IN THE THIRTEENTH JUDICIAL CIRCUIT FOR THE STATE OF FLORIDA
CIVIL APPEAL

JOHNNIE WILLIAMS and
JANICE WILLIAMS,
Appellants,

vs.

HILLSBOROUGH COUNTY,
Appellee.
_____/

Circuit Case No.: 22-CA-6291
Division: G
L.T. case no.: 22-DD-0310

APPELLATE OPINION

This case is before the Court seeking review of a decision declaring Appellants' dogs to be "dangerous dogs" under section 767.12, Florida Statutes, and section 6-27, Hillsborough County Code. The Order is reviewable pursuant to Florida Rules of Appellate Procedure 9.030(c)(1)(A), (C) and 9.110(a)(1) & (2), (c), (d); Florida Statutes § 767.12(4). In their appeal, Appellants ask this court to reverse the decision of the hearing officer and remand the case back for a new hearing. Appellants contend that they were denied due process, and, flowing from that violation, no competent, substantial evidence supports the decision such that the judgment departs from the essential requirements of law. From a thorough review of the record, and the fact that the County does not mount any challenge to Appellants' due process assertions in its answer brief, the Court agrees with Appellants that, although any single occurrence recounted by Appellants would not amount to a violation of their right to due process, the proceeding was fraught with rulings that, taken together denied them due process, and the conclusions resulting from that denial appear to be unsupported by the evidence as presented such that the resulting judgment departs from the essential requirements of law. Accordingly, the decision of the hearing officer is reversed.

FACTS

The undisputed facts are that the Williamses (Appellants) and Ms. Redd (the complainant/victim) are neighbors in a rural community of Hillsborough County. Three dogs were involved in the incident that took place shortly after midnight on January 16, 2022. One dog, Gunny, belongs to Ms. Redd. The other two dogs, Stump and Zoey, belong to Appellants. Ms. Redd was well-acquainted with the Williamses' dogs, and, by her own admission, unafraid of them. She routinely permitted her stepson to climb a ladder over the fence to visit with the Williamses' grandson. There had never been a biting incident involving the Williamses' dogs before the night of the incident, but there was a history of "fence fighting" between the dogs.

The Williamses' and Ms. Redd's properties are separated by a very strong fence. According to the record, Ms. Redd had returned from an evening out with her husband during which time she admitted to having consumed a few drinks. She let her dog Gunny out to relieve himself and readied herself for bed. Within a minute or two, she heard growling and barking, so she went outside to investigate. There was a breach in the fence where a panel had been pushed toward the Williamses' property. At least one of the Williamses' dogs was on Ms. Redd's side of the fence. When she grabbed her dog by the collar to bring him inside, she was subjected to significant aggression, having been pulled to the ground by a dog whose identity she "assumed" as being one of the Williamses' dogs because she had her own dog by the collar. However the events transpired, she was, admittedly, severely injured. During the attack Mr. Williams was alerted by his wife. He appeared at the scene, firing a .38 caliber pistol to scare the dog. The gunshot stopped the aggression, and Ms. Redd's dog ran off. Thereafter, Mr. Williams spotted his dog Zoey laying on the ground on Ms. Redd's side of the fence. Zoey had injuries indicative of involvement in a dog fight. Her snout showed she had been bitten. Neither the Williamses' other dog Stump, nor Ms. Redd's dog Gunny, had any injuries.

Beyond these undisputed facts, details become murky at best. Ms. Redd initially reported that the dogs had been fighting when she went to retrieve her dog. She later said that they had not been fighting and denied saying otherwise. Several witnesses testified that the fence appeared to have been pushed from Ms. Redd's property, suggesting that Ms. Redd's dog Gunny caused the breach. Ms. Redd's son testified that it was at least possible for it to have been pulled from the Williamses' property, implicating one of their dogs. A veterinarian testified that neither of the Williamses' dogs had injuries consistent with having pulled the fence toward their property, however. Ms. Redd said initially that both of the Williamses' dogs were responsible for the attack, but she admitted that she did not know which dog inflicted her injuries. She also indicated in her deposition that she had been attacked on her left side. Later, in an affidavit submitted after the hearing, she said she was grabbed on her right waist and pulled to the ground. Mr. Williams testified that he told Ms. Redd to "let go of the dog [Gunny]" but that she did not. She did not hear this command and did not release her dog until the gunfire scared him off. Mr. Williams attempted to testify that Ms. Redd's dog had a history of aggression toward his dogs and engaged in significant "fence fighting," but he was largely prohibited from elaborating on Gunny's behavior by repeated, sustained objections. Mr. Williams further testified that Gunny was "flailing on" Ms. Redd, and that Gunny broke loose at the sound of gunfire. After Ms. Redd stood up, Mr. Williams saw his own dog Zoey lying on the ground. It is not known where in relation to Ms. Redd Zoey was seen. Mr. Williams never saw Stump on Ms. Redd's property or his own. Stump was later found in the Williamses' garage. Mr. Williams testified that although Zoey was on Ms. Redd's property, he did not see her involved in any fighting.

