sexual conduct that Petitioner participated in, Jane Doe "began to get rather weak[,] [a]nd then [he] believe[s] she blacked out." (Hr'g Tr. 77:23-78:2.) Jane Doe stated, "They were not necessarily forcing me into a certain position, but I was being held up. And I laid down at this point. They said something about trying to hold me up more so this could continue." (*Id.* 100:10-14.) Petitioner admitted during the hearing that, a couple of seconds after he disengaged from Jane Doe, she fell over to her side, and "that's why [Petitioner] assumed she fell asleep." (*Id.* 49:1-6.) When Petitioner was asked whether he "believe[s] that consent can be given under the influence of alcohol[,]" he answered, "According to the Golden Rule Book,[[2]] it says, no." (*Id.* 111:2-5.)

During the hearing, Petitioner asked John Doe questions, but declined to interrogate the other witnesses. Petitioner's statements and questions during the hearing related to what happened that night, and he did not make any due process arguments at the hearing.

Following the witnesses' statements, the hearing officer deliberated for an unreported period of time and then announced his decision and rationale. The hearing officer found that

[2] This is Respondent's student handbook.

Petitioner violated UCF's Sexual Misconduct rule. The hearing officer recommended the following sanctions: suspension for three semesters, through Fall 2015; complete an alcohol/drug evaluation and treatment or attend the PASS Program through the Wellness and Health Promotion Services Office; interview an off-campus victim services representative; complete a research paper on acceptable and unacceptable conditions for consent; and not have any contact with Jane Doe during Petitioner's academic career. These sanctions were upheld by the Director of the Office of Student Conduct, who added that Petitioner would be on Disciplinary Probation for the duration of his undergraduate academic career when he does return to UCF.

Petitioner then appealed the decision to the Vice President for Student Development and Enrollment Services. Petitioner argued that the evidence was that Jane Doe consented to the sexual activity and that he did not know that she had passed out. Petitioner asserted that "[d]ue to being a virgin and being very sexually inexperienced[, he] didn't see the potential problems with sexual relations while inebriated." (Pet'r App. A-13.) Petitioner contended that it was unfair to treat Jane Doe differently from him when they both had been drinking. Finally, Petitioner argued that the sanctions were disproportionate to the violations. UCF prepared a document labeled "Student Conduct Appeals Decision Summary," which contained a statement that the hearing officer's "decision was also based on the fact that the victim never gave consent to the charged student and under state law, consent cannot be given if a person is intoxicated." (*Id.* A-14.)

On reviewing Petitioner's appeal, the Vice President upheld the violations and increased the suspension by one term, to include Spring 2016. Petitioner then pursued this certiorari proceeding to review UCF's decision.

STANDARD OF REVIEW

In a certiorari proceeding, the circuit court is limited to determining whether the lower tribunal's decision was supported by competent substantial evidence, whether there was a departure from the essential requirements of the law, and whether procedural due process was accorded. *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000); *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (en banc).

I. Due Process

A. Adequate Notice

Petitioner argues that he did not receive adequate notice to prepare for the hearing. First, he argues that he did not receive the five business days' written notice of the hearing required by UCF's Student Conduct Review Process. Second, Petitioner argues that the same-day notice of his review meeting, which was his only opportunity to review the evidence before the hearing, did not give him sufficient time to prepare for that review meeting. Third, Petitioner contends that he was denied due process because he did not receive a copy of the complaint against him, as provided in UCF's Review Process, and he was not informed of his rights under Title IX. Petitioner did not raise any of these issues during his proceedings before UCF, including at the hearing and in his appeal to the Vice President of Student Development and Enrollment Services.

In *Anderson v. School Board of Seminole County*, a mother appealed her daughter's expulsion. 830 So. 2d 952, 952 (Fla. 5th DCA 2002). The mother argued that the notice she received was unreasonable, as she received it on Friday afternoon and the hearing was held on Monday morning. *Id.* She also argued that the information she did receive "did not identify the actual charges on which the school was to proceed and did not advise her of due process rights . .

