

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

Joshua Staskus,

CASE NO.: 2015-CA-7598-O

Petitioner,

v.

University of Central Florida,

Respondent.

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

James Joseph Hayes Dickey, Esq., for Petitioner.

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

Before DOHERTY, TURNER, and WOOTEN, J.J.

PER CURIAM.

**FINAL ORDER DENYING
AMENDED PETITION FOR WRIT OF CERTIORARI**

Petitioner Joshua Staskus seeks certiorari review of his suspension through the Fall 2015 term from the University of Central Florida. This Court has jurisdiction under *Couchman v. University of Central Florida*, 84 So. 3d 445, 449-50 (Fla. 5th DCA 2012), and Florida Rule of Appellate Procedure 9.030(c)(3). Petitioner failed to preserve many of his arguments for appellate review. Additionally, he was not deprived of due process when the hearing panel considered a document that Petitioner did not see until two days before the hearing and Petitioner's past conduct. Finally, competent substantial evidence supports the finding that

Petitioner violated UCF's Conduct Code. Therefore, the Amended Petition for Writ of Certiorari is denied.

Petitioner and Jane Doe¹ were students at UCF. Doe graduated in spring 2015, and Petitioner anticipated graduating in fall 2015. In 2013, Doe filed a complaint with UCF against Petitioner for stalking, which resulted in a no-contact order against him.

Sometime in spring 2015, Doe participated in a fundraiser. She received a donation and accompanying message to her fundraising account from Petitioner's email address. The message stated that things were "rough a year ago" between the two and that Petitioner still felt guilty regarding how he acted and how he made Doe feel. (App. 21.)

On March 28 and 29, 2015, after Doe received the donation and message, Doe and Petitioner attended an all-night fundraiser at the UCF Arena called Knight-Thon, which was part of the program benefitting from the donations Doe received through her fundraising account. During Knight-Thon, Petitioner was consistently around Doe. Doe stated that she would try to move away from Petitioner, but then he would appear near her again.

At one point, Petitioner and Doe interacted on a set of stairs. Doe testified that Petitioner came up behind her, put his hands on her shoulders, and said something to the effect of, "[Jane], you shouldn't stop on the stairs." (Hr'g Tr. 60:20-61:5, Apr. 22, 2015.) Doe "turned around, saw who it was and immediately tore away." (*Id.* at 61:2-3.) Petitioner agreed that there was an encounter on the stairs with Doe, but stated that he did not realize the woman was Doe until after he passed her and that any contact with her was accidental.

Doe subsequently got the building manager to accompany her to her car when leaving Knight-Thon, as she did not feel safe after the encounter. She also complained to a UCF police officer, who then arrested Petitioner at Knight-Thon for battery.

¹ This student is referred to by a pseudonym to protect her privacy.

The incidents at Knight-Thon led to a Conduct Code proceeding against Petitioner. Petitioner was charged with violating three provisions of UCF's Rules of Conduct: Disruptive Conduct 3(a) (impairing, interfering, or obstructing UCF functions or the rights of other UCF members); Disruptive Conduct 3(h) (failing to comply with instruction from a UCF official); and Harmful Behavior 4(g) (stalking).

On April 17, 2015, UCF sent Petitioner an email stating that there was new information for him to review and asking him to schedule a day and time to review it. The additional information was a screen shot of the donation message Doe received. Petitioner came in to review the information on April 20, 2015. Petitioner was asked if he would like to continue the hearing on the conduct charges, but he declined the offer. Petitioner signed a waiver stating that he waived his right to five days' notice of the hearing and that he understood that signing the waiver invalidated an appeal based on lack of notice. Petitioner states that he was told that no other hearing times were available due to finals.

At the hearing, held on April 22, 2015, Petitioner and Doe gave their versions of the events. The screen shot of the donation message was provided to the hearing panel, and Petitioner argued that the donation message could have been created by anyone using his email address. Petitioner presented his credit card statement, which did not contain the donation. A member of the hearing panel asked Petitioner if he questioned anyone about this unauthorized transaction, and he stated that he did not. Two witnesses, in addition to Doe, stated that Petitioner was around Doe during the entire event. Doe also discussed the incidents in 2013 that led to the stalking charge and no-contact order.

