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

Michael Navarro,

Petitioner,
v.

University of Central Florida,

Respondent.
_____/

CASE NO.: 2015-CA-1678-O

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

Roy D. Wasson, Esq., and Emily Joyce Phillips, Esq., for Petitioner.

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

Before DAWSON, MYERS, and DAVIS, J.J.

PER CURIAM.

FINAL ORDER DENYING
AMENDED PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Navarro seeks certiorari review of his suspension of the Spring 2015 semester from the University of Central Florida. This Court has jurisdiction under Florida Rule of Appellate Procedure 9.030(c)(3). Although an ex parte communication between UCF and the Complainant occurred, Petitioner was not deprived of due process. Additionally, UCF's definition of stalking is not unconstitutionally overbroad on its face, and Petitioner failed to preserve his other arguments for appellate review. Therefore, the Amended Petition for Writ of Certiorari is denied.

Petitioner and his girlfriend ("Complainant") were students at UCF. During the Spring 2014 semester, Complainant broke up with Petitioner. After the break up, Petitioner continually contacted Complainant, even after she told him that she did not want to communicate with him any more. At one point, Petitioner told Complainant that he would hurt himself if she did not talk to him. This prompted Complainant to call the police, and Petitioner was Baker Acted.[1]

Despite this incident, Petitioner continued trying to contact Complainant. In addition to texting and calling her, Petitioner contacted her friends and family in trying to reach her. He sent Complainant presents, letters, and flowers during the summer. Petitioner had his friends and family contact Complainant on his behalf. During the Fall 2014 semester, Petitioner purchased a new phone specifically to try to get in touch with Complainant. These attempts to contact Complainant made her feel upset and fearful, and she did not want to run into Petitioner on campus.

On August 27, 2014, Complainant filed an incident report against Petitioner with UCF, and UCF charged him with violating several sections of UCF's Code of Student Conduct, specifically the ones prohibiting stalking, failing to respect the privacy of others, and disruptive conduct.

UCF conducted a hearing on the violations on November 10, 2014. Petitioner was a senior that semester. During the hearing, Petitioner, Complainant, and Complainant's friend testified. The hearing officer's questions focused on whether Petitioner contacted or tried to contact Complainant. The hearing officer determined that Petitioner violated the student conduct

[1] The Baker Act states that a person may be involuntarily examined "if there is reason to believe that the person has a mental illness and because of [the] mental illness . . . [t]here is a substantial likelihood that without . . . treatment the person will cause serious bodily harm to himself . . . or others in the near future, as evidenced by recent behavior." § 394.463(1), (1)(b)2., Fla. Stat. (2014).

code and recommended a suspension of the Fall 2014 and Spring 2015 semesters, among other things. The Director of the Office of Student Conduct upheld the violations and sanctions.

Petitioner then appealed the decision to the Vice President for Student Development and Enrollment Services, arguing that UCF did not follow prescribed protocol and procedure and that the punishment was too severe. Petitioner labelled one of his bases for appeal as the discovery of new and significant evidence and attached a note purporting to be from Complainant stating that Petitioner agreed not to contact her or her family again and that she did not want him suspended. The note did not contain any names or signatures.[2]

In a document titled, "Student Conduct Appeals Decision Summary," dated December 3, 2014, this note is addressed. It states that the note contradicts Complainant's statements during the hearing, and that when she was questioned regarding the requested reduction in punishment, she communicated that Petitioner's attorney contacted her family, and this was how she could get Petitioner to leave her alone and prevent legal action against both her and them.

On appeal, the Vice President upheld the violations, but decreased the suspension to just Spring 2015. Petitioner then filed this certiorari proceeding to review UCF's decision.

A. 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*

[2] Appendix F is a signed copy of this statement, although the signature is illegible and there is no indication that this signed copy was presented to UCF.

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).

B. Ex parte communication

Petitioner argues that he was denied due process of law because of an ex parte communication between UCF and Complainant. When Petitioner filed his appeal of the director's decision to the Vice President, he included, as one of the bases, "discovery of new and significant evidence." (App. C at 3.) This new and significant evidence was Petitioner's claim that the Complainant disagreed with the punishment. Attached to Petitioner's appeal was a note stating:

> To Whom It May Concern:
>
> I am the complainant in the case against Michael Navarro. I have been informed of the punishment that he received. I hope that he has learned from this and I trust that I will never have to concern myself with him in the future. I know that his education and future are very important to him. He has agreed to have no further contact with me or my family. I do not wish for him to end up being suspended and have long term harm to his potential at both UCF and graduate school.
>
> Thank you.

