20CA1205 Martin v Regents 12-02-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 20CA1205
City and County of Denver District Court No. 18CV32672
Honorable Andrew P. McCallin, Judge

Casey Martin,

Plaintiff-Appellant,

v.

Regents of the University of Colorado,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE TOW
Freyre and Taubman*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 2, 2021

Burns, Figa & Will, P.C., Benjamin T. Figa, John S. Gleason, Greenwood Village, Colorado, for Plaintiff-Appellant

Hermine Kallman, Megan Clark, Denver, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 Appellant, Casey Martin, appeals the district court's judgment upholding the decision of the Regents of the University of Colorado to revoke his master's degree. We affirm.

I. Background

¶ 2 This case arises from the Regents' decision to revoke Martin's master's degree after concluding that he plagiarized portions of his master's thesis. Martin sought review of this decision under C.R.C.P. 106(a)(4), and the district court, in a thorough and well-reasoned order, upheld the Regents' decision. Martin now appeals.

¶ 3 Martin was a University of Colorado (CU) student in the Asian Languages and Civilizations graduate program beginning in the fall of 2010. For his first year, he studied abroad at Sophia University (Sophia) in Tokyo. While there, he became friends with Sophia student Justin Aukema. Both students wrote theses that analyzed the depiction of the Great Tokyo Air Raid in Saotome Katsumoto's film *War and Youth*. It is undisputed that either Martin or Aukema plagiarized the other's thesis. What is disputed is which student was the plagiarist. The following timeline outlines the evidence the Regents considered in answering this question:

- February 27, 2011: Martin allegedly emailed drafts of a paper he wrote on *War and Youth* to his undergraduate advisor;
- February 2011: Martin allegedly emailed Aukema drafts of the paper on *War and Youth* along with his thesis proposal titled "The Great Tokyo Air Raid in Modern Film";
- April 2011: Martin allegedly posted on a blog (which he claimed to be administered by Aukema), wwiiairraids.wordpress.com, about the Great Tokyo Air Raid and later incorporated these writings into his thesis;
- June 2011: Aukema sent both his advisor and Martin a draft proposal of his thesis on *War and Youth*;
- July 2011: Aukema emailed another draft of his paper to Martin;
- December 2011: Aukema sent his advisor his thesis proposal outline;
- January 2012: Martin defended his thesis proposal and was told to narrow the subject;

- January 2012: Martin emailed Aukema saying, “I am still a bit uncertain about what I will do for my M.A. thesis, or if I will even do one at all”;
- May 2012: Aukema emailed Martin a draft of his thesis and Martin responded that he would be happy to read it;
- July 2012: Aukema submitted his thesis;
- August 1, 2012: Aukema defended his thesis while Martin was in attendance;
- August 2, 2012: Aukema emailed Martin a copy of his thesis;
- August 4, 2012: Martin responded to Aukema’s email, saying, “I am really impressed by all of your hard work and proud to call you my friend”;
- December 2012: Martin submitted and defended his thesis;
- May 2013: Martin received his Master of Arts degree
- March 2014: Aukema discovered Martin’s thesis online and emailed professors at Sophia, alleging that Martin had plagiarized his thesis.

¶ 4 After Aukema raised this allegation, a Sophia professor notified CU professor Janice Brown. Professor Brown then filed a report with CU's Honor Code office.[1] Once Martin was notified of Aukema's allegation, he asserted that it was Aukema who had plagiarized his thesis. The Honor Code Council investigated the claim against Martin, found that he had committed plagiarism, and recommended that his degree be revoked.

¶ 5 Martin appealed the Honor Code Council's decision. The appeal board granted Martin's appeal request "on the grounds of inconsistencies with the established hearing process."

¶ 6 A few months later, CU's Research Integrity Officer, Joseph Rosse, reached out to Aukema. He informed Aukema that his complaint should have been filed with the Standing Committee on Research Misconduct (SCRM), which investigates "non-course-related research misconduct (including plagiarism)." Rosse told Aukema that if he wished to file a complaint with the SCRM, he could do so. Aukema did so.

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[1] The Honor Code, which is administered by the student-run Honor Code Council, prohibits academic dishonesty.

