NOT FINAL UNTIL DISPOSITION
OF TIMELY-FILED MOTION FOR
REHEARING OR CLARIFICATION

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION
CASE NO.: 2022-13-AP-01

DIEGO RODRIGUEZ

Appellant,

v.

MIAMI-DADE COUNTY,
FLORIDA CODE ENFORCEMENT

Appellee.
_____/

OPINION

Opinion filed: March 20, 2024

An Appeal from a March 3, 2022 Final Order of Miami-Dade County, Florida Code Enforcement bearing Citation # 2021-G177360.

Adam S. Feldman, Esquire, Cernitz, Shanbron, LLC, for Diego Rodriguez, Appellant.

Ryan Carlin, Esquire, Assistant County Attorney, Miami-Dade County Attorney's Office, for Miami-Dade County, Florida Code Enforcement, Appellee.

Before: TRAWICK, SANTOVENIA, and ARECES, R., JJ.

SANTOVENIA, J.

Factual History

On May 10, 2021, Miami-Dade Police Sergeant Wilhelm issued a citation to Appellant Diego Daniel Rodriguez ("Appellant" or "Rodriguez") for an open burn in violation of Sec. 24-41.4 of the Miami Dade County Code of Ordinances. Rodriguez elected to appeal the citation and a hearing was held on March 3, 2022 before Hearing Officer Charles Everett ("Hearing Officer").

Sergeant Wilhelm, of the agricultural patrol section, testified at the hearing that he smelled smoke and found the open burn pit with smoke emanating from the inside of a metal garbage container on Rodriguez's property ("Property"), which was unattended. He knew it was Rodriguez's property because Rodriguez had identified himself as the Property owner when Wilhelm had been there on a previous occasion for another incident involving the same violation. Rodriguez was given a verbal warning for the prior incident.

Wilhelm showed body-worn camera footage of the scene, and also testified that there was no permit obtained to conduct the open

burn. The fire was burning within 100 feet of a building. Wilhelm testified that as the fire was unattended, it could have spread to other property or structures in the area. Wilhelm also testified that the smoke could have become heavy and thick, causing the roadway nearby to be obscured and dangerous for travelers.

Wilhelm testified that permits for open burns are normally issued by the Miami-Dade County Fire Rescue Department depending on weather conditions.

Rodriguez did not cross-examine the officer, but disputed that the nighttime burn was unattended and testified that he was *probably* on the Property. He also disputed that he needed a permit and argued that Section 823.145, Florida Statutes, exempted him from the requirement of obtaining a permit to conduct the burn. He did not present the Hearing Officer with a copy of the statute, but quoted the statutory terms to the Hearing Officer.

The Hearing Officer subsequently found in favor of Miami-Dade County, relying on the evidence and testimony of Sergeant Wilhelm. Rodriguez was found to be in violation of County Ordinance 24-41.4 and fined a civil penalty and costs, for a total of $452.00. This appeal followed.

Standard of Review

The applicable standard of review of an administrative decision by the circuit court includes a determination of: (1) whether procedural due process is 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. *See Broward County v. G. B. V. International, Ltd.*, 787 So. 2d 838 (Fla. 2001); *Haines City Cmty. Dev. v. Heggs,* 658 So. 2d 523 (Fla. 1995).

A departure from the essential requirements of law means an inherent illegality or irregularity, an abuse of judicial power, or an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. *Haines, supra.*, *Id.* at 527. As long as the record contains competent substantial evidence to support the underlying decision, the decision is presumed lawful and the court's job is ended. *Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs,* 794 So. 2d 1270, 1275-76 (Fla. 2001).

Procedural Due Process

Procedural due process requires notice and an opportunity to

be heard. *Kupke v. Orange County,* 838 So. 2d 598 (Fla. 5th DCA 2003). Moreover, "[d]ue process is a flexible concept and requires only that the proceeding be 'essentially fair.'" *Carillon Cmty. Residential v. Seminole Cnty.*, 45 So. 3d 7, 9 (Fla. 5th DCA 2010). "The extent of procedural due process varies with the character of the interest and the nature of the proceedings involved." *Id.*

Procedural due process in the administrative setting does not always require application of the judicial model. *Hadley v. Dept. of Admin.,* 411 So. 2d 184 (Fla. 1982); *Seminole Ent., Inc. v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th DCA 2001). Consequently, such hearings are not controlled by strict rules of evidence and procedure. *Id.* Under all circumstances, due process requires notice reasonably calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Dawson v. Saada,* 608 So. 2d 806 (Fla. 1992). A party to a quasi-judicial hearing "must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Kupke, supra.*, 838 So. 2d at 599 (Fla. 5th DCA 2003) (citing *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship,* 619 So. 2d 996 (Fla. 2d DCA 1993)).