(App. C at 5.) In the Student Conduct Appeals Decision Summary, it states,

> The victim filed paperwork within her appeal window stating that she hopes Michael has learned from this incident and she trusts she will not have to concern herself with him again. Michael has agreed to have no further contact with the victim or her family. She goes on to state that she does "not wish for him to end up being suspended and have long term harm to his potential at both UCF and graduate school." *It is important to note that the victim's statements above are contradictory to the statements

> provided during the hearing. Moreover, when the victim was challenged with her desire to request a reduction of Michael's sanctions it was communicated that this was her effort to get Michael to agree to leave her alone and to prevent legal action against her and her family following the outcome of the student conduct case. (Michael's attorney contacted the victim's family).

(App. D at 2.) Petitioner argues that the ex parte contact, as evidenced by this statement in the Student Conduct Appeals Decision Summary, denied him due process.

In *Jennings v. Dade County*, 589 So. 2d 1337, 1339 (Fla. 3d DCA 1991), the Third District considered "the effect of an ex parte communication upon a decision emanating from a quasi-judicial proceeding of the Dade County Commission." It held that once an ex parte contact is proved, a presumption of prejudices arises.[3] *Id.* The petitioner is then "entitled to a new and complete hearing before the commission unless the defendant proves that the communication was not, in fact, prejudicial." *Id.* This is because "[e]x parte communications are inherently improper and are anathema to quasi-judicial proceedings." *Id.* at 1341. Despite this, they do "not mandate automatic reversal." *Id.* Once an ex parte contact is proven, it is presumed prejudicial, but the opposing party can prove it was not by competent evidence. *Id.*

In determining whether the ex parte communication was prejudicial, the trial court should decide "'whether . . . the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair . . . .'" *Id.* (quoting *Prof'l Air Traffic Controllers Org. (PATCO) v. Fed. Labor Relations Auth.*, 685 F.2d 547, 564–65 (D.C. Cir. 1982). The trial court should consider the following factors in deciding this:

(1) "the gravity of the ex parte communications;"

[3] In response to *Jennings*, the Florida Legislature amended section 286.0115, Florida Statutes, to allow local governing bodies to remove the presumption of prejudice from ex parte communications with local public officials if the county or municipality adopts ordinances removing the presumption, but also establishing a process to disclose the communication. Ch. 95-352, 1995 Fla. Sess. Law Serv. (amending § 286.0115, Fla. Stat. (1995)) (West).

(2) "whether the contacts may have influenced the agency's ultimate decision;"

(3) "whether the party making the improper contacts benefited from the agency's ultimate decision;"

(4) whether the opposing party knew of the contact and had an opportunity to respond; and

(5) whether vacating and remanding would serve a useful purpose.

Id. (quoting *PATCO*, 685 F.2d at 564–65). Because the court's priorities "are the integrity of the process and the fairness of the result, mechanical rules have little place in a judicial decision whether to vacate a voidable agency proceeding. Instead, any such decision must of necessity be an exercise of equitable discretion." *Id.* (quoting *PATCO*, 685 F.2d at 564–65). Under the factors set forth above, "one of the primary concerns is whether the ex parte communication had sufficient impact upon the decision and, therefore, whether the vacation of the agency's decision and remand for a new proceeding would be likely to change the result." *Id.* at 1342 n.4. In *Jennings*, the Third District ordered the trial court to provide the petitioner with an evidentiary hearing to establish that the ex parte contacts happened, and, if he was successful, then for "the respondents to rebut the presumption that prejudice occurred to the claimant." *Id.* at 1342.

UCF admits that it did contact the Complainant. But it argues that the Vice President was not the person that contacted her and that the Vice President did not review the document containing a description of the ex parte contact in rendering her decision. Because the ex parte contact was admitted, however, there is a presumption of prejudice, and the Court now applies the factors enumerated in *Jennings* to determine whether the "decisionmaking process was

irrevocably tainted so as to make the ultimate judgment of the agency unfair . . . ." *Jennings*, 589 So. 2d at 1341.

1. Gravity of the ex parte communications

The first factor under *Jennings* is the gravity of the ex parte communication. *Id.* Petitioner argues that the language used in the description of the communication points to its seriousness, especially the word "challenged." UCF contends that the communication is unimportant because it is not bound by the victim's wishes in determining sanctions.