¶ 7 Aukema's complaint was initially handled by an inquiry committee, which determined that "ample evidence" existed for the SCRM to conduct a full investigation. An investigative committee then conducted an investigation and found that Martin had plagiarized Aukema's works. The SCRM reviewed these findings and concurred with the investigative committee's conclusion. It recommended that CU invalidate Martin's thesis and revoke his degree. CU's administration accepted the SCRM's conclusions and recommended that the Regents revoke Martin's degree.

¶ 8 When Aukema's allegation against Martin was brought before the Regents, they conducted some additional investigation of their own. Much of this investigation focused on the validity of the emails, drafts, and blog posts Martin claims to have written and sent in early 2011. After three hearings, the Regents revoked Martin's master's degree based on the conclusion that he had committed plagiarism.

¶ 9 On appeal, Martin asserts that the Regents abused their discretion in revoking his degree by (1) violating his due process rights; (2) acting when they were equitably estopped from taking a position contrary to the Honor Code Council Appeals Board; (3)

lacking competent evidence to revoke his degree; (4) being biased against him; and (5) misapplying or misinterpreting their own laws and policies. We affirm the district court's judgment upholding the Regents' decision.

II. Review of an Administrative Decision under Rule 106(a)(4)

¶ 10 Under Rule 106(a)(4), the district court may review actions and provide relief "[w]here, in any civil matter, any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law." Review is limited to whether "the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer." C.R.C.P. 106(a)(4)(I).

¶ 11 In an appeal of a Rule 106(a)(4) proceeding, we sit in the same position as the district court and review the decision of the administrative body itself. *Roybal v. City & Cnty. of Denver*, 2019 COA 8, ¶ 9. In our review, "we apply a deferential standard, and we may not disturb the governmental body's decision absent a clear abuse of discretion." *Langer v. Bd. of Comm'rs*, 2020 CO 31, ¶ 13.

"An agency abuses its discretion if its decision is not reasonably supported by any competent evidence in the record, or if the agency has misconstrued or misapplied applicable law." *Khelik v. City & Cnty. of Denver*, 2016 COA 55, ¶ 13.

III. Martin Did Not Preserve His Due Process and Equitable Estoppel Claims

¶ 12 We begin by addressing Martin's unpreserved claims that (1) his due process rights were violated and (2) the Regents were equitably estopped from taking a different position than the Honor Code Appeals Board.

A. Applicable Law/Standard of Review

¶ 13 We will not consider for the first time on appeal arguments that were not made before the administrative body or the district court. *See Debalco Enters., Inc. v. Indus. Claim Appeals Office*, 32 P.3d 621 (Colo. App. 2001) (arguments not raised in administrative proceedings are not preserved for appellate review); *Roalstad v. City of Lafayette*, 2015 COA 146, ¶ 13 (we review de novo issues that were presented to the district court).

B. Due Process

¶ 14 Martin argues that the Regents violated his procedural and substantive due process rights under the Fourteenth Amendment and the Colorado Constitution. Beyond bald assertions that he was not "provided due process," Martin never raised specific arguments before either the Regents or the district court regarding procedural or substantive due process. Martin claims that "the [d]istrict [c]ourt squarely addressed [his] due process arguments" in its order. This claim, however, is not supported by the record. And any passing references to "due process" made by the district court fail to establish that Martin properly preserved this claim. *See In re Estate of Ramstetter*, 2016 COA 81, ¶¶ 70-71 (rejecting contention that district court's reference to a broader legal principle preserved appellant's specific legal argument). We thus decline to consider this claim.

C. Equitable Estoppel

¶ 15 Martin also contends that "the Regents are equitably estopped from reversing the Appeal Board's finding that Martin did not commit plagiarism." Before the Regents, Martin raised only a claim of *collateral* estoppel. And before the district court, he only asserted

that the Regents were equitably estopped from rejecting the conclusions of one of Martin's witnesses regarding the authenticity of some of the emails. He did not argue that they should have been barred from reaching a decision different from that of the Honor Code Appeals Board. Therefore, we will not consider this argument.

IV. Competent Evidence Supports the Regents' Decision

¶ 16 Martin next argues that the Regents made an arbitrary and capricious decision by "ignoring or not following up on critical evidence." We reject both Martin's proposed standard of review and his contention.

A. Standard of Review

¶ 17 Initially, we note that Martin invokes an incorrect standard of review. He argues that we should consider whether the Regents made an arbitrary and capricious decision under the standard set forth in *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001). But *Lawley* involved a challenge under the Administrative Procedure Act (APA), section 24-4-106, C.R.S. 2021, not under Rule 106(a)(4). *Id.* at 1247. Our review under Rule 106(a)(4) is more deferential than review under the APA. *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1308-09 (Colo. 1986).