The Appellant here was provided the opportunity to present evidence without being curtailed in any way in his presentation[1] and to cross-examine witnesses if he so chose (he chose not to cross-examine Sergeant Wilhelm). He was also presented with the facts upon which the Hearing Officer's ruling was based. Accordingly, due process was afforded to Appellant. [2]

Competent Substantial Evidence

The Appellant's Initial Brief does not argue that the Hearing Officer's decision is not supported by competent substantial evidence. Notwithstanding, the Court addresses that there is competent substantial evidence supporting the Hearing Officer's decision.

Notably, the record below includes Appellant's May 23, 2021 letter addressed to Code Enforcement and signed by Appellant which attempts to negate any involvement by Appellant with the open burn on the night in question and with ownership of the Property. The letter states that:

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[1] When given the opportunity to cross-examine the County's witness and to present his own testimony, Appellant argued that "the statute speaks for itself. So I don't know what more to say". (R. 72)

[2] The Hearing Officer should not infer from this finding that his failure to read the Florida Right to Farm Act exemplifies a model of procedural due process.

> I have received this violation **yet I never was at this property on 5/10/2021 at 2:20 am.** The owner of the property is FLAVORUS INC with a mailing address of 2780 SW 37th Ave., Suite #100, Miami, Florida 33133.

(R. 1, 5, 8) (emphasis added). Conversely, Appellant testified at the hearing that he *was probably* at the Property legally burning plastic remnants as allowed by Section 823.145, Fla. Stat., titled "Disposal by open burning of certain materials used in agricultural operations."

"Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The test is whether any competent substantial evidence exists to support the decision maker's conclusions, and any evidence which would support a contrary conclusion is irrelevant. *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm's.*, 794 So. 2d 1270, 1276 (Fla. 2001).

If any competent substantial countervailing evidence exists, it is legally irrelevant. See *Dusseau*, 794 So. 2d at 1274 ("[C]ontrary evidence . . . is irrelevant to the lawfulness of the decision[.]"); *see also State, Dep't of Hwy. Safety & Motor Vehicles v. Wiggins*, 151 So. 3d 457, 464 (Fla. 1st DCA 2014) ("The sole starting (and ending) point

is a search of the record for competent substantial evidence *supporting* the decision.") (emphasis in original).

Appellant's admission in his May 23, 2021 letter addressed to Code Enforcement that he *was not* at the Property on the night in question is competent substantial evidence in the record supporting the Hearing Officer's conclusion. Thus, we find no error in the Hearing Officer's rejection of a statutory legal argument which ultimately requires acceptance as true of a contrary factual assertion that Petitioner *was probably* at the Property on the night in question. (R. 73:12-14). Of course, such credibility determinations are for the Hearing Officer to make and are not subject to our review.

Appellant did quote the provisions of the specific statute upon which he relied, Section 823.145, Fla. Stat., to the Hearing Officer, as follows:

> I have 823.145, which exempts me from any open burn. Its disposal of open burning of certain materials used in agricultural operations.
> Polyethylene, agricultural p1astic; damaged, nonsalvageable, untreated wood pallets; packing material that cannot be feasibly recycled, which are used in connection with agricultural operations related to the growing, harvesting, or maintenance of crops, may be disposed of by open burning **provided that no public nuisance or any condition adversely affects the environment or the public health is created thereby**

> **and that state or federal national ambient air quality standards are not violated**.

(R. 71:14-72:7) (emphasis added).

Even assuming *arguendo* that Section 823.145 did apply to Appellant's open burn, the statute clearly only allows the burning of certain materials and for limited purposes, explicitly listed in the statute, and requires conditions that do not create a public nuisance, a condition adversely affecting the public health, or a violation of air quality standards. Appellant did not address below how the open burn complied with the highlighted proviso in Section 823.145, Fla. Stat.

Sergeant Wilhelm's testimony is competent substantial evidence for the Hearing Officer's findings and conclusion that:

> there was no one present at the time that the officer was on the scene, at least when the fire was still there and at least smoldering. I see evidence of the smoke in the photograph itself.

