

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

MARWAN AL-FARWAN,

Appellant,

v.

CITY OF ORLANDO, FLORIDA,

Appellee.

CASE NO.: 2013-CV-000001-A-O

L.T. Case No: CEB 08-50573COMM

Appeal from the decision of the
Code Enforcement Board,
City of Orlando, Florida.

Kenneth M. Beane, Esquire, for Appellant.

Victoria Cecil Walker, Assistant City Attorney,
for Appellee.

Before G. ADAMS, MIHOK, and LUBET, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING FINAL ADMINISTRATIVE ORDER

Appellant, Marwan Al-Farwan (“Al-Farwan”) timely appeals the “Order Denying Request for Reconsideration of the Penalty” entered December 12, 2012 by the Code Enforcement Board (“CEB”) for the City of Orlando (“City”), Appellee. This Court has jurisdiction pursuant to section 162.11, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(C). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Summary of Facts and Procedural History

Al-Farwan is the owner of commercial real property located at 648 West Washington Street in Orlando, Florida (“Property”). On May 16, 2008, Code Enforcement Officer, Raymond Rodriguez, filed with the CEB a Statement of Violation and Notice of Hearing for code violations discovered on the Property concerning the exterior walls of the building and a pole providing electrical service to the building. On June 11, 2008, a hearing was held addressing the violations. After hearing testimony and reviewing the evidence, the CEB entered its Findings of Fact, Conclusions of Law, and Order pursuant to chapter 162, Florida Statutes, finding Al-Farwan in violation of chapter 30A under Title II, Article III of the City’s Code of Ordinances (“City Code”). The CEB’s Order gave Al-Farwan thirty days from the date of the order to bring the Property into compliance or a fine of \$100.00 per day would be imposed. The corrective actions required were washing and painting the exterior walls and replacing a bracket to secure an electrical pole to the building. Upon the expiration of the compliance deadline, Officer Rodriguez re-inspected the Property and found that the pole supplying electrical power to the building was still not in compliance with the CEB’s Order. As a result, Officer Rodriguez filed an Affidavit of Non-Compliance on July 14, 2008. On August 21, 2008, the CEB entered a Statutory Order Imposing Penalty/Lien in accordance with its Order dated June 11, 2008. The Property was ultimately brought into compliance on February 28, 2011 and the total penalty amount that accrued in this case was \$96,200,002.

On December 3, 2012, pursuant to the Policy and Procedures of the Code Enforcement Board of the City of Orlando, Florida (“CEB’s rules”), Al-Farwan filed with the CEB a written Request for Reduction of Penalty, also known as a Request for Reconsideration of the Penalty (“Request”). The Request claimed financial hardship and conflicts in obtaining a permit after the

work was completed due to ongoing issues of whether a permit was or was not required for some of the corrective actions that were taken. The City then submitted its written response to Al-Farwan's Request. On December 12, 2012, after reviewing both Al-Farwan's Request, supporting documentation, and the City's response, the CEB denied Al-Farwan's Request and entered its Order Denying Request for Reconsideration of the Penalty, which is the subject of this appeal.

Standard of Review

Per section 162.11, Florida Statutes, a circuit court reviewing a final administrative order cannot engage in de novo review and shall limit its review to the record created before the enforcement board. *City of Deland v. Benline Process Color Co., Inc.*, 493 So. 2d 26, 27 (Fla. 5th DCA 1986). This appeal from the CEB is governed by a three part standard of review: 1) whether procedural due process was accorded; 2) whether the essential requirements of law have been observed; and 3) whether the administrative agency's findings and judgment are supported by competent, substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). The circuit court in its appellate capacity is not entitled to make separate findings of fact or to reweigh the evidence. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 529 (Fla. 1995).

Arguments and Analysis

First, Al-Farwan's arguments raise issues as to whether the CEB deprived him of due process and failed to follow the essential requirements of the law and do not specifically involve the issue as to whether the CEB's decision was or was not supported by competent substantial evidence. Thus, this Court's review will focus on whether procedural due process was accorded and whether the essential requirements of the law were followed.

Al-Farwan's first argument – deprived of due process at the hearing

Al-Farwan argues that he was deprived of due process because at no time during the hearing addressing his Request was he or his attorney given an opportunity to be heard. Thus, Al-Farwan concludes that the CEB failed to comply with the requirements of the quasi-judicial hearing as provided in the City Code and Florida Statutes.