¶ 18 Under Rule 106(a)(4), we may disturb the decision of the administrative body only if there is "no competent evidence" to support the decision. *Yakutat Land Corp. v. Langer*, 2020 CO 30, ¶ 20. "No competent evidence" exists when "the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.* at ¶ 21 (quoting *Van Sickle v. Boyles*, 797 P.2d 1267, 1272 (Colo. 1990)).

¶ 19 Because we are not the fact finder, it is not our role to weigh the evidence or substitute our judgment for that of the agency. *City & Cnty. of Denver v. Gutierrez*, 2016 COA 77, ¶ 10. Furthermore, an agency's decision is not an abuse of discretion "when the reasonableness of the agency's action is open to a fair difference of opinion, or when there is room for more than one opinion." *Khelik*, ¶ 13; *see also Colo. Health Consultants v. City & Cnty. of Denver ex rel. Dep't of Excise & Licenses*, 2018 COA 135, ¶ 11.

B. Analysis

¶ 20 Here, the evidence before the Regents reflected that, starting in June 2011, Aukema began sending Martin documents such as his thesis proposal and drafts of his thesis. Martin attended Aukema's

thesis defense and received a copy of Aukema's final thesis. At no point during this period did Martin allege that Aukema had plagiarized his work; instead, he supported and encouraged Aukema. Martin only alleged that Aukema had committed plagiarism after Aukema brought a claim against him.

¶ 21 Vital to Martin's defense and his assertion that Aukema had plagiarized his work was the claim that Martin had written a paper and blog post containing the research in question prior to June 2011.

¶ 22 As for the paper, Martin claimed that he had sent it to his undergraduate advisor in February 2011. The advisor's memory on whether he had received this document was "imprecise," according to the SCRM. The SCRM reached out to the Information Technology Services department (IT) at Martin's undergraduate school to see if it could access and provide the email in question; the IT officer responded, "I have taken a look and I do have access to email from the period in question. I'm not seeing anything matching these dates with these email addresses."

¶ 23 To support his claim, Martin provided a printed copy of the email in question. He also provided a hard copy of an email that

Apple Support[2] had sent him, which stated that "we have looked on the email server and verified the following emails that you requested." The original emails and their attachments, however, were not provided, and the SCRM's attempts to validate Martin's email or the Apple Support email with Apple Support were unsuccessful.

¶ 24 When Martin's case was before the Regents, a "Mac specialist" was hired to investigate the emails in question. The consultant, Evan Miller, provided a brief letter stating that he had examined the emails and concluded that they had not been tampered with in any way. But Miller did not download the emails or review and download the attachments to the emails, which contained the alleged thesis draft. Concerned that the emails and attachments still had not been provided in their native formats, the Regents requested that Martin "coordinate with [CU]'s internal audit department under a mutually agreed upon protocol to download the e-mails and attachments in their native formats." Martin refused.

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[2] We infer from the record that Apple Support provides customer support to those who use Apple Inc. services such as email.

¶ 25 Regarding the April 2011 blog post, Martin claimed that Aukema created the blog wwiiairraids.wordpress.com and plagiarized from Martin's posts on it. Aukema, however, maintained that Martin created the blog in the spring of 2014 — after Aukema had accused him of plagiarism. The SCRM asked a technician with CU's IT office to ascertain when the blog was created and what it contained. The technician could confirm only that the site existed on May 22, 2014, but could not confirm it existed before that date. Thus, Martin's claim that the blog existed and that he had posted on it in 2011 could not be verified.

¶ 26 The SCRM made additional findings regarding the evidence, which the Regents then considered:

- Several of Aukema's materials misstated the number of deaths in the air raid, while Martin's paper correctly recited this figure. The SCRM noted that it was more likely that when Aukema submitted his materials, he provided original, albeit incorrect, details than "that he copied the section from [Martin]'s paper of February 2011 — in which the facts . . . are given correctly — but then chose to insert, repeatedly, a factual error in materials he

submitted to his thesis committee and advisor in December 2011 and January 2012."