The hearing panel found against Petitioner on all charges. The panel relied on the donation message to find a violation of Disruptive Conduct 3(a). The panel found that it was

more likely than not that Petitioner did send the donation message, and by doing so, Petitioner violated the no-contact order. The events that occurred at Knight-Thon formed the basis for finding violations of Disruptive Conduct 3(h) and Harmful Behavior 4(g).

UCF then imposed several punishments, including suspension through the Spring 2016 term. Petitioner appealed to the Senior Associate Vice President and Dean of Students, arguing that it was improper for Doe to discuss the 2013 case, violation, and probation in detail at the hearing; that there was a new witness to the incident on the stairs; that the sanctions were disproportionately high; and that the State Attorney's Office dropped the battery charge. The Vice President upheld the violations, but decreased the suspension by one term, to run through fall 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).

B. Failure to raise arguments below

Petitioner raises several arguments in the Amended Petition that were not presented during the proceedings below, either before the hearing panel or in Petitioner's appeal of the panel's decision to the Vice President. These arguments are:

- Petitioner was denied a fair and impartial hearing as evidenced by the hearing panel reprimanding his advisor for speaking, but not doing the same to Doe's advisor;

- Petitioner was denied procedural due process because he was prompted to directly question Doe, which violates UCF regulations;²
- UCF departed from the essential requirements of the law because an alleged violation of the no-contact order did not violate Doe’s rights as a member of the UCF community;
- the donation to Doe’s fundraising account and accompanying message were speech protected by the First Amendment; and
- Petitioner’s off-campus internet speech is beyond the reach of UCF regulations and protected by the First Amendment.

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); *Anderson v. Sch. Bd. of Seminole Cnty.*, 830 So. 2d 952, 952 (Fla. 5th DCA 2002) (failure to raise due process arguments in expulsion proceeding below precluded raising arguments on appeal, even though party was appearing pro se).

C. UCF’s failure to provide document three days before the hearing

The basis the hearing panel gave for finding a violation of Disruptive Conduct 3(a) was the donation to Doe’s fundraising account and accompanying message. The panel relied on the message to find that Petitioner violated the no-contact order. Disruptive Conduct 3(a) prohibits students from acting in a way “that impairs, interferes with, or obstructs the orderly conduct,

² This argument also fails because the hearing transcript demonstrates that Petitioner was not asked to directly question Doe. Instead, he was asked if he had any questions of her, not if he wanted to directly question her. In addition, Petitioner stated that he did not have any questions to ask her.

processes, and functions of the University or any part thereof or the rights of other members of the University community.” (Supp. App. C at 2.)

Petitioner argues that he was denied procedural due process because he did not receive the screen shot of the donation message at least three days before the hearing, as required by UCF’s regulations.

UCF counters that Petitioner was notified that there was new evidence for him to review on April 17th, and that he came in to review it on April 20th (the hearing was held on April 22nd). UCF also states that Petitioner was given the choice to delay the hearing or waive the five-day period, and Petitioner waived the notice period. Petitioner signed a statement that he waived “my right to 5 days['] notice in advance of a scheduled hearing in order to proceed immediately with hearing procedures. I understand['] that signing this waiver will invalidate my opportunity to file an appeal based on lack of proper notice.” (Supp. App. H.) UCF also points out that Petitioner responded to the screen shot in detail, stating to the hearing panel how it was possible for someone else to make a donation and write a message using his name and email address. Petitioner responds that he was told that there were no other available time slots for a hearing, due to UCF not holding hearings during finals. Petitioner also argues that he was clearly prejudiced by the late submittal because he was questioned during the hearing if he had asked anyone about this unauthorized transaction, and he did not have time to do so.

In *Binger v. King Pest Control*, 401 So. 2d 1310, 1313-14 (Fla. 1981), the Supreme Court of Florida set out the factors for determining whether a witness that was not timely disclosed to the opposing party should be permitted to testify at trial. The trial court has the discretion to exclude the witness, but that discretion “should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party.” *Id.* at 1314. Prejudice

refers to whether the opposing party was actually surprised, and not to whether the testimony will be damaging to the opposing party. *Id.* The following is a non-exhaustive list of factors that the trial court may consider in exercising its discretion:

(i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases).