THE HEARING

In code enforcement proceedings, the burden is on the government to prove by a preponderance of the evidence a violation of the law or local ordinance, in this case

section 767.11(1)(a), Florida Statutes, and 6-27, Hillsborough County Code. At the start of the hearing, the hearing officer described the order of proceeding. She indicated that the County would give an opening statement, then present its case. Following that, Respondent (Appellants) would have the opportunity to present their case. She did not mention affording Appellants an opportunity to present an opening statement. When Appellants' attorney inquired whether they would be allowed to give an opening statement *at the start of their case*, the hearing officer responded affirmatively. The County waived opening and was directed to proceed with its case without Appellants' counsel having been afforded an opportunity to give their opening. Later, when it was time for Appellants to present their case and counsel attempted to make an opening statement, the hearing officer denied them that opportunity, indicating that it should have been given at the outset of the case. In addition, her order erroneously faulted Appellants' counsel for not advising her at the appropriate time that they wanted to give an opening statement when, in fact, counsel had inquired about giving an opening statement at the beginning of the hearing.

The hearing progressed, and the County was given time to call several witnesses including Ms. Redd, her son, various animal control officers, and a veterinarian. At the conclusion of the County's case, the hearing officer advised Appellants' counsel that the hearing would conclude at 5:00pm regardless of where Appellants were in their case. In addition, because the hearing officer, in strictly applying the rules of procedure regarding questioning of witnesses, denied Appellants the ability to use any time-saving shortcuts in their presentation,[1] Appellants were afforded significantly less time to present their case. Regarding time management, the Court notes that the County took up significant time in this administrative proceeding with frequent objections, oftentimes without a sound legal basis.

Further complicating matters, the victim was herself represented by counsel, Mr. Lopez. The hearing officer assured Appellants that Ms. Redd was not a party and that Mr. Lopez would not be permitted to participate because his participation was prohibited by the rules.[2] Mr. Lopez was nonetheless permitted to and did interrupt the proceedings 11 times, of which at least two interfered with Appellants' counsel's questioning of witnesses. In addition, Mr. Lopez, not the County's attorney, argued for the admissibility of Ms. Redd's son's testimony as to the construction of the fence as being "expert," despite failing to satisfy requirements for the admission of expert opinion testimony based on training and experience. Specifically, the hearing officer took no testimony as to the witness's qualifications to support the opinion. Appellants' attorney was not even allowed to ask about the witness's licensure status. In another instance, Mr. Lopez, not the County's attorney, argued for the admissibility of evidence. At times, it appeared that Mr. Lopez was acting in a supervisory capacity over the County's case, rather than as

[1] The hearing officer sustained a number of the County's objections to Appellants' cross examination of its witnesses as being outside the scope of direct, despite appearing to this court to be valid lines of questioning, forcing Appellants to recall those witnesses in the presentation of their case, and despite Appellants' counsel's plea that he was doing so to save time.

[2] This court has not been provided a citation as to the rule the hearing officer referred to. This court assumes the hearing officer was familiar with the rules governing the underlying proceeding.

an observer, at times prompting Mr. Cox to make objections or ask a specific question. Rather than admonish Mr. Lopez to refrain from participating, the hearing officer repeatedly sustained objections Mr. Lopez was not authorized to make. More significantly, at one point the hearing officer suggested an objection for Mr. Cox to make, utterly compromising her neutrality in the proceeding.

Finally, the hearing officer ended the hearing before Appellants had an opportunity to present their case, depriving them of the opportunity to call several witnesses and present an in-person closing, after having already been denied the opportunity to present an opening statement.