- "[Martin]'s thesis includes several uses of *ibid* that do not correspond to the previous footnote, while the *ibids* in [Aukema]'s thesis correspond to the previous note in every case that involves English-language material," suggesting that the *ibids* originated from Aukema's work.
- The footnotes in Martin's thesis were sometimes formatted correctly and sometimes formatted incorrectly; however, each incorrect footnote was identical to an incorrectly formatted footnote from Aukema's thesis. As the SCRM noted, "although [Aukema]'s footnotes are *consistently* wrong, [Martin]'s footnotes are *inconsistently* wrong."
- Evidence suggested that Martin did not have a "sufficient mastery of Japanese in February 2011 to read and interpret the abundant Japanese-language sources cited in [his] paper."

¶ 27 Martin argues that the Regents abused their discretion by failing to interview certain witnesses. However, there is no

requirement that an agency interview or obtain certain evidence; instead, it simply must base its decision on sufficient evidentiary support. *See Ross*, 713 P.2d at 1309. Martin also contends that the SCRM and the Regents ignored, overlooked, or failed to consider certain evidence. But the fact that the Regents did not find particular evidence compelling or persuasive does not mean that they abused their discretion. *See Khelik*, ¶ 13; *Colo. Health Consultants*, ¶ 11 (an agency's decision may be open to a fair difference of opinion).

¶ 28 We conclude that the Regents' finding that Martin plagiarized Aukema's work was not so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. *See Yakutat Land Corp.*, ¶ 21. Thus, it was supported by competent evidence in the record. We therefore conclude that the Regents did not abuse their discretion.

V. Bias

¶ 29 Martin also contends that the Regents' proceedings were inherently biased against him. We disagree.

A. Additional Facts

¶ 30 When Aukema reported Martin's supposed plagiarism, his complaint was sent to Professor Brown, the chair of the Department of Asian Languages and Civilizations. Before the Honor Code proceedings began, the dean of the graduate school, John Stevenson, became involved. It is apparent from the record that Professor Brown and Dean Stevenson seemed invested in Martin being found responsible for plagiarizing Aukema's work.

¶ 31 Emails between the two indicate that they were concerned about CU's relationship with Sophia should Martin not be penalized by the Honor Code Council. Dean Stevenson wrote to Professor Brown that he intended "to follow up via other paths if the verdict is innocent." During the Honor Code hearing, Dean Stevenson was present. There, he displayed "problematic" behavior, including loudly sighing, whispering, and laughing while Martin was speaking and leaning over to tell the director of investigations that Martin was lying. The record reflects that the Appeals Board took Dean Stevenson's actions into consideration when overturning the decision of the Honor Code Council.

¶ 32 After the Appeals Board ruling was released, Dean Stevenson emailed a director and professor at Sophia to inform him that he "planned to pursue the case through [CU]'s Research Misconduct process." He explained that he planned "to be quite aggressive in seeing that this does not disappear and that it reaches a proper conclusion." Dean Stevenson then brought the case to the attention of the SCRM, which began its investigation.

¶ 33 The record does not reflect that either Dean Stevenson or Professor Brown participated in the investigations of the SCRM or the Regents. Indeed, Martin's opening brief suggests that Dean Stevenson was no longer employed with CU by the time the case reached the Regents.

¶ 34 Before the Regents, Martin asserted that Dean Stevenson's behavior, particularly before the Honor Code Council, prejudiced him. The Regents noted that Dean Stevenson's conduct was "less than professional," but that he "was not a witness before the Inquiry Committee or Investigating Committee," and that there was no evidence "that he improperly influenced their work or the conclusions that Mr. Martin engaged in plagiarism."

B. Applicable Law

¶ 35 "Another basis for setting aside an administrative decision as arbitrary and capricious would be a showing at a C.R.C.P. 106(a)(4) hearing that the administrative decision-makers held some institutional bias or personal grudge against the affected party." *Churchill v. Univ. of Colo.*, 2012 CO 54, ¶ 66. "Any appearance of impropriety sufficient to cast doubt on the impartiality of the Regents and the investigating faculty members would be grounds for a reversal of the underlying administrative decision . . . ." *Id.*; *see Venard v. Dep't of Corr.*, 72 P.3d 446, 449–50 (Colo. App. 2003).