. .” *Id.* Although the mother appeared at the hearing with her daughter, who testified, she did not make any due process arguments. *Id.* The Fifth District held that the mother thus waived her objections and was precluded from raising them “for the first time on appeal.” *Id.* The court rejected the mother’s argument that she was not aware of her rights, stating, “Pro se litigants . . . should not be treated differently from litigants in similar situations who are represented by counsel and are charged with knowledge of those rights.” *Id.*

As in *Anderson*, Petitioner failed to make any due process arguments at the hearing or in his appeal to the Vice President. Also as in *Anderson*, Petitioner appeared at the hearing and fully participated in it. Petitioner not only gave his version of the events, but also questioned one of the witnesses. Thus, Petitioner, just like the mother in *Anderson*, failed to preserve his arguments that his due process rights were violated regarding inadequate notice.

The importance of preserving the issue of notice for appellate review is demonstrated by the arguments made in this case. In the Response to the Amended Petition for Writ of Certiorari, UCF contends that Petitioner selected the date for the hearing himself at the informational meeting. In the Reply to the Response, Petitioner states that there is no support in the appendices for this. There is no support in the documents from the proceedings below because the issue was not raised below, and therefore this Court cannot adequately evaluate UCF’s response to Petitioner’s argument. It denies Respondent due process to raise an argument for the first time on appeal, as it precludes Respondent from introducing evidence opposing the argument during the fact-finding proceedings below.

B. Failure to Provide Panel Hearing

Petitioner argues that his due process rights were violated because the formal hearing he received was not a panel hearing; instead, it was an administrative hearing. Under UCF’s Student

Conduct Review process, one of the major differences between the two types of formal hearings is that a panel hearing consists of a panel of two students and two faculty and administrative staff members determining whether there has been a violation, and in an administrative hearing, only one faculty or administrative staff member makes that decision.

UCF's Review Process states, "In cases of alleged . . . Sexual Misconduct . . . , the student is required to have a panel hearing." (Pet'r App. A-9 at UCF-5.009(2)(d).) Later, it repeats that "[a]dministrative hearings are not an option in cases of alleged . . . Sexual Misconduct . . . ." (*Id.* at UCF-5.009(3)(b)1.)

UCF argues that Petitioner consented to the administrative hearing because he had notice of it and was given the opportunity to ask questions about the procedure. Petitioner responds that he was only nineteen years old, did not have an attorney, and was given a short period of time to decide how to proceed with no meaningful guidance. Petitioner says that UCF never advised him that he was entitled to a panel hearing.

Petitioner received the following notices from UCF:

- October 23, 2014—notice of a violation of UCF's Rules of Conduct, including that the violation alleged was Sexual Misconduct.
- October 28, 2014—letter stating that the Office of Student Conduct received an incident report regarding sexual misconduct and setting an appointment for Petitioner to discuss the report. This letter references the future hearing and directs Petitioner to a website to refer to the Student Conduct Review Process. It ends by stating, "Any questions you have about this information will be answered at your appointment." (Pet'r App. A-6.)

- October 31, 2014—letter stating that an administrative hearing had been scheduled and directing Petitioner to contact the Office of Student Conduct if he has any questions.

The hearing was held on November 4, 2014, more than a week after the first written notice to Petitioner. Neither at the hearing nor in Petitioner's appeal to the Vice President does he argue or even mention that the hearing should have been conducted by a four-person panel.

In *Matar v. Florida International University*, the student was charged with academic misconduct. 944 So. 2d 1153, 1155 (Fla. 3d DCA 2006). The student argued that he was denied his due process right under the Florida Administrative Code to a hearing before a panel composed partly of students. *Id.* at 1157. The court held that the student did not preserve this argument for appellate review. *Id.* The student had two opportunities to argue that his due process rights were violated, and he did not avail himself of either of those. *Id.* at 1157-58. The first was during the hearing, and the second was when he appealed the hearing officer's decision to the university president. *Id.* Because the student did not take either of these opportunities, the court held that his "claim was not preserved for appellate review before this court." *Id.* at 1157.

Similarly to *Matar*, Petitioner had many opportunities to request a panel hearing before seeking certiorari review. Petitioner was informed that he was charged with Sexual Misconduct and directed to a website with the Student Conduct Review Process, which contains the panel hearing requirement, in the October 28, 2014, letter. This was three days before the letter setting the date of the administrative hearing, and seven days before the hearing itself. Petitioner did not present any evidence indicating that three days was not enough time for him to read the Student Conduct Review Process and note how his hearing should be conducted. Despite access to this information, Petitioner did not request a panel hearing at any time from UCF—not before the

hearing, during the hearing, or after the hearing in his appeal to the Vice President. Just like the student in *Matar*, Petitioner did not avail himself of several opportunities to request a panel hearing. Thus, the Court follows *Matar* and finds that Petitioner failed to preserve his claim to a panel hearing for appellate review.