THE ORDER

Although the hearing concluded without Appellants being fully able to present their case during the scheduled hearing, the hearing officer allowed the parties to make post-hearing submissions. These, however, were not limited to the parties—Mr. Lopez was also permitted to make submissions on behalf of the victim even though his participation was not permitted. Indeed, Mr. Lopez submitted a motion to exclude Appellants' expert's testimony, which was effectively granted since the Order expressly struck the testimony in relation to the motion. Mr. Lopez also included an affidavit of Ms. Redd, with photographs, even though she testified in person at the hearing. The County did not enter any submissions of its own, rather, it simply adopted the memorandum Mr. Lopez filed on Ms. Redd's behalf. These submissions by Mr. Lopez were expressly admitted and considered by the hearing officer, again despite her earlier statement that doing so violated the rules.

If the foregoing violations were not serious enough, the Order resolves several inconsistencies in the victim's testimony with the hearing officer's subjective belief that those inconsistencies were the result of "[the victim] experiencing a traumatic event, which may have impacted her hippocampus." In so doing the hearing officer referred to unnamed, unadmitted "numerous studies" implicating the effect of trauma on victims' recall as a result of "damage to their hippocampus," which she opined affects how information is stored and recalled. None of these "numerous studies" were discussed or entered in evidence, nor was even a single specific study cited, much less analyzed, for this court to review. The Order states that the hearing officer "does not find that [the victim] was being untruthful." Even if trauma affects a person's recall, when, as here, a single witness's testimony is inconsistent, at least one statement is inaccurate, even if the inaccuracy is unintentional. Here, there was not just one, but three sets of inconsistencies. It is not clear how the unnamed studies assisted the hearing officer in determining which statement was and was not truthful under these circumstances or how she was able to determine the victim was not being untruthful despite making inconsistent statements.

Finally, despite evidence from two witnesses with no stake in the matter that a breach in the fence that allowed at least one of Appellants' dogs onto the victim's property was caused by the victim's own dog, the hearing officer's conclusions were

based solely on testimony from the victim's son, whose testimony was elevated to "expert" status without evidence admitted of his expertise over Appellants' counsel's objection. He opined only that it was *possible* for Appellants' dogs to have pulled the fence open, despite that he did not see the damaged fence before it was repaired, and in contrast to significant testimony that, although such a scenario was theoretically possible, it was highly unlikely. From the foregoing evidence the hearing officer determined that both of the Williamses' dogs were "dangerous" under state law and the Hillsborough County Code.

STANDARD OF REVIEW

A circuit court reviews an administrative agency decision to determine (1) whether procedural due process was accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla.1995). Appellants contend that the proceedings below were so unfair that it denied them procedural due process. Flowing from the denial of due process, they contend that contextual evidence that could negate a "dangerous dog" finding under sections 767.11 and 767.12, Florida Statutes, was not considered. Moreover, where three dogs were involved, and there is no clear identification as to the dog responsible for the victim's injuries, Appellants maintain that the decision is unsupported by competent, substantial evidence.

DISCUSSION

DUE PROCESS

Procedural due process requires both fair notice and a real opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth'ty,* 795 So. 2d 940, 948 (Fla. 2001). Parties must be provided an opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* "The specific parameters of the notice and the opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding. *Keys,* 795 So. 2d at 948, citing *Gilbert v. Homar,* 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed.2d 120 (1997). Further, "the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts ..." *Hormilla v. Miami-Dade Cnty., Code Enf't - Animal Serv. Dep't*, No. 2021-30 AP01, 2022 WL 2800966, at *2 (Fla. Cir. Ct. July 16, 2022) (quoting *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991)). "When assessing whether or not a violation of due process has occurred, 'a court must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest.'" *Joshua v. City of Gainesville*, 768 So. 2d 432, 438 (Fla. 2000) (quoting *Econ. Dev. Corp. v. Stierheim*, 782 F.2d 952, 953-54 (11th Cir. 1986)).