Conversely, the City argues that Al-Farwan fails to allege or demonstrate a deprivation of a right, which is essential to a due process claim and even if due process protection does apply here, the record shows that the CEB's consideration of Al-Farwan's Request was within the parameters of due process. Furthermore, the City contends that proceedings for reduction requests submitted to the CEB are governed by the CEB's rules as authorized under chapter 162, Florida Statutes.

Analysis: Section 9 of the CEB's rules addresses the procedures for requests for reduction of penalties or liens. Prior to considering such requests, the subject property must be in compliance and the respondent must submit a request in writing along with supporting documentation showing in detail any medical hardship, financial hardship, or other hardships or extenuating circumstances that precluded compliance within the prescribed time period. Further, upon request, the CEB will also accept oral testimony at the hearing relating to the submittal. A respondent wishing to provide oral testimony must complete a Notice of Appearance form and hand it to the CEB's Recording Secretary before the case is called to be heard. The Recording Secretary shall then provide a copy of the Notice of Appearance to the CEB Chairman and the CEB's Division Manager. Oddly, while the CEB rules include the opportunity to provide oral testimony, the instructions in the Request for Reduction of Penalty form appear to indicate otherwise as follows:

Your completed application will be presented to the Board in its entirety, along with all supporting documentation. City staff will prepare a written response and recommendation to the Board after reviewing the materials submitted. The Board will review all the materials submitted, and its decision will be based upon these materials and its collective evaluation of the case. **The Board will not hear oral presentation, so it is important that this application is complete.** However, you are encouraged to attend the hearing to answer any questions the Board may have regarding your application. [*Emphasis added*]

Notwithstanding this discrepancy between the CEB rule and the form's instructions and Al-Farwan's claim in his Reply that he submitted a Notice of Appearance form prior to the hearing, there is no Notice of Appearance document in the record. Also, from review of the hearing transcript, there was no mention at the hearing that the form was submitted nor was there any verbal request made by Al-Farwan or his counsel asking to speak at the hearing. Further, Al-Farwan was provided the opportunity to submit evidence in support of his Request and did so by including supporting documents. Lastly, Al-Farwan does not argue that he was not provided due process at the June 11, 2008 hearing where the violations were initially addressed. Accordingly, this Court finds that Al-Farwan's due process argument lacks merit.

Al-Farwan's second argument – CEB abused its discretion by not considering certain factors

Al-Farwan argues that the CEB abused its discretion by not applying the three factors set forth in subsection 162.09(2)(b), Florida Statutes, and section 5.07 in chapter 5 under Title II, Article I of the City Code, when it considered his request to reduce the penalty amount. Specifically, Al-Farwan argues that the reduction of the total amount of the fines is in effect a reduction of the daily fines and when considering the request for reduction, the same factors should be reconsidered as the CEB is required to do when first setting the daily fines. Per subsection 162.09(2)(b), Florida Statutes, when initially determining the amount of the fine, if any, the factors that the CEB must consider are: 1) the gravity of the violation; 2) any actions taken by the violator to correct the violation; and 3) any previous violations committed by the

violator. These same factors are mirrored in subsection 5.07(4) of the City Code. Also, subsection 162.09(2)(c), Florida Statutes, states that any enforcement board may reduce a fine imposed pursuant to this section. Al-Farwan claims that at no time during the CEB's deliberations did the members comment on any one of these three factors and the code violation that was cited in the original compliance schedule was very minor.

Conversely, the City first points out that although the CEB's authority as to whether to grant a reduction of the penalty amount is discretionary under chapter 162, Florida Statutes, the correct standard of review to be applied is whether the CEB departed from the essential requirements of the law when it denied Al-Farwan's Request. Next, the City contends that based upon the plain meaning of subsection 162.09(2)(b), Florida Statutes, and the Court's decision in *Fernandez v. City of Orlando*, the CEB is only required to consider these factors when initially determining the fine amount to impose. Thus, the City concludes that the CEB may, but is not required, to apply these factors when considering requests to reduce the penalty amount. *See Fernandez and Scarito v. City of Orlando*, 16 Fla. L. Weekly Supp. 382a (Fla. 9th Cir. Ct. 2008) (explaining that the CEB was not required to reconsider factors it was statutorily required to consider in imposing the fine when ruling on a motion to reconsider and reduce the fine); *see also Khan v. City of Orlando*, 16 Fla. L. Weekly Supp. 608b (Fla. 9th Cir. Ct. 2009) (finding that the code enforcement board may consider the factors set forth in subsection 162.09(2)(b), Florida Statutes, when deciding to grant a reduction, but is not required to do so).