C. Right to Counsel

Petitioner argues that his due process rights were violated because he was not permitted to have an attorney participate at the hearing. He contends that having an advisor who is not permitted to cross examine witnesses, present evidence, or participate denied him due process. UCF argues that, first, Petitioner could have chosen an attorney as his advisor for the hearing, but he did not; and, second, there is no right to an attorney in student conduct proceedings.

Petitioner relies on the nonbinding and unpublished case *Coulter v. East Stroudsburg University*, Case No. 3:10-CV-0877, 2010 WL 1816632 (M.D. Penn. May 5, 2010), to support his contention that not being allowed to have the legal advisor participate in the hearing violates due process. In *Coulter*, the university allowed the student facing suspension to have an attorney attend the hearing, but the attorney was not permitted to participate. *Id.* at *1. The student believed that she might also face criminal charges arising from the conduct that was the basis of her suspension. *Id.* at *2. Due to this belief, the student followed her attorney's advice and did not say anything or cross-examine the witness at the hearing, for fear of incriminating herself in the later criminal proceeding. *Id.* at *1. The court held that the student's due process rights were violated because her attorney was not allowed to participate in the hearing, but the court specifically limited its holding to those situations "where a student is simultaneous[ly] facing criminal sanctions and academic discipline . . . ." *Id.* at *3. That is because the student could incriminate herself by cross-examining witnesses or saying other things at the hearing that could

be used against her in the criminal proceeding. *Id.* at *2-3. Allowing an attorney to participate in the hearing would alleviate this issue. *Id.* at *3.

In this case, Petitioner does not argue at any time that he was facing criminal prosecution. He does not argue that an attorney able to participate in his hearing would protect him from self-incrimination in some later criminal proceeding. Thus, his case is distinguishable from *Coulter*. Because Petitioner could have chosen an attorney as his advisor during the hearing,[3] and Petitioner did not cite any binding law or analogous cases to the Court stating that prohibiting an attorney from participating in the hearing is a violation of Petitioner's due process rights, nor has any been found, the Court rejects this argument.

Florida law indicates that there is no right to an attorney in a student disciplinary hearing, even when the student is facing suspension. In *Robinson v. Board of Public Instruction of Dade County*, 271 So. 2d 784, 785 (Fla. 3d DCA 1973), the appellant was suspended from a public high school and asked the court to enter an injunction requiring the school to hold a hearing where the student would have the right to an attorney appearing and assisting him, among other things. The court held that imposing requirements from the criminal law upon a school disciplinary hearing, including the right to counsel, "would be unrealistic and illogical. The imposition of such requirements would require nothing less than a full-fledged trial before a child could be disciplined at the school level." *Id.* at 787. The court reasoned that a hearing of this type would infringe upon the time needed for teaching. *Id.* The court then held that the appellant was not deprived of due process, notwithstanding the fact that he was not represented by counsel at the hearing. *Id.*

Although *Robinson* involved a high school student, it also involved a disciplinary proceeding at a public school resulting in suspension, just as in Petitioner's case. Thus, Florida

[3] Instead, he chose his brother.

law indicates that Petitioner does not have any right to the appearance or assistance of counsel at a disciplinary hearing conducted by UCF.

D. Alleged Hearing Officer Bias

Petitioner argues that he was denied due process because the hearing officer's questions demonstrated that the hearing officer was biased against him. This bias was allegedly demonstrated by the amount of time that the hearing officer questioned Jane Doe and that the hearing officer apologized to her twice for the graphic nature of his questions. Petitioner also argues that bias was shown by his "lengthy cross examination" and that he was questioned in an argumentative manner. (Am. Pet. Writ of Cert. 26.) Finally, Petitioner argues that the hearing officer demonstrated bias by his brief recess to deliberate before announcing his decision.

