

IN THE MATTER OF
DENNIS G. SYKES -APPELLANT
1706 SELMA AVENUE
HALETHORPE, MD 21227

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. CBA-17-014

RE: Civil Citation No.: CB 1600276

* * * * *

OPINION

This matter comes before the Board of Appeals for Baltimore County (the “Board”) as a Record Appeal from a Code Enforcement Hearing that occurred on October 11, 2016, before the Administrative Law Judge (ALJ). The hearing concerned an alleged violation at 1706 Selma Avenue, Halethorpe, Maryland 21227 (the “Property”). The ALJ found that the property owner, Dennis G. Sykes, (“property owner”) failed to comply with a Civil Citation issued on June 2, 2016, requiring him to repair or remove a failing porch roof and associated gutters. The property owner was fined \$3,000.00, with all but \$2,900.00 suspended, and required to make the needed repairs by November 29, 2016, upon pain of the reinstatement of the entire \$3,000.00 fine.

BACKGROUND

This case comes before the Board as a Record Appeal. Accordingly, the Board’s review of the ALJ’s decision is solely based on the audio record of the October 11, 2016, Code Enforcement Hearing that the Board was provided and the oral argument presented before the Board at the appeal hearing on December 7, 2016.

As was testified to at the October Code Enforcement Hearing, pursuant to the Baltimore County Building Code, § 40-12, Part 121.1 – Notice of Unsafe Structure, and Part 121.2 – Repair Order, Inspector Robert Peters issued a Code Enforcement & Inspections Citation on June 2, 2016

to the property owner. The citation alleged that there was a failing porch roof which represented a dangerous and unsafe condition. The citation required the owner to promptly obtain a work permit and repair the structure. However, at the hearing itself, Inspector Peters did not appear. Rather, the above information regarding Inspector Peter's actions and findings and conclusions, along with photographs taken by Mr. Peters, were provided by a different Inspector, James Garland. Mr. Garland had not been present when Mr. Peters made his inspection, took the photographs, and/or issued the citation. Following Mr. Garland's testimony, the ALJ questioned Mr. Sykes who acknowledged that the photographs were accurate and that the porch, in fact, needed repair. It was established that on June 16, 2016, some two weeks after the issuance of the citation, Mr. Sykes had obtained a building permit to allow the required repairs to be made. The repairs had not been made as of the date of the hearing before the ALJ.

It was on this record that the ALJ sustained the citation. He imposed a civil penalty of \$3,000.00 with all but \$2,900.00 suspended, so long as the property was brought into compliance by November 29, 2016. According to the recording of the proceeding, the entire matter took about eight minutes. A timely appeal was noted to this Board.

BOARD'S OPINION

An appeal to the Board of Appeals for a code violation is an appeal on the record made before the ALJ. Section 3-6-303 (a) of the Baltimore County Code provides in pertinent part:

(a) Hearing on the record.

(1) (i) Except as provided in subsection (b) of this section, the Board of Appeals hearing shall be limited to the record created before the Hearing Officer, which shall include:

1. Except as provided in paragraph (2) of this subsection, the recording of the testimony presented to the Hearing Officer;
2. All exhibits and other papers filed with the Hearing Officer; and
3. The written findings and final order of the Hearing Officer.

(ii) If the violator requests a transcription of the recording, the violator shall pay the cost of the transcription...

All of the items delineated in § 3-6-303(a) are included in the record before the Board.

After hearing the argument on the record, this Board has the authority under BCC, §3-6-304 to do the following:

(a) *Disposition options.* In a proceeding under this subtitle, the Board of Appeals may:

- (1) Remand the case to the Hearing Officer;
- (2) Affirm the final order of the Hearing Officer; or
- (3) Reverse or modify the final order if a finding, conclusion, or decision of the Code Official, the Director, or the Hearing Officer:
 - (i) Exceeds the statutory authority or jurisdiction of the Code Official, the Director, or the Hearing Officer;
 - (ii) Results from an unlawful procedure;
 - (iii) Is affected by any other error of law;
 - (iv) Subject to subsection (b) of this section, is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
 - (v) Is arbitrary or capricious.

The primary question raised by this case is whether the County can sustain its burden to prove the alleged violation through the use of what may be usefully referred to as a “surrogate witness.” Everyone acknowledges that Inspector Peters was the inspector who issued the citation, witnessed the condition of the house, and took the photographs of the allegedly dangerous condition. Yet Mr. Peters was not present at the hearing to provide his eyewitness account or to authenticate the photographs. Instead, Inspector Garland testified to what Mr. Peters would have said, under oath, had Mr. Peters been present. The County’s case essentially ended there, and on that record, the evidence would have been insufficient. At that point, however, the ALJ questioned Mr. Sykes, and elicited from Mr. Sykes admissions as to all of the matters that the County was required to prove, thereby repairing any possible deficiencies in the County’s case. It was on that basis that the civil penalty was imposed.