Appellants contend that their due process rights were violated for myriad reasons. The Court agrees. Notably, although the County filed an answer brief, its

answer brief does not dispute or even respond to Appellants' due process argument in any way. "It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties." *Polyglycoat Corp. v. Hirsch Distributors, Inc.,* 442 So. 2d 958, 960 (Fla. 4th DCA 1983) (internal citations omitted). When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived. *Id.* The want of due process alone requires that the decision be reversed. Even if the County had not effectively conceded this point, the record supports this conclusion. The hearing officer unfairly denied Appellants the opportunity to present opening argument, and she limited their ability to cross examine witnesses, present their own case, and ultimately, present a closing statement. As this was an evidentiary hearing in a contested proceeding, the matter should have been tried as is customary in a bench trial. *Fernandez In re: Guardianship of Fernandez*, 36 So.3d 175, 176 (Fla. 3d DCA 2010). Even if evidence wouldn't have impressed the court, party had a right to present it, and their inability (or significantly reduced ability) to do so is a denial of due process. *Minakan v. Husted*, 27 So. 3d 695, 699 (Fla. 4th DCA 2010) (internal citations omitted). Moreover, although it is not inherently violative of due process to set a goal of completing trial in one day, summarily shortening proceedings as the hearing officer did here can give rise to a due process violation when it results in the failure to afford a party a full, fair, and meaningful opportunity to be heard. *Julia v Julia*, 146 So. 3d 516, 520 (Fla. 4th DCA 2014). Finally, despite the hearing officer stating early in the proceeding that Ms. Redd's attorney was not permitted to participate, she allowed the County's attorney to rely heavily on Ms. Redd's counsel in prosecuting the case. Related to this, and as will be explained below, the hearing officer accepted and appears herself to have relied heavily on submissions by Ms. Redd's attorney after the close of the hearing.

ESSENTIAL REQUIREMENTS OF LAW

Application of the wrong law or legal standard is reversible error. *Nader v. Dept. of Highway Safety and Motor Vehicles,* 87 So. 3d. 712, 725-26 (Fla. 2d DCA 2012) (failure to follow the plain language of the statute merited second-tier certiorari review). Here, dangerous dogs are addressed under section 767.11 and 767.12, Florida Statutes. In relevant part, section 767.11 says:

> 767.11 Definitions.—As used in this act, *unless the context clearly requires otherwise*:
> (1) "Dangerous dog" means any dog that according to the records of the appropriate authority:
> (a) Has aggressively bitten, attacked, or endangered or has inflicted severe injury on a human being on public or private property;
> (b) Has more than once severely injured or killed a domestic animal while off the owner's property; or
> (c) Has, when unprovoked, chased or approached a person upon the streets, sidewalks, or any public grounds in

> a menacing fashion or apparent attitude of attack, provided that such actions are attested to in a sworn statement by one or more persons and dutifully investigated by the appropriate authority.
> (2) "Unprovoked" means that the victim who has been conducting himself or herself peacefully and lawfully has been bitten or chased in a menacing fashion or attacked by a dog.
> (3) "Severe injury" means any physical injury that results in broken bones, multiple bites, or disfiguring lacerations requiring sutures or reconstructive surgery. (Emphasis added.)

The hearing officer appears to have relied on subsection (1)(a).[3] The injury was severe, and it is undisputed that the incident occurred on private property. The hearing officer also concluded that no evidence suggests that Ms. Redd had conducted herself in a manner other than "peacefully." At first blush, the statute appears to impose strict liability on dog owners, meaning that, regardless of the reason, if a dog inflicts a serious bite, the dog may be declared "dangerous." A closer review, however, shows that the statute intends for a factfinder to take the context of a given situation into account. Moreover, section 767.12 states in relevant part that:

> (2) A dog may not be declared dangerous if:
> (a) The threat, injury, or damage was sustained by a person who, at the time, was unlawfully on the property or who, while lawfully on the property, was tormenting, abusing, or assaulting the dog or its owner or a family member.
> (b) The dog was protecting or defending a human being within the immediate vicinity of the dog from an unjustified attack or assault.

Although it is not clear what constitutes "tormenting" under the statute, Appellants attempted to, but were largely prevented from presenting evidence of context, including, but not limited to, that Ms. Redd may have intervened in a dog fight between her dog and the Williamses' dogs, and that dogs generally, and her dog specifically, may have reacted aggressively in response to being grabbed by the collar. According to the hearing officer, this information was "irrelevant."[4] Because the text of the statute allows

[3] The Court disagrees with Appellant that it is limited to review of the matter under 767.11(1)(c), Florida Statutes. The citation appears to cite Appellants under both (1)(a) and (1)(c). The Court agrees that the requirements of subsection (1)(c) are not met here.