As UCF points out, the hearing officer also apologized to John Doe and Petitioner for the graphic nature of the questions. Thus, his apologies to Jane Doe do not amount to evidence of bias.

Petitioner's argument that the hearing officer was biased as evidenced by his questioning of Petitioner also does not have merit. In *Nateman v. Greenbaum*, 582 So. 2d 643, 644 (Fla. 3d DCA 1991), the petitioner sought to disqualify a judge because the judge's questions of the petitioner indicated that the judge did not believe the petitioner's testimony. In denying the petition, the court commented on the judge's role when the judge is also the fact finder. *Id.* Quoting *In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980), the court noted that when judges act as fact finders, they necessarily form attitudes towards those testifying. *Id.* Those attitudes are required to determine the witnesses' credibility. *Id.* The judge "'has an official obligation to become prejudiced in that sense. . . . If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render

decisions.'" *Id.* (quoting *In re Int'l Bus. Machs. Corp.*, 618 F.2d at 930). If the judge's questions to the witness reveal the judge's opinion of the witness's credibility, then that is not a basis for disqualification. *Id.* If it were, then this "would wreak administrative havoc in the circuit court by inviting mid-hearing motions for recusal. The unacceptable alternative is a blanket rule against a judge's examination of parties or witnesses." *Id.* at 644-45. Thus, the court rejected the petitioner's disqualification argument. *Id.* at 645.

In *R.R.G. v. State*, 945 So. 2d 640, 641 (Fla. 2d DCA 2006), the appellate court did not hold that the judge was biased, even though "she became actively involved in asking questions." The examination grew so heated that eventually the trial judge ejected the witness from the courtroom. *Id.* Even in this situation, the appellate court held "that the trial court did not cross the line of judicial neutrality during the evidentiary stage of this proceeding . . . ." *Id.*

As the cases above demonstrate, extensive, and even intensive, cross-examination is not a sufficient indication of bias, especially when the decision maker is also the fact finder. The hearing officer's conduct in Petitioner's proceedings does not rise to the level of that of the judge in *R.R.G.* In addition, under *Nateman*, when judges are the factfinders, they necessarily form opinions regarding the witnesses' credibility, and those opinions may be observed through the judges' demeanor. *Nateman*, 582 So. 2d at 644. This is not evidence of impermissible bias.

There is no indication in the appendices of how long the hearing officer took between hearing the witnesses' statements and returning with his decision, and Petitioner does not explain how a short deliberation time evidences bias against him. Florida courts have indicated that it does not, as the District Courts of Appeal have rejected the argument that a short deliberation time, standing alone, indicates that the jury did not do its job. *Lindsey v. Johnson*, 415 So. 2d 778, 780 (Fla. 1st DCA 1982) ("The mere fact that the jury verdict was arrived at in a relatively

short period of time does not, by itself, establish that the jury failed to perform its function."); *N. Dade Imported Motors, Inc. v. Brundage Motors, Inc.*, 221 So. 2d 170, 177 (Fla. 1st DCA 1969) (same); *Park v. Belford Trucking Co.*, 165 So. 2d 819, 823 (Fla. 3d DCA 1964) (same).

As none of Petitioner's arguments regarding bias have merit, the Court holds that Petitioner failed to demonstrate that he was deprived of due process.

II. Competent Substantial Evidence

A. The Violations

Petitioner argues that there is no competent substantial evidence supporting UCF's decision. UCF determined that Petitioner violated UCF's Sexual Misconduct rule, which states that misconduct is "[a]ny nonconsensual sexual conduct which occurs on . . . the UCF campus." (Pet'r App. A-9 at UCF-5.008(5)(a).) The Sexual Misconduct rule continues, "A person shall not knowingly take advantage of another person who is . . . under the influence of . . . alcohol . . . or who is not conscious or awake, and thus not able to give consent as defined above." (*Id.* at UCF-5.008(5)(a)6.)