C. Analysis

¶ 36 It is clear that Dean Stevenson and Professor Brown were biased against Martin, which perhaps impacted the Honor Code Council's decision to find him responsible for plagiarism. However, we are not reviewing the decision of the Honor Code Council. Instead, we consider only whether the "administrative decision-makers" — the Regents — held an institutional bias or personal grudge against Martin. *Churchill*, ¶ 66.

¶ 37 The Regents relied on the SCRM's investigation and findings but also conducted their own independent investigation into the

claim. Nothing in the record suggests that they held any bias against Martin. In fact, Martin himself concedes that "the Regents were not *per se* biased against Martin." But, he asserts, they "adopted the wholesale findings of the SCRM, which were premised upon the unfair bias of CU administrators." We first note that this is an insufficient basis to set aside the Regents' decision, as Martin must establish that the bias of which he complains was held by the actual decision-maker — i.e., the Regents themselves. *See id.*

¶ 38 In any event, this claim is unsupported by the record. The Regents agreed that Dean Stevenson's behavior was not professional but specifically explained that he was in no way involved in the extensive SCRM investigation. There is no indication that Dean Stevenson's behavior impacted the SCRM's findings, which were then relied on by the Regents. Moreover, the Regents did not simply accept or rubber-stamp the SCRM's investigation. To the contrary, the Regents requested additional investigation and information, particularly regarding the critical issue of the authenticity of the disputed emails.

¶ 39 Because nothing in the record casts doubt on the impartiality of the Regents, we decline to reverse their decision on this basis.

VI. Application of Policies

¶ 40 Martin also asserts that "[t]he Regents misapplied or ignored their own laws and policies by permitting Dean Stevenson and the CU administration to override the Honor Code Council's findings and initiate another investigation against Martin with the SCRM." We disagree.

A. Applicable Law

¶ 41 A governmental body abuses its discretion when it misinterprets or misapplies the governing law. *Khelik*, ¶ 13. In construing an administrative regulation, we apply the same basic rules of construction we use to interpret a statute. *Petron Dev. Co. v. Wash. Cnty. Bd. of Equalization*, 91 P.3d 408, 410 (Colo. App. 2003), *aff'd*, 109 P.3d 146 (Colo. 2005); *see also Williams v. Colo. Dep't of Corr.*, 926 P.2d 110, 112 (Colo. App. 1996).

¶ 42 We first look to the ordinary and common meaning of the language in a provision, giving effect to every word and term whenever possible. *Lewis v. Taylor*, 2016 CO 48, ¶ 13. "If the statutory language is clear," we interpret the statute according to its plain and ordinary meaning. *Id.* at ¶ 20.

B. Analysis

¶ 43 The Regents revoked Martin's degree on the basis that he "engaged in conduct that violates Article 7.B.1(A) of the Laws of the Regents, which specify that, 'by enrolling as a student in the university, a person shall assume obligations of performance and behavior established by the university relevant to its lawful missions, processes, and functions.'" As previously discussed, Martin's case came before the Regents after an extensive investigation by the SCRM. According to the SCRM's guidelines, the SCRM exists to prevent, identify, and investigate alleged research misconduct, including plagiarism, committed by "any person who, at the time of the alleged research misconduct, was employed by, was an agent of, or was affiliated by contract or agreement with [CU]." Looking to the plain and ordinary meaning of the language of the SCRM's policies, we conclude that the allegation against Martin fell squarely within the SCRM's purview.

¶ 44 Martin claims, however, that "the Regents' law and policies designated the Honor Code as the process to adjudicate plagiarism allegations." But nothing in either the Honor Code policies or the SCRM policies states that an investigation and finding by the Honor

Code Council precludes additional investigations by other offices of the university for the same claim.

¶ 45 Martin has therefore failed to establish that the Regents abused their discretion by misconstruing or misapplying their laws and policies.

VII. Attorney Fees

¶ 46 Martin requests attorney fees pursuant to 42 U.S.C. § 1988. Under section 1988, "a prevailing party is eligible to recover attorney fees under that section if it pled a 'substantial' section 1983 or constitutional claim." *Beaver Creek Prop. Owners Ass'n v. Bachelor Gulch Metro. Dist.*, 271 P.3d 578, 585 (Colo. App. 2011). Assuming without deciding that this statute applies to Martin's claim, he is not a prevailing party and thus is not entitled to attorney's fees.

VIII. Conclusion

¶ 47 The judgment is affirmed.

JUDGE FREYRE and JUDGE TAUBMAN concur.