(R. 74:18-75:5). Specifically, Sergeant Wilhelm testified regarding safety concerns of another property catching on fire, a concern that the building which was within 100 feet of the open burn may be occupied, and the possibility of heavy and thick smoke causing the

roadway nearby to be obscured so that travelers could not see where they were travelling, and that "there's a lot of danger in the area". (R. 66:21-67:6; 69:14-24). That testimony of the open burn conditions present on the night in question is also wholly inconsistent with the open burn conditions that are allowed by Section 823.145 in any event.

As to Appellant's mere mention at the hearing of Section 823.14, the Florida Right to Farm Act, beyond Appellant arguing that "I'm a farmer and I'm exempt from any permit", there is no record below of any evidence having been presented by Appellant as to how the Property allegedly falls within the definitions of "farm" and "farm operation" and other provisions of Section 823.14. *See, e.g., Haines Cnty*, 658 So. 2d at 529 ("the circuit court functions as an appellate court, and, among other things, may not reweigh the evidence or substitute its judgment for that of the [Commission.]"); *G.B.V. Int'l*, 787 So. 2d at 843 (the circuit court "should review the record to determine simply whether the Commission's decision is supported by competent substantial evidence."); *Dusseau*, 794 So. 2d at 1275 (evidence contrary to the decision is "irrelevant").

Essential Requirements of Law

Notwithstanding the Hearing Officer's lack of familiarity with the provisions of the Florida Right to Farm Act, the Hearing Officer's conclusion is nonetheless mandated by Appellant's failure to establish any facts supporting application of the Florida Right to Farm Act to Appellant's prohibited open burning activity without a permit.

The only specific statute upon which Appellant relied at the hearing, Section 823.145, Fla. Stat., is a separate statute from Section 823.14, the Florida Right to Farm Act. Appellant merely mentioned at the hearing the Florida Right to Farm Act without mentioning how it allegedly applies to Appellant. The court notes that the stated legislative intent and purpose of the Florida Right to Farm Act is "to protect reasonable agricultural and complementary agritourism activities conducted on farm land [sic] from nuisance suits and other similar lawsuits". Section 823.14(2), Fla. Stat. The Florida Right to Farm Act provides, in relevant part, that:

> **4) Farm operation not to be or become a nuisance.—**
> (a) No farm operation which has been in operation for 1 year or more since its established date of operation and which was not a nuisance at the time of its established

> date of operation shall be a public or private nuisance if the farm operation conforms to generally accepted agricultural and management practices…

It is significant to note that Appellant was not sued for creating a nuisance by his open burning activity. Rather, he was cited for violating a Miami-Dade County ordinance for conducting an unattended, open burn without a permit. There is also no record below of any evidence having been presented by Appellant as to how the Florida Right to Farm Act somehow pre-empts the County's ordinance. Being a farmer, standing alone, does not exempt one from complying with local ordinances and permitting requirements.

Additionally, in a similar case where a county sought a summary judgment that its zoning permit regulations regarding nurseries are not governed by the Florida Right to Farm Act because they are not intended to limit farming operations, the Fourth District Court of Appeal held that the Act does not prohibit enforcement of ordinances in existence at the time of the adoption of the Act. *Wilson v. Palm Beach Cnty.,* 62 So. 3d 1247, 1248 (Fla. 4th DCA 2011). Rather, the Act restricts local governments from adopting new ordinances that "prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation on land classified as agricultural

land pursuant to s. 193.461, where such activity is regulated through implemented best management practices or interim measures developed by the Department of Environmental Protection, the Department of Agriculture and Consumer Services, or water management districts and adopted under chapter 120 as part of a statewide or regional program".[3] *Id*. at 1250-1251.

The Hearing Officer's decision followed a hearing at which due process was afforded the Appellant, as he received notice of and participated in the hearing, but presented no evidence. The decision is also supported by competent substantial evidence and complies with the essential requirements of law. For the foregoing reasons, the Hearing Officer's decision is affirmed.

Additionally, this Court denies Appellant's motion for attorney's fees under Section 57.105 (5), Fla. Stat.

TRAWICK, J., CONCURS

ARECES, R., J., DISSENTS

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[3] Appellant made no factual argument below regarding its alleged bona fide farming operation, how that operation is otherwise regulated on the state level, or how the County's ordinance is pre-empted by the Florida Right to Farm Act. *Wilson* notes that the Florida Right to Farm Act "limit[s] adoption of new ordinances from the date the Legislature first prohibited such adoption, which occurred on June 16, 2000." *Id.* at 1249. Appellant also did not address below or in its initial or reply briefs whether the County's ordinance was first enacted before or after the Florida Right to Farm Act.

