

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 26-10044
Non-Argument Calendar

JESSE LEE,

Plaintiff-Appellant,

versus

CITY OF GULFPORT,
CITY MANAGER, GULFPORT,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:23-cv-02996-VMC-AEP

Before JORDAN, ABUDU, and ANDERSON, Circuit Judges.

PER CURIAM:

Jesse Lee appeals the district court's grant of summary judgment in favor of the City of Gulfport and its Manager, James

O'Reilly, on his claims that trespass warnings issued to him violated his substantive and procedural due process rights. Exercising plenary review of the district court's order, *see Fernandez v. Seaboard Marine Ltd.*, 135 F. 4th 939, 947 (11th Cir. 2025), and for the reasons that follow, we affirm in part and vacate in part.

I

The City, at the behest of its Manager, Mr. O'Reilly, had the Gulfport Police Department issue two written trespass warnings to Mr. Lee due to: (a) his causing a disturbance at the City's Building Department during the COVID-19 pandemic by pressing the handicap button on the outside of a door, thereby preventing a City employee from closing it (the 2020 incident); and (b) his refusing to leave the Building Department when told to do so (the 2021 incident).¹

In 2023, Mr. Lee was arrested for trespassing after refusing to leave the premises of the Gulfport Casino during a private event and being told to leave. The trespassing charge for this incident was later dropped and is not at issue in this appeal (except to provide background).

The two warnings, which stated that they were indefinite in duration, prohibited Mr. Lee from returning to the City Hall Complex except to attend City Council meetings and to conduct in-person business at City Hall if accompanied by a police escort. The

¹ Florida's trespass statute can be found at Fla. Stat. § 810.09.

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warnings also did not state whether they could be appealed, or how, or to whom.

II

We first address Mr. Lee’s substantive due process claim. When a plaintiff challenges executive action as a violation of substantive due process, the question is whether the conduct at issue is so outrageous that it “shocks the conscience.” *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998); *Henry v. Sheriff of Tuscaloosa Cnty.*, 180 F.4th 1294, 1301 n.2 (11th Cir. 2026) (en banc).

In this circuit, individuals have a constitutionally protected liberty interest “to be in parks or on other city lands of their choosing that are open to the public generally,” but a “person may forfeit this liberty interest by trespass or other violation of law.” *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011). Mr. Lee, quoting our decision in *Catron*, submits that “[e]ven if it is impractical for the City to provide a pre-warning hearing to assure that there are reasonable grounds to support the trespass warning, the City must provide some post-deprivation procedure to satisfy the requirements of the Due Process Clause.” *Id.* at 1268 (internal quotation marks omitted).

The problem for Mr. Lee is that this language from *Catron* concerns procedural due process, and not substantive due process. Indeed, Mr. Lee seems to conflate substantive due process and procedural due process by arguing, in the substantive due process portion of his brief, that the trespass warnings were inadequate because they did not provide him with proper notice—i.e., they did

not tell him why he was being issued the warnings and they did not tell him how he could appeal the warnings. He also contends that the right of appeal, to the extent it existed, was not in writing at the time of the warnings and was therefore ephemeral.

We take up these alleged procedural deficiencies in Part III below. But those deficiencies do not make the trespass warnings violative of substantive due process. As the Supreme Court has explained, the substantive component of the Due Process Clause “bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.” *Zinerman v. Burch*, 494 U.S. 113, 125 (1990) (internal quotation marks omitted). On the other hand, infirmities in the process provided are front and center in determining whether a person has been deprived of procedural due process. *See id.* (“In procedural due process claims, the deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*.”) (emphasis in original). *See also, e.g., Bettendorf v. St. Croix Cnty.*, 631 F.3d 421, 426 (7th Cir. 2011) (“While [substantive due process] relates to the propriety of the decision itself, [procedural due process] is concerned with the manner in which a decision is made. As this Court has said repeatedly, the two are not to be confused.”).

The only real substantive due process argument that Mr. Lee makes is that the trespass warnings were of indefinite duration and therefore, in his view, of a permanent character. But contrary to

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what Mr. Lee suggests, the trespass warnings did not constitute a complete premises ban; Mr. Lee was still permitted to attend City Council meetings and could conduct in-person business at City Hall if accompanied by a police escort.