To justify the Garland testimony as a substitute for Peters, the County argues, with some merit, that hearsay is admissible in these hearings, and therefore the Garland testimony should suffice. Certainly as to the ownership of the property, the issuance and nature of the citation, and any other matter reflecting official action, Mr. Garland's testimony is adequate and admissible. The question of the photographs as a fair and accurate representation of the violation at the time of the issuance of the citation is more problematic. Mr. Garland could not, and did not state that these photographs satisfied the typical standard for admission because he had never inspected the property. His testimony amounted to saying that Mr. Peters believes, and would testify if present, that the photographs were a fair and reasonable depiction of the subject property and reflect the condition leading to the violation. Either properly authenticated photographs or the eyewitness testimony of an inspector are crucial in proving the violation. Even a notarized affidavit under the penalties of perjury from Mr. Peters would have possibly helped somewhat. This possible weakness in the County's presentation was remedied by the ALJ questioning Mr. Sykes who, in response, not only ratified the information that had been presented against him, but also "cured" the possible evidentiary defects. Again, the County argues, with some merit, that this was a civil proceeding, and therefore Mr. Sykes had no right to refuse to testify, had no right to counsel, and had no right to be alerted to the consequences of his providing information in the matter that would salvage a failure of proof in the County's case against him. It is even arguable that if Mr. Sykes had refused to respond to the questions from the ALJ, the ALJ could have drawn a negative inference against Mr. Sykes based on the refusal to provide information.

While it is true that this is technically a civil proceeding, there is a significant punitive component, i.e., a fine of up to \$200 per day of the life of the violation. Indeed, in this case, the ALJ initially imposed a fine of \$8,000.00, based on 40 days of the violation existing. While the

fine was reduced to \$3,000.00, either sum is considerable to any person of ordinary means. The ALJ suspended all but \$100.00 and used the possibility of the full \$3,000.00 fine as strong incentive to Mr. Sykes to make the repairs. This is perfectly appropriate. Yet it is the possibility of such a significant fine that causes the Board to be concerned about procedural fairness.

The use of a surrogate witness in Mr. Sykes' case was unusual and apparently largely unplanned. We were told by the County Attorney at the hearing that the County is considering procedures for future cases in which a single County representative would testify in lieu of the actual inspectors who made the inspections. The County Attorney indicated that the County is trying establish appropriate guidelines for when and how such a surrogate would be used. This type of procedure could well be an appropriate method to free up the inspectors from what is often very routine and uncontested testimony. Indeed, the testimony is probably so routine and so uncontested that it is difficult for the participants to resist the conclusion that satisfying all of the "niceties" is a needless technicality. Nonetheless, the fair resolution of these cases involves an ALJ assessing the sufficiency of the evidence. Otherwise, the word of an inspector, without more, would be enough, and the ALJ's role would be reduced simply to fashioning a disposition based on a cold record. So, while it may well be possible to establish procedures that would dispense with the need for the actual inspector to attend the hearing (like is done in many traffic court cases), those procedures have to be carefully constructed to insure procedural and substantive fairness.

Given Mr. Peter's absence, the County failed to adequately authenticate the photographs specifically, and the precise technical nature of the cited condition generally. In this particular case, without the carefully constructed safeguards that the County will be creating, the Board is unwilling to have the questioning of Mr. Sykes be the basis upon which the County's failure of proof is remedied. For that reason, the Board is ruling in Mr. Sykes' favor; in this instance

however, there is nothing to prevent the County from re-inspecting Mr. Sykes' home and, if appropriate, re-issuing a citation.

CONCLUSION

Based on the findings stated above, the Board finds that the ALJ decision of October 11, 2016 in this matter was unsupported by competent, material and substantial evidence and resulted from an unlawful procedure. The ALJ decision is therefore REVERSED. Mr. Sykes has paid the \$100.00 fine, and it should be refunded as well as the normal costs of the appeal. Mr. Sykes has requested further financial compensation of \$300.00 for "time and travel". There is no basis in law for such an award, and it is denied. Mr. Sykes has also requested that the Board order the County to assign an inspector other than Mr. Peters for all future matters concerning Mr. Sykes' premises. Assignment of inspectors is a matter wholly within the purview of Code Enforcement. This Board lacks the authority (and desire) to meddle in the operations of the Department of Permits, Approvals, and Inspections.

ORDER

THEREFORE, IT IS THIS 21st day of December, 2016 by the
Board of Appeals of Baltimore County

ORDERED that the October 11, 2016 decision of the Administrative Law Judge in this matter be and the same is hereby **REVERSED**; and it is further

ORDERED that the Violation and the fine issued by the Administrative Law Judge in Citation Number CB1600276 be and the same are hereby **DISMISSED**.

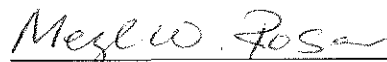
In the matter of: Dennis Sykes/CBA-17-014

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

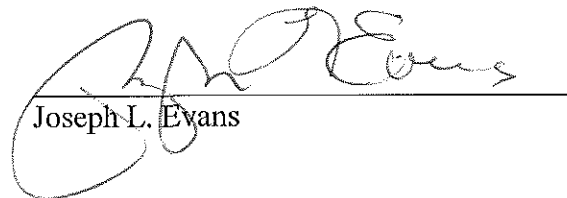
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Andrew M. Belt, Panel Chairman



Meryl W. Rosen



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Board of Appeals of Baltimore County

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December 21, 2016

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Dennis G. Sykes
1706 Selma Avenue
Halethorpe, Maryland 21227

RE: *In the Matter of: Dennis G. Sykes*
Case No.: CBA-17-014

Dear Messrs. Merrick and Sykes:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all **Petitions for Judicial Review** filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington Ham".

Krysundra "Sunny" Cannington
Administrator

KC/tam
Enclosure
Duplicate Original Cover Letter

c: Robert Peters, Inspector/Code Enforcement
James R. Garland, Jr., Inspector/Code Enforcement
Lawrence M. Stahl, Managing Administrative Law Judge
Lionel Van Dommeleon, Chief/Code Enforcement
Arnold Jablon, Deputy Administrative Officer, and Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law