Id. The testimony should be allowed if, after reviewing the factors, “use of the undisclosed witness will not substantially endanger the fairness of the proceeding” *Id.* *Binger* applies to administrative proceedings and documents. *See Med. Logistics, Inc. v. Marchines*, 911 So. 2d 823, 824 (Fla. 1st DCA 2005) (applying *Binger* to workers' compensation proceedings and stating that its principles are appropriately applied outside civil circuit court litigation); *Antun Invs. Corp. v. Ergas*, 549 So. 2d 706, 708 (Fla. 3d DCA 1989). Excluding untimely disclosed evidence “is a drastic remedy” that should only be applied in “the most compelling circumstances” *Med. Logistics, Inc.*, 911 So. 2d at 824. The evidence should only be excluded if it would actually procedurally prejudice the other party. *Id.*

The first factor listed in *Binger* is the objecting party's ability to cure the surprise or his independent knowledge of the existence of the evidence. *Binger*, 401 So. 2d at 1314. There is no indication from the appendices that Petitioner knew of the screen shot before UCF disclosed it to him. Petitioner did vigorously contest the authenticity of the screen shot at the hearing, however, even going so far as submitting his own documentary evidence to refute the screen shot—a copy of his credit card statement that did not contain the donation. Petitioner argued that anyone could have made the donation in his name and using his email address.

Because Petitioner was able to respond to the screen shot with arguments and evidence of his own, the first factor weighs in favor of admitting the screen shot. Petitioner cured the surprise by responding to the screen shot and contesting its authenticity.

There is no information regarding the other two factors—whether UCF engaged in bad faith conduct or intentionally did not comply with its regulation regarding three days’ notice, and the possible disruption of an orderly and efficient hearing—before the Court.

In *Antun Investments Corp. v. Ergas*, 549 So. 2d at 708, the Third District applied *Binger’s* principle that the trial court’s discretion should be exercised according to whether the opposing party will be prejudiced by documents that were not timely disclosed. The opposing party received the documents two days before trial, but did not depose the documents’ authors or ask for a continuance to review the documents. *Id.* The trial court did not abuse its discretion in admitting the documents into evidence because the opposing party had sufficient time “to take appropriate action” *Id.*

In *London v. Dubrovin*, 165 So. 3d 30, 31 (Fla. 3d DCA 2015), when the party served its exhibit list late, the trial court offered the opposing party a continuance, but the offer was declined. A continuance is the cure for violating an order on deadlines to disclose evidence, and failing to either request one or accept the trial court’s offer of “one precludes a later claim of prejudice.” *Id.* at 32.

Just as in *Antun*, Petitioner received the screen shot two days before the hearing. And just as in *Antun* and *London*, Petitioner did not avail himself of the opportunity to continue the hearing. Petitioner cannot now claim prejudice, and the hearing panel did not abuse its discretion in considering the screen shot.

It was within the hearing panel's discretion to determine whether to consider the screen shot. Petitioner responded to the screen shot with his argument that he did not make the donation and presented evidence in support of that argument. Finally, Petitioner declined the offer to continue the hearing. Thus, the Court holds that the hearing panel did not abuse its discretion in considering the screen shot and use of the screen shot did not substantially endanger the fairness of the hearing. Petitioner was not denied procedural due process when the hearing panel considered the screen shot.

D. Evidence of Petitioner's past conduct

Petitioner argues that he was deprived of procedural due process because his irrelevant past conduct was discussed during the hearing. Petitioner is referring to the incidents that occurred between him and Doe that led to the 2013 no-contact order. Petitioner contends that evidence of his past conduct prejudiced the panel members against him and created confusion regarding what testimonial evidence was permissible.

Petitioner relies on UCF's regulation prohibiting evidence of a victim's irrelevant past conduct, including sexual history, during a hearing. Petitioner argues that this provision should be read in conjunction with the preamble to UCF's regulations, which states that the provisions are designed to provide a fair hearing process for both parties, to prohibit his past conduct from being admissible.

The UCF regulation applies to the victim's past conduct, not the Petitioner's past conduct. Although Petitioner relies on the fairness-to-both-parties language in the preamble to argue that the regulation applies to him, the policy for the regulation refutes that argument. The regulation is based on rape shield laws, which were enacted because "a victim of a sexual assault

should not be subjected to having her sexual history brought up in open court” *Lewis v. State*, 591 So. 2d 922, 925 (Fla. 1991); *Michigan v. Lucas*, 500 U.S. 145 (1991) (rape shield law “designed to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior.”). The policy underlying UCF’s regulation prohibiting discussion of the victim’s irrelevant past conduct was adopted to protect the victim, and it specifically states that it applies to the victim. Petitioner cannot rely on it to prevent evidence of his behavior that resulted in the no-contact order coming before the hearing panel.