In our view, the prohibitions triggered by the trespass warnings did not “shock the conscience.” The trespass warnings left sufficient room for Mr. Lee to visit the City Hall Complex to do business, in person, with the City and its officials. As a result, the prohibitions were not akin to a permanent governmental “banishing” from public property. *Cf. Baldwin v. Alsbury*, 223 So. 2d 546, 547 (Fla. 1969) (“[T]he court was without power to indefinitely suspend a sentence in return for petitioner’s promise to stay out of town.”). As we have said, “[w]hen ‘executive action’ is involved, only the most egregious official conduct can be said to be arbitrary in the constitutional sense.” *Littlejohn v. School Bd. of Leon Cnty.*, 132 F.4th 1240 (11th Cir. 2025) (some internal quotation marks and citation omitted). The trespass warnings here fell short of that high standard.²

² Given our rejection of the substantive due process claim, we need not address the appellees’ argument that this claim fails because the City Hall Complex is a non-public forum. *Cf. Daniel v. City of Tampa*, 38 F.3d 546, 549–50 (11th Cir. 1994) (addressing, in a First Amendment challenge to § 810.09, whether housing authority property was a non-public forum).

III

Next we turn to the procedural due process claim. We have explained the basis of that claim in Part II, so we won't repeat it here.

The essence of procedural due process is notice and an opportunity to be heard. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). Based on Mr. Lee's statements at his deposition, we affirm as to some aspects of the due process claim but vacate as to others.

A

The first aspect of Mr. Lee's procedural due process claim is that the City completely failed to provide any post-deprivation remedy.

As noted earlier, the trespass warnings issued to Mr. Lee in 2020 and 2021 were of indefinite duration. In January of 2022, the Gulfport Police Department issued Written Directive 406.08, which provided for appeals to the City Manager of trespass warnings on public property or in public buildings. *See* D.E. 1, Exh. 4 at 4 ("The trespassed individual may file an appeal with the City Manager's office to have the trespass warning repealed or amended. Upon notification by the City Manager's office of any changes regarding the status of a trespass warning, an officer will ensure that any relevant records and/or databases are appropriately updated.") (exhibit to Mr. Lee's initial complaint). Because the trespass warnings were in effect when Directive 406.08 was issued, we assume

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that Mr. Lee could have appealed those warnings early in 2022. Indeed, Mr. Lee—given his deposition testimony—does not appear to contend otherwise. *See* D.E. 89-2 at 166 (Mr. Lee stating that he chose not to appeal because the appeal would be heard by Mr. O’Reilly).

So the City provided an appellate remedy. And because Mr. Lee does not deny that Directive 406.08 could have been used to challenge the earlier 2020 and 2021 trespass warnings, we affirm the district court’s rejection of his claim that the City failed to provide any post-deprivation remedy.³

B

There is, however, another aspect of the procedural due process claim that the district court got wrong. The court ruled that the procedural due process claim failed because it had already rejected the substantive due process claim (i.e., because the warnings did not unconstitutionally deprive Mr. Lee of a protected liberty interest). *See* D.E. 122 at 32 (“As there was no constitutional violation [of substantive due process], Mr. O’Reilly is entitled to qualified immunity on Counts VI and VII, and Gulfport cannot be held liable under 42 U.S.C. § 1983.”). This was mistaken. That certain government conduct does not “shock the conscience” for purposes

³ Mr. Lee contends that there was no way for him to know in 2020 or 2021 that an appellate remedy existed, but even assuming that is true, it does not explain why he could not have used Directive 406.08 in early 2022. As noted, Mr. Lee testified that he chose not to appeal because Mr. O’Reilly would have resolved the appeal.

of substantive due process does not doom a related but legally distinct procedural due process claim based on the lack of adequate notice or procedures. As noted earlier, the two types of due process claims are different.

An individual like Mr. Lee has a liberty interest in being in “parks or on other city lands of their choosing that are open to the public generally.” *Catron*, 658 F.3d at 1266. This liberty interest suffices to require procedural due process protections. *Cf. Benning v. Comm’r, Ga. Dept. of Corr.*, 71 F.4th 1324, 1332–33 (11th Cir. 2023) (liberty interest created by the First Amendment triggers procedural due process protections). “Even if it is impractical for the City to provide a pre-warning hearing to ‘assure that there are reasonable grounds to support’ the trespass warning, the City must provide some post-deprivation procedure to satisfy the requirements of the Due Process Clause.” *Catron*, 658 F.3d at 1268 (rejecting the contention that due process is satisfied through a person’s ability to challenge a trespass warning at a later criminal proceeding if and when he is charged with a violation of the state’s trespass statute).