[4] The possibility that Ms. Redd's injuries were inflicted by her own dog is relevant and is suggested by testimony that Mr. Williams, upon witnessing Ms. Redd on her knees facing the ground to "let go of your dog." Although there is no doubt Ms. Redd suffered a serious injury by a dog, the record before this court contains no positive identification of the dog that attacked her and suggests at least the possibility that her own dog could have been responsible.

consideration of context that could negate a "dangerous dog" finding, the information was not irrelevant.

COMPETENT, SUBSTANTIAL EVIDENCE

"Competent substantial evidence is tantamount to legally sufficient evidence." *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1274 (Fla. 2001). The Florida Supreme Court has explained that competent substantial evidence is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The evidence relied upon should be "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *State v. Desange*, 294 So. 3d 433, 437 (Fla. 2d DCA 2020) (citing *Dausch v. State*, 141 So. 3d 513, 517-18 (Fla. 2014)) (internal citations omitted). In determining whether competent, substantial evidence supports the order under review, the court is not permitted to reweigh the evidence. *Dusseau,* 794 So. 2d at 1275. This court is mindful of that mandate.

In contrast, appellate review of an alleged *insufficiency* of evidence is reviewed under the de novo standard of review. *Mace v. MT Bank*, 292 So. 3d 1215, 1219 (Fla. 2d DCA 2020) (appellate court may review the sufficiency of the evidence in a civil, nonjury trial without the issue being preserved with a motion in the trial court.) *See also Wells Fargo v. Sawh*, 194 So. 3d 475, 480 (Fla. 3d DCA 2016) *citing Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010); *Meyers v. Schontz*, 251 So. 3d 992, 1000 (Fla. 2d DCA 2018). Given these considerations, several matters stand out here. One is that the victim made inconsistent statements regarding events leading to the attack. The record indicates that Ms. Redd initially told law enforcement that the dogs had been fighting. She later denied that they had been fighting and that she had ever said otherwise. She also gave inconsistent statements as to the side of the body she was attacked from. In addition, although she initially implicated Zoey as the dog who attacked her, she later admitted she did not know which dog attacked her. This evidentiary conflict is key to the case, and it emanates from a single witness. To resolve the conflicts, the hearing officer not only relied on her belief regarding the supposed impact of trauma on the brain—because no facts were put in evidence on this—but she expressly found that Ms. Redd had not been untruthful, an almost impossible conclusion given that she made inconsistent statements on key facts—whether the dogs were fighting and the identity of the dog that attacked her. It is black letter law that a factfinder cannot consider matters outside of evidence. *R.J. Reynolds Tobacco Co. v. Schleider*, 273 So. 3d 63, 69 (Fla. 3d DCA 2018). Another is that the hearing officer seemed opposed to considering evidence that Ms. Redd's own dog may have caused the breach that led to the dogs interacting. To that end, the hearing officer accepted as expert testimony the opinion testimony of the victim's son as an expert contractor, without having required or even allowed a proper foundation for accepting such testimony. The hearing officer went so far as to prevent Appellants' attorney from verifying the witness's license, sustaining an objection by the County. As noted previously, the hearing officer also prevented Appellants from developing evidence of Ms. Redd's dog's aggression and history of fence fighting. In effect, she short-circuited Appellants' ability to present evidence of the *context* that

section 767.11, Florida Statutes, expressly requires a hearing officer to consider in making a dangerous dog finding if such context exists. In addition, the Court agrees with Appellants that there is no *competent* evidence as to the identification of the dog or dogs inflicting Ms. Redd's injuries.

Generally, the remedy for due process violations is to remand the cause for a new hearing. See *Dep't of Highway Safety & Motor Vehicles v. Corcoran*, 133 So. 3d 616, 623 (Fla. 5th DCA 2014). Because, however, the court also finds the evidence to be insufficient to support the decision below despite myriad due process violations, a remand for another hearing would be tantamount to giving the County a forbidden second bite at the apple. "A party does not get the proverbial 'second bite at the apple' when it fails to satisfy a legal obligation the first time around." *Bartolone v. State,* 327 So. 3d 331, 336 (Fla. 4th DCA 2021), citing *Richards v. State,* 288 So. 3d 574, 576 (Fla. 2020). It is therefore

ORDERED that the judgment is REVERSED with directions to enter judgment for Appellants.

ORDERED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 12/22/2023
Christopher Nash

Christopher C. Nash, Circuit Judge

Electronic copies provided to parties through JAWS