There is no dispute that sexual conduct occurred between Petitioner and Jane Doe. At the hearing, Petitioner stated that Jane Doe was drinking, and that when they began kissing, she showed signs of intoxication. John Doe stated that during the sexual conduct that Petitioner participated in, Jane Doe "began to get rather weak[,] [a]nd then [he] believe[s] she blacked out." (Hr'g Tr. 77:23-78:2.) Jane Doe stated that during the sexual conduct, "They were not necessarily forcing me into a certain position, but I was being held up. And I laid down at this point. They said something about trying to hold me up more so this could continue." (*Id.* 100:10-14.) Petitioner admitted during the hearing that, a couple of seconds after he disengaged from Jane Doe, she fell over to her side, and "that's why [Petitioner] assumed she fell asleep." (*Id.*

49:1-6.) Finally, when Petitioner was asked whether he "believe[s] that consent can be given under the influence of alcohol[,]" he answered, "According to the Golden Rule Book, it says, no." (*Id.* 111:2-5.)

The statements before the hearing officer were that Petitioner knew Jane Doe had been drinking, Petitioner knew she was intoxicated, Petitioner and Jane Doe then engaged in sexual conduct, John Doe and Petitioner were holding Jane Doe in place during the sexual conduct, and almost immediately after Petitioner disengaged from Jane Doe, Petitioner saw Jane Doe "fall asleep." This is competent substantial evidence that Petitioner knowingly took advantage of a person under the influence of alcohol, which is Sexual Misconduct as defined by UCF's policy.

Although Petitioner argues that there was evidence of Jane Doe's consent, under the standard of review, this Court is not permitted to reweigh the evidence. If the administrative hearing officer's findings of fact are supported by competent substantial evidence, then this Court must accept them. *Kany v. Fla. Eng'rs Mgmt. Corp.*, 948 So. 2d 948, 953 (Fla. 5th DCA 2007). The circuit court, in reviewing the hearing officer's findings, cannot determine credibility or substitute its judgment for the hearing officer's. *San Roman v. Unemployment Appeals Comm'n*, 711 So. 2d 93, 95 (Fla. 4th DCA 1998). If there is conflicting evidence, then it is the hearing officer that determines the weight of the evidence and whether to reject it. *Id.* "It is not the role of the appellate court to reweigh the evidence anew." *Young v. Dep't of Educ., Div. of Vocational Rehab.*, 943 So. 2d 901, 902 (Fla. 1st DCA 2006). "When the facts are such as to give an agency the choice between alternatives, it is up to that agency to make the choice, not the circuit court." *Miami-Dade Cnty. v. Reyes*, 772 So. 2d 24, 28 (Fla. 3d DCA 2000).

As may be expected in a case of this type, there were conflicts in the descriptions of what happened that night. On certiorari review, the circuit court is not permitted to determine whose

version of events is more credible. Instead, that is the role of the hearing officer, and the circuit court is only permitted to determine if competent substantial evidence supports the hearing officer's decision. As there is competent substantial evidence supporting the hearing officer's determination that Petitioner engaged in Sexual Misconduct as defined by UCF's rule, the Court rejects Petitioner's argument that there is not.

B. The Sanctions

Due to the violation of the sexual misconduct rule, Petitioner was suspended from UCF through the Spring 2016 term, required to write a paper, be evaluated for alcohol issues, interview a victim's rights representative, be on disciplinary probation upon his return to UCF, and not contact Jane Doe. Petitioner argues that these sanctions are not supported by competent substantial evidence and are inappropriately punitive. Petitioner supports this argument by stating that he is a freshman honors student, he had not been in trouble before this incident, the subjects he was studying, his future plans, why he chose to attend UCF, and "that he was sexually inexperienced and, as a result of his youth and inexperience, he did not anticipate the potential problems that could arise from having sexual relations while inebriated." (Am. Pet. Writ Cert. at 42-43.) Petitioner also states that all three students engaged in the same activity: "drinking to the point of intoxication and then engaging in sexual activity with a person who was allegedly unable to consent." (*Id.* at 43.) Petitioner contends that UCF imposed a different standard on Jane Doe, because she was not punished even though she engaged in the same activities that Petitioner did.

Regarding Petitioner's argument that UCF imposed a different standard on Jane Doe, and as pointed out in UCF's response to the amended petition, Jane Doe was not accused of sexual misconduct. No one accused Jane Doe of knowingly taking advantage of Petitioner or John Doe.

Petitioner never claims that he did not consent to the sexual conduct. Thus, there is a valid reason for the difference in treatment between Petitioner and Jane Doe.