The document described the ex parte communication this way:

> [W]hen the victim was challenged with her desire to request a reduction of Michael's sanctions it was communicated that this was her effort to get Michael to agree to leave her alone and to prevent legal action against her and her family following the outcome of the student conduct case. (Michael's attorney contacted the victim's family).

(App. D at 2.)

The word "challenged" does indicate that the person that contacted the Complainant did not believe that she wanted Petitioner's punishment reduced. It also says that the Complainant was promised something in return for agreeing to make this statement, and that Petitioner's attorney is the one that communicated with her family. All three of these comments are serious, as they all indicate to the Vice President that this basis for Petitioner's appeal may not have been sincerely given. Thus, this factor weighs in favor of finding a violation of due process.

2. Whether the communication may have influenced the agency's ultimate decision

UCF argues that the ex parte communication was not significant because it is not bound by the victim's preferences in sanctions. It contends that Petitioner's appeal was actually granted

because the Vice President reduced the suspension from two semesters to one. Petitioner replies that even if UCF is not bound by the victim's preferences, those preferences are a consideration, and Petitioner may have received an even better result without the ex parte communication.

The Vice President did reduce the sanction, which indicates that the ex parte communication did not negatively influence her decision. Also, because the ex parte communication only related to the punishment, it is improbable that it influenced her decision regarding whether Petitioner committed the proscribed conduct.

In Petitioner's appeal to the Vice President, two of the bases are that the punishment is too severe, and the third is that there was no demonstration of adhering to prescribed protocol and procedure. As most of the grounds for Petitioner's appeal related to the severity of the sanctions, and the description of the ex parte communication related specifically to that issue, there is a chance the ex parte communication may have influenced the Vice President's decision. That chance is remote, however. As noted above, the Vice President reduced the suspension. Because the ex parte communication related to the sanction, and not the actual violation, the ex parte communication probably did not influence her decision to uphold the violation. If the ex parte communication had influenced the Vice President, then she would have upheld the two-semester suspension or increased it, not reduced it. Thus, the evidence before the Court indicates that the ex parte communication did not influence the Vice President's decision, and this factor militates against granting the Petition.

3. Whether the party making the improper contacts benefited from the agency's ultimate decision

The third factor is whether the party making the improper contacts benefited from the agency's ultimate decision. *Jennings*, 589 So. 2d at 1341. There is no indication that the

Complainant benefitted from the Vice President upholding the violation, but reducing the suspension from two semesters to one, especially because she stated at the hearing that she was fearful. There is also no indication that UCF benefitted from the Vice President's decision. As neither party involved in the ex parte contact appears to have benefitted from the Vice President's decision, this factor also weighs against granting the Petition.

4. Whether the opposing party knew of the communication and had an opportunity to respond

The fourth factor is whether Petitioner knew of the communications and had an opportunity to respond. *Jennings*, 589 So. 2d at 1341. There is no indication of when Petitioner received the Student Conduct Appeals Decision Summary, so it is unclear whether he had an opportunity to examine the facts regarding the ex parte communication before the Vice President decided the appeal or to protest the ex parte communication to her. Giving Petitioner the benefit of the doubt, it appears from the briefs that Petitioner did not know about the ex parte communication. Thus, this factor will be weighed in favor of Petitioner.

5. Whether vacating the decision and remanding for new proceedings would serve a useful purpose

The fifth and final factor is whether vacating the agency's decision and remanding for new proceedings would serve a useful purpose. *Id.* Petitioner was suspended for the Spring 2015 semester. Petitioner was a senior when the hearing was conducted on November 10, 2014, over a year ago. It is now early 2016. Petitioner argues that he should have had the opportunity to be present during the communication with the Complainant and conduct follow-up questioning. Petitioner says that he could have rehabilitated the Complainant on whether she was pressured to

state that she believes Petitioner should not be suspended and whether she honestly believes that Petitioner should not be suspended.

Petitioner's proffered best-case scenario does not change the outcome that he was found to engage in the prohibited conduct. In addition, Petitioner may have graduated from UCF by now.

Petitioner argues that the sanctions may impede his chances of getting into graduate school. But the finding that he violated the student conduct code by engaging in Disruptive Conduct and Harmful Behavior would still stand.

The evidence is overwhelming and uncontradicted that Petitioner violated the conduct code. Petitioner continued to contact the Complainant after she asked him to stop, and he then tried to reach her through her family, his family, and her friends. Petitioner continued to contact Complainant even after she called the police and he was Baker Acted because he said that he was going to hurt himself if he could not talk to her. Petitioner does not dispute any of this evidence, and instead, discussed at the hearing that he did all of these actions. Finally, Complainant stated at the hearing that Petitioner continuing to contact her after her numerous requests that he stop made her upset and fearful, and she did not want to run into him on campus.