Mr. O’Reilly testified that his decision on an appeal from a trespass warning, pursuant to Written Directive 406.08, could be appealed to the City Council. *See id.* The Gulfport City Code provides that “[a]ny person aggrieved by a decision or order of the city manager or his designee may appeal said decision as otherwise provided in the . . . Code.” Gulfport City Code § 22-17.15. But our review of the Code did not locate any ordinance which specified

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exactly how the City Manager’s decision in a trespass appeal case could itself be appealed. The Board of Adjustment, for example, can review zoning decisions made by the City Manager, *see* Gulfport City Code § 22-11.03(1), but we could not locate a comparable provision in the Code for trespass warning appeals, and the City has not provided us with one. It is therefore unclear to us what an appeal from the City Manager (to the extent it exists) would look like.⁴

In any event, Mr. Lee stated at his deposition that, though he was aware of the appellate remedy provided by Directive 406.08, he never appealed either of the trespass warnings. *See* D.E. 89-2 at 163–66. And the reason he did not appeal, he explained, was because he “fe[lt] that the person violating his rights [i.e., the City Manager who requested the issuance of the trespass warnings] should not be the one who has the authority to make those decisions. . . . That’s it.” *Id.* at 166. When asked if he made a “conscious and deliberate decision and choice to deliberately not file an appeal of either of [the] trespass warnings . . . pursuant to . . . [D]irective 406.08,” Mr. Lee answered “Yes.” *Id.* at 166.

The opportunity to be heard must be “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333

⁴ The City also does not tell us whether, or how, the City Council’s decision affirming, reversing, or modifying the City Manager’s decision under Directive 406.08 is judicially reviewable.

(1976). As applied to Mr. Lee, the appellate remedy provided by Directive 406.08 suffers from two potential problems.

First, in Mr. Lee's case, the person adjudicating the appeal is the same person who sought and obtained the trespass warnings that were issued. Mr. O'Reilly was, in essence, both the complainant at whose behest the warnings were issued to Mr. Lee and the official who was to consider any appeal filed by Mr. Lee. Cf. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."); *Sheldon v. S.E.C.*, 45 F.3d 1515, 1519 (11th Cir. 1995) ("[A]n agency may combine investigative, adversarial, and adjudicative functions, as long as no employees serve in dual roles.") (internal quotation marks and citation omitted). On remand, the district court will need to determine whether, and if so how, this dual role served by Mr. O'Reilly impacts Mr. Lee's procedural due process claim.

Second, Directive 406.08 provides no standards whatsoever by which the City Manager is to review a trespass warning. At his

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deposition, Mr. O'Reilly explained that if he received an appeal from a trespass warning, he would meet with the individual who had received the warning and find out if any other warnings had been issued to him by the Police Department, but he could not say what effect the existence of other warnings or their proximity in time would have on his review of the matter. *See* D.E. 89-4 at 22–23. At the end of the day, Mr. O'Reilly would base his decision on whether vacatur of the warning would “continu[e] [to] sustain[] the behaviors that have created it.” *Id.* at 23.

“[P]rocedural due process in the administrative setting does not always require application of the judicial model.” *Dixon v. Love*, 431 U.S. 105, 115 (1977). Thus, the possible concern here is not so much about the application of an open-ended standard that is subject to case-by-case adjudication. *Cf. Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1378–79 (11th Cir. 1994) (addressing whether “substantial work” standard set out in a city ordinance was unconstitutionally vague). Rather, it is the complete absence of a standard. When combined with the dual role of the City Manager as complainant and appeal adjudicator, the complete lack of a standard is potentially problematic. *See Barnes v. Merritt*, 376 F.2d 8, 11 (5th Cir. 1967) (“[T]he lack of ascertainable standards is a violation of due process actionable [in a 42 U.S.C. § 1983 lawsuit.]”) (holding that, where a municipality had denied the plaintiff’s application for a retail liquor license, a complaint alleging that “standards for deciding the qualifications of liquor license holders [were] totally non-existent” stated a claim for relief).

We express no views on the appropriate outcome of the second aspect of Mr. Lee's procedural due process claim. We conclude only that the district court erred in the reason it provided for granting summary judgment and that more analysis is needed on remand.

IV

The district court's summary judgment order is affirmed with the exception of the portion of the procedural due process claim as indicated above.

AFFIRMED IN PART AND VACATED IN PART.