Under UCF's rules, "A student involved in an offense warranting consideration of action more serious than disciplinary probation . . . may face suspension." (Pet'r App. A-9 at UCF-5.009(5)(c).) UCF's rules do not state what misconduct warrants which sanction; instead they describe the different types of possible sanctions.

Petitioner has not cited any law to the Court supporting his argument that the punishment was excessive. When an administrative agency has imposed a penalty within its guidelines, a court cannot substitute its judgment for the agency's. *Mendez v. Fla. Dep't of Health*, 943 So. 2d 909, 911 (Fla. 1st DCA 2006). In *Locklear v. Florida Fish & Wildlife Conservation Commission*, 886 So. 2d 326, 327 (Fla. 5th DCA 2004), the defendant argued, among other things, that the penalty imposed on him by the Florida Fish & Wildlife Conservation Commission was "grossly disproportionate to the violations committed." The penalty was specifically authorized by the Florida Statutes, however. *Id.* at 327-28. "It is an elementary principle of administrative law that so long as a penalty imposed by an administrative agency is within the permissible range of statutory law, an appellate court will not disturb the penalty unless the administrative findings are reversed in whole or in part." *Id.* at 329.

Here, suspension is listed as a possible sanction in UCF's rules. Competent substantial evidence supports the Sexual Misconduct violation by Petitioner, and because suspension is a permitted sanction, the Amended Petition for Writ of Certiorari will not be granted on this basis.

III. Essential Requirements of the Law

Petitioner argues that UCF departed from the essential requirements of the law because it misapplied the Sexual Misconduct rule. He contends that UCF's decision was based on an

incorrect interpretation of Florida law: that consent cannot be given if a person is intoxicated. Florida law, however, does not appear to be the basis of any of the rulings below. The hearing officer did not mention Florida law in his written Statement of Determination, nor did he mention it in the hearing when he announced his factual findings and conclusions. The Director did not mention Florida law in upholding the violations, and the Vice President did not mention Florida law in rejecting Petitioner's appeal.

The following statement does appear in a document labeled "Student Conduct Appeals Decision Summary": that the hearing officer's "decision was also based on the fact that the victim never gave consent to the charged student and under state law, consent cannot be given if a person is intoxicated." (Pet'r App. A-14.) From the document's title, this is clearly a summary of a decision, not a UCF administrator's decision itself, and nothing before the Court indicates that UCF's administrators made their decisions based upon state law.

Petitioner also argues that the hearing officer departed from the essential requirements of the law by applying the Sexual Misconduct rule differently to Petitioner than to Jane Doe because of Petitioner's gender. Petitioner bases this upon the hearing officer giving more credence to Jane Doe's statements at the hearing than to his statements. This, however, was within the hearing officer's discretion, as he is the one charged with determining the credibility of the witnesses and resolving conflicts among the evidence. Petitioner also bases this argument on the idea that he was subject to discipline for engaging in the same behavior that Jane Doe engaged in. As explained above, Jane Doe was not accused of sexual activity without consent; Petitioner was. Thus, Petitioner's different treatment was not a departure from the essential requirements of the law.[4]

[4] Petitioner also argues, "[T]he hearing officer misapplied the Rules of Conduct relating to sexual misconduct because his factual findings did not support his legal conclusion that Jane Doe was unable to consent to the

Petitioner failed to preserve many of his due process arguments for appellate review, and his remaining arguments regarding due process violations are unavailing. The violation and sanction determinations are supported by competent substantial evidence, and UCF did not depart from the essential requirements of the law.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Amended Petition for Writ of Certiorari is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 3rd day of December, 2015.

/S/
SALLY D. M. KEST
Presiding Circuit Judge

LUBET and H. RODRIGUEZ, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Warren W. Lindsey, Esq.**, Lindsey & Ferry, P.A., P.O. Box 505, Winter Park, FL 32789; and **Youndy C. Cook, Deputy General Counsel,** Office of the General Counsel, University of Central Florida, 4365 Andromeda Loop N. MH360, Orlando, FL 32816-0015; on this 3rd day of December, 2015.

/S/
Judicial Assistant

encounter and the Petitioner 'knowingly' took advantage of her condition." (Am. Pet. Writ Cert. 31.) This is a rephrasing of the argument that competent substantial evidence does not support the hearing officer's findings, which is discussed in Part II.A, of this Order.