I dissent.

The basic requirements of due process are "notice and a *meaningful* opportunity to be heard." *Pena v. Rodriguez*, 273 So. 3d 237, 240 (Fla. 3d DCA 2019) (emphasis added). The Florida Supreme Court has, moreover, explained that "[t]here is…no single, unchanging test which may be applied to determine whether the requirements of procedural due process have been met." *Hadley v. Dept. of Administration*, 411 So. 2d 184, 187 (Fla. 1982); *see also Volynsky v. Park Treet Investments 21, LLC.*, 322 So. 2d 714, 715 (Fla. 3d DCA 2021) ("the specific parameters of the notice and 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.").

Additionally, Florida courts have long held that due process must not be illusory. *See e.g. Redman v. Kyle*, 76 Fla. 79 (Fla. 1919) ("the hearing allowed must be such as is practicable and reasonable in the particular case, not merely colorable and illusory."). Florida courts have, in fact, held that "due process requires that judicial decisions be reached by a means that preserves both the appearance

and reality of fairness." *Pena*, 273 So. 3d at 240.

In this case, Petitioner was denied due process. Petitioner was cited for an open burn in violation of Sec. 24-41.4 of the Miami Dade County Code of Ordinances. A remote hearing was held on March 3, 2022. At said hearing, Petitioner appeared remotely and, among other things, attempted to explain that he was exempt from Sec. 24-41.4, because, as a farmer, he is permitted to open burn certain materials. Specifically, Petitioner said,

> Sir, under Florida Statute 8213 - - 823-14, which is the Florida Right to Farm Act, I have 823.145, which exempts me from any open burn. Its disposal of open burning of certain materials used in agricultural operations. Polyethylene, agricultural plastic; damaged, non-salvageable, untreated wood pallets; packing material that cannot be feasibly recycled, which are used in connection with agricultural operations related to the growing, harvesting, or maintenance of crops, may be disposed of by open burning provided that no public nuisance or any condition adversely effects the environment or the public health is created thereby and that state or federal national ambient air quality standards are not violated.

R. at 13:14-14:7. Petitioner's recitation of the law is largely consistent with its actual language. *See* § 823.145, Fla. Stat. The Petitioner went on to argue that he fell under the statutory provision's

protection.

The Hearing Officer then completely ignored Petitioner's argument and ruled against him because he "[did] not have" the statute "in front of him." R. 16:12-17. Specifically, the Hearing Officer stated,

> All right. Based upon the evidence and testimony that I've received, **notwithstanding the Florida Statute, which I do not have in front of me**, I'm going to give you an opportunity, once I make a ruling, for either side to appeal my decision.

R. 16:11-17. Telling a litigant—let alone a *pro se* litigant and member of the community—that the tribunal has ruled against him, not because the law did not favor him, but merely because no one could be bothered to look up the law on their computer or smartphone and apply it to the facts, or not, as may be appropriate, is not due process. This is particularly true where the Hearing Officer acknowledges that said law, if applicable to Petitioner, could preempt the very Ordinance under which Petitioner was cited. Specifically, the Hearing Officer in this case stated,

> I am going to find in favor of the department, notwithstanding the Respondent's citing of the statute itself. That will be handled on appeal.

> I do—I will assert and will assert [sic] that **if that statute does exist**,[4] it does trump county court law. State law is superior to county court law. **I do not have the statute in front of me. So I'm ruling in favor of the department**.

R. 17:6-11.

This is unacceptable.

I do not know whether sec. 823.145, Fla. Stat. applies to Petitioner, nor whether it can, or should, afford Petitioner a defense to the specific charges against him. The problem is that the Hearing Officer doesn't know either.

Petitioner was not afforded a *meaningful* opportunity to be heard. The due process afforded to him was illusory.

I would grant the Petition for Writ and remand for the Hearing Officer to conduct an actual hearing where the laws that are cited by the Parties are read, considered, and applied to the facts, or not, as may appropriate.

COPIES FURNISHED TO COUNSEL
OF RECORD AND TO ANY PARTY
NOT REPRESENTED BY COUNSEL.

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[4] The statute does, in fact, exist.

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