Because there is substantial evidence that Petitioner did violate the student conduct code, and because Petitioner has already served the semester suspension and may have even graduated, vacating the decision and remanding for a rehearing would not serve a useful purpose. As stated in *Jennings*, the court's priority is whether the ex parte communication sufficiently impacted the decision, such that vacating it and remanding would probably change the result. 589 So. 2d at 1342 n.4. Because the ex parte communication related to the sanction, and not the actual

violations, and the evidence of the violations was overwhelming and uncontradicted, quashing the order and holding a new proceeding would not likely change the result.

Weighing all of the factors enunciated in *Jennings*, the decisionmaking process was not irrevocably tainted by the ex parte contact so as to render the ultimate judgment unfair. Although the communication was serious, and Petitioner arguably did not sufficiently know about it to respond to it, the other factors weigh against remanding. It does not appear that the communication influenced the Vice President's decision, neither the Complainant nor UCF benefitted from the ex parte communication, and most importantly, vacating the decision and remanding would not serve a useful purpose, as the evidence overwhelmingly supported the violations. Therefore, Petitioner's due process rights were not violated by the ex parte contact.

C. Overbreadth challenge

Petitioner argues that UCF's definition of stalking in its student conduct code violates the First Amendment by being unconstitutionally overbroad on its face. Although this argument was not raised in the proceedings before UCF, a facial constitutional challenge may be raised for the first time on appeal. *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002).

UCF determined that Petitioner violated the student conduct code by engaging in prohibited behavior described in its subsections 5.008(4)(g) and (h), which state the following:

> (g) Stalking: defined as repeated, unwanted conduct toward or contact with another person that creates fear for the person's safety or the safety of others, or causes an individual to suffer emotional distress. Such conduct is direct, indirect, or through a third party using any type of action, method, or means. Cyber stalking is also included in this definition.
> (h) Failure to respect the privacy of other individuals including but not limited to stalking.

(Resp. App. I at 3.) The student conduct code also states, "The right of all students to seek knowledge, debate ideas, form opinions, and freely express their ideas is fully recognized by the University of Central Florida. The Rules of Conduct apply to student conduct and will not be used to impose discipline for the lawful expression of ideas." (*Id.* at 1.)

"The overbreadth doctrine applies when legislation criminalizes constitutionally protected activities along with unprotected activities, by sweeping too broadly and infringing upon fundamental rights." *State v. Catalano*, 104 So. 3d 1069, 1077 (Fla. 2012). "The government may regulate expression only with narrow specificity." *Id.* Facial application of the overbreadth doctrine "must be used sparingly." *Id.* at 1078. In analyzing a facially overbroad argument, the court must first determine if the statute restricts First Amendment rights, "and whether the restrictions are substantial." *Id.*

Thus, the first consideration is whether UCF's definition of stalking restricts First Amendment rights. Petitioner argues that UCF's student conduct code "includes protected expression of ideas that the recipient may find troubling, but which are not in any way threatening or otherwise unlawful." (Am. Pet. Writ Cert. 15.)

Petitioner's argument ignores several parts of the stalking definition. First, it ignores that the conduct must be directed toward the person or there must be contact with the other person. In addition, the conduct or contact must be repeated and unwanted. It is not simply that the person finds the expression troublesome, but that the expression is repeatedly directed to that person. Thus, the stalking definition focuses on conduct, rather than speech.

Courts have consistently upheld stalking statutes that focus on conduct, rather than speech, against an overbreadth challenge. *See United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) (stalking statute was not overbroad where it regulated conduct and the conduct was

not necessarily associated with speech); *United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014) (stalking statute survived overbreadth challenge because "the proscribed acts are tethered to the underlying criminal conduct and not to speech."); *Staley v. Jones*, 239 F.3d 769, 785 (6th Cir. 2001) ("overbreadth scrutiny diminishes as the behavior regulated by the statute moves from pure speech toward harmful, unprotected conduct.").