Petitioner does not point to any other regulations precluding the admission of his past conduct; instead, he asserts that the evidence was irrelevant. At the hearing, Petitioner argued that he was not the person that donated to Doe’s fundraising account and left the accompanying message. The message read:

I am glad to see you doing this [redacted] know things between you and I have been rough a year ago. Even though I was found [i]nnocent, I still feel a lot of guilt over my reactions and how I made you feel. That is pretty much the reason why I joined KYX, to get closer to God and find closure from this chapter of my life. Like it or not, I would strongly prefer to see you as a friend and Greek life sister as opposed to an enemy. May God bless your soul [redacted]

(App. 21.) The hearing panel determined that this message, which the panel described as containing “detailed information of previous interactions,” made it more likely than not that Petitioner, and not someone else, submitted the donation. (App. 9 at 2.)

“Evidence which has a reasonable tendency to establish the crime charged is not inadmissible because it points to another crime committed by the defendant.” *Yesbick v. State*, 408 So. 2d 1083, 1085 (Fla. 4th DCA 1982). Where identity is at issue, evidence of prior bad acts may circumstantially prove it. *Council v. State*, 691 So. 2d 1192, 1195 (Fla. 4th DCA 1997).

In *Ratushinak v. State*, 517 So. 2d 749, 752 (Fla. 4th DCA 1987), the defendant argued that the jury should not have heard that he had just left jail before the crimes were committed. The perpetrator of the charged crime told his victim that he escaped from jail. *Id.* Thus, the evidence that the defendant was released from jail shortly before the crime occurred was relevant to the material fact of identity and therefore admissible. *Id.*

Petitioner put identity at issue by questioning whether he was the one that sent the donation message to Doe. Evidence of Petitioner's past conduct was relevant to who sent Doe the message because the message referred to prior interactions between the message's sender and Doe. Thus, those past interactions tended to establish that Petitioner was the one that sent Doe the message, making his past conduct relevant and therefore admissible.

UCF's regulations did not exclude evidence of Petitioner's past conduct, and his past conduct was relevant to the issue he raised at the hearing of whether he was the one that sent the donation message. Therefore, the hearing panel considering the screen shot did not violate Petitioner's due process rights.

E. Competent substantial evidence

Petitioner argues that the hearing panel's decision was not supported by competent substantial evidence. He argues that the evidence boiled down to he-said, she-said regarding the incident on the stairs, and the evidence regarding the donation message was insubstantial because the screen shot was not authenticated and could have been manipulated or forged.

At the hearing, Doe and two other witnesses stated that Petitioner was around Doe during the entire event. Regarding the incident on the stairs, Doe said that Petitioner placed his hands on her upper arms from behind her and said something to the effect of, "[Jane], you shouldn't stop

on the stairs.” (Hr’g Tr. 60:20-61:5.) Doe also stated that she received the donation to her fundraising account from Petitioner before Knight-Thon.

If the 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 like this, there were conflicting statements regarding what happened at Knight-Thon. On certiorari review, the circuit court is not permitted to determine whose version of events is more credible. Instead, that is the hearing panel’s role, and the circuit court determines only whether competent substantial evidence supports the decision. Doe’s and the witnesses’ statements provide competent substantial evidence supporting the panel’s determination that Petitioner did have contact with Doe and thus violated the Conduct Code.

Petitioner failed to preserve many of his arguments for appellate review. Additionally, his due process rights were not violated when the hearing panel considered the screen shot of the message accompanying the donation and his past conduct that resulted in a no-contact order.

Finally, competent substantial evidence supports the hearing panel's decision.

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 1st day of June, 2016.

/S/

PATRICIA A. DOHERTY
Presiding Circuit Judge

TURNER and WOOTEN, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **James Joseph Hayes Dickey, Esq.**, 2431 Aloma Ave., Suite 265, Winter Park, FL 32792; 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 1st day of June, 2016.

/S/

Judicial Assistant