Analysis: This Court concurs with the City and the Court's analysis in *Fernandez* and *Khan* that based upon the plain reading of section 162.09, Florida Statutes, the CEB is not required to reconsider these factors when deciding whether or not to grant a reduction of the penalty because as stated under subsection 162.09(2)(c) of the statute, a penalty reduction is

discretionary. Further, the criteria for the CEB to consider when granting a request to reduce the penalty amount is medical hardship, financial hardship, or other hardships or extenuating circumstances. From review of the hearing transcript, this Court finds that the CEB applied the correct criteria when it reviewed Al-Farwan's Request including his evidence i.e. supporting documents consisting of tax returns and bank statements. Therefore, the CEB followed the essential requirements of the law when addressing Al-Farwan's Request.

Al-Farwan's third argument – deprived of due process by CEB not providing him with written notice of the violations pertaining to stucco work and closing in a wall

Al-Farwan argues that the CEB and the inspector deprived him of due process as required by the City Code by not providing him with written notice of the violations pertaining to stucco work and closing in a wall that were done without a permit. Thus, he concludes that a fine for this violation should not have been assessed. In this argument, Al-Farwan discusses the following: On June 11, 2008, the CEB ordered that Al-Farwan's store front walls should be cleaned and painted. This corrective action was to be completed by July 11, 2008 or a fine of \$100.00 per day would be assessed against the property. Before July 11, 2008, Al-Farwan cleaned up and painted the front wall as provided in the compliance schedule. Wanting to improve the building's appearance even more, Al-Farwan also applied stucco to the wall. When the property was re-inspected on July 14, 2008, the inspector's affidavit stated the property was not in compliance. One of the items noted not to be in compliance was that no permit was issued for the stucco work. The stucco work and closing in a wall were not required to be done in the original compliance schedules. Al-Farwan concludes that he was deprived of due process because there is nothing in the record to show that he received written notice or a citation pertaining to the stucco work and closing in the wall before the June 11, 2008 CEB meeting as required in section 5.04 in chapter 5 under Title II, Article I of the City Code. Subsection

5.04(4) of the City Code requires delivery of a written notice and subsequent noncompliance before the CEB can consider imposing a fine.

Conversely, the City contends that this issue is not properly before this Court because it does not relate to the CEB's Order Denying Request for Reconsideration of the Penalty that is the subject of this appeal. Further, the City argues that Al-Farwan waived his right to be heard on this issue because he failed to contest Officer Rodriguez's finding of noncompliance pursuant to the CEB's rules and *Massey v. Charlotte County*, 842 So. 2d 142 (Fla. 2d DCA 2003). Moreover, the City points out that this Court should not consider the document that Al-Farwan relies upon because it was a printout of the CEB Officer's notes from a computer screen that was not created before the CEB. Thus, the City argues that the document falls outside the record for appellate review pursuant to section 162.11, Florida Statutes. Lastly, the City concludes that the document and the record clearly show that the Officer's finding of noncompliance was based upon Al-Farwan's failure to secure a permit and final inspection for the electrical pole.

Analysis: From reviewing the documents in the record leading up to the CEB's Order that is the subject of this appeal, the only violations involved in the CEB proceedings referenced in the case, CEB 08-50573COMM, were for Al-Farwan's non-compliance to timely wash and paint the exterior walls and to replace a bracket to secure an electrical pole to the building as evidenced by the Statement of Violation and Notice of Hearing, Compliance Schedule, affidavits, letters, the CEB's Findings of Fact, Conclusions of Law, and Order from the June 11, 2008 hearing, and the Statutory Order Imposing Penalty/Lien. Accordingly, this Court concurs with the City that the violations pertaining to stucco work and closing in the wall were outside of the record and scope of the Order being appealed. Thus, this Court's review of this argument cannot go further.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the City of Orlando Code Enforcement Board's "Order Denying Request for Reconsideration of the Penalty" entered December 12, 2012 is **AFFIRMED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 9th day of April, 2014.

/S/ _____
A. THOMAS MIHOK
Circuit Judge

LUBET, J., concurs.

G. ADAMS, J., dissents without opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Kenneth M. Beane, Esquire**, 2601 Wells Avenue, Suite 181, Fern Park, Florida, 32730 and **Victoria Cecil Walker, Assistant City Attorney**, Orlando City Hall, 400 S. Orange Avenue, Orlando, Florida 32801 on this 9th day of April, 2014.

/S/ _____
Judicial Assistant