Petitioner's case demonstrates how UCF's definition of stalking pertains more to conduct than to speech. During the hearing, very little was said regarding what Petitioner was trying to communicate to Complainant. Instead, the hearing officer's questions focused on how often Petitioner contacted her, her family, and her friends, especially after Complainant told Petitioner that she did not want to communicate with him. For example, the hearing officer asked Petitioner, "Did she ask you to stop contacting her at any point after she asked you for space and you continued to contact her?" (Hr'g Tr. 28:2-5.) She also asked, "[A]fter you actually stopped contacting her, did you contact her friends and family?" (Hr'g Tr. 33:20-21.) The message that Petitioner was trying to communicate to the Complainant was not as important as his continued attempts to communicate with her after she, her family, and her friends told him she did not want to hear from him. The hearing officer's decision was based on Petitioner's conduct in repeatedly contacting and attempting to contact the Complainant, even after she told him to stop.

Second, under the stalking definition, the conduct or contact must create fear or cause the person to suffer emotional distress. Despite Petitioner's argument, the conduct or contact must go beyond being troubling or even irritating to qualify as stalking. Petitioner does not cite any law granting a First Amendment right to cause fear or emotional distress with conduct directed toward or contact with a particular person. Instead, the law is to the contrary. *See Bouters v. State*, 659 So. 2d 235, 237 (Fla. 1995) (rejecting overbreadth challenge to state stalking statute,

stating, "'While the First Amendment confers on each citizen a powerful right to express oneself, it gives the [citizen] no boon to jeopardize the health, safety, and rights of others.'" (quoting *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 675 (Fla. 1993))); *United States v. Eckhardt*, 466 F.3d 938, 943 (11th Cir. 2006) (denying overbreadth challenge to federal statute criminalizing making annoying, abusive, harassing, or threatening telephone calls because calls made to harass and frighten are not constitutionally protected). Therefore, UCF's stalking definition, which requires that the conduct be directed at a person and cause fear or emotional distress, does not restrict First Amendment rights.

Also, courts have upheld stalking and cyberstalking statutes on the additional basis that the statutes contained provisions specifically exempting constitutionally-protected activities from their reach. *Burroughs v. Corey*, 92 F. Supp. 3d 1201, 1205, 1208-09 (M.D. Fla. 2015) (noting Florida's "savings clause" in rejecting overbreadth challenge to its stalking statute); *Staley v. Jones*, 239 F.3d at 786 (stalking statute's exclusion for constitutionally protected activity prevented it from being applied to innocent conduct). UCF's student conduct code also has such a provision, stating that the rules will not be used to discipline students for the lawful expression of ideas.

Finally, as the party challenging the rule, Petitioner had the burden to demonstrate "actual facts that substantial overbreadth exists." *J.L.S. v. State*, 947 So. 2d 641, 645 (Fla. 3d DCA 2007); *Burroughs v. Corey*, 92 F. Supp. 3d at 1205 (party challenging statute has burden to show "a substantial number of unconstitutional applications, especially when compared to the statute's plainly legitimate coverage."). Because Petitioner failed to present any scenarios of an unconstitutional application of the stalking definition, Petitioner did not meet his burden of demonstrating that the definition is unconstitutionally overbroad.

UCF's stalking definition does not restrict First Amendment rights, and Petitioner failed to demonstrate that the definition is unconstitutionally overbroad; therefore Petitioner's argument that the definition is unconstitutionally overbroad on its face is rejected.

D. Failure to raise arguments below

Petitioner raises several arguments in the Amended Petition that were not presented during the proceedings below. These arguments are that Petitioner's conduct was not "student conduct" within the meaning of the Code of Student Conduct because most of it occurred off-campus and therefore UCF cannot constitutionally punish him for it, and that Petitioner's conduct did not satisfy UCF's definition of disruptive behavior. Because these arguments were not presented during the proceedings below, they were not preserved for review here. *Matar v. Fla. Int'l Univ.*, 944 So. 2d 1153, 1155 (Fla. 3d DCA 2006) (failure to present due process argument during university disciplinary proceedings precluded appellate court review of argument); *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002) (as-applied constitutional challenge must be raised in the proceedings below to be preserved for appellate review).

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 4th day of February, 2016.

/S/
DANIEL P. DAWSON
Presiding Circuit Judge

MYERS and DAVIS, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Roy D. Wasson, Esq.**, Wasson & Associates, Chartered, Courthouse Plaza-Suite 600, 28 W. Flagler St., Miami, FL 33130; **Emily Joyce Phillips, Esq.**, Phillips Lanier, One Biscayne Tower, 2 S. Biscayne Blvd., Suite 2300, Miami, FL 33131; 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 4th day of February, 2016.

/S/
Judicial Assistant