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IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

JOHN W. STANTON,

Plaintiff,

CASE NO.: 01-2016-CA-______

v.

DIVISION: _____

CITY OF GAINESVILLE,

Defendant.
____________________________/

PETITION FOR WRIT OF CERTIORARI

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COMES NOW John W. Stanton, pursuant to Florida Rule of Appellate Procedure 9.100, and files this petition for writ of certiorari directed to the City of Gainesville.

BASIS FOR INVOKING JURISDICTION

This is a timely petition for writ of certiorari, as the City of Gainesville's Policy E-3, Section III.F.2. provides that an employee has 60 days from the date of final action to seek redress in the court system. This Court has jurisdiction under Florida Rule of Appellate Procedure 9.190(b)(3) and 9.030(c)(3), as certiorari is the proper method to review decisions rendered by local government agencies.[1]

[1] *See also* Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

PROCEDURAL BACKGROUND

Petitioner, John Stanton, was employed by the City of Gainesville (City) as an Assistant General Manager for Energy Supply at Gainesville Regional Utilities (GRU) from June 2008 until his termination in February of 2016.[2] Until August of 2015, Mr. Stanton reported to Ed Bielarski, the General Manager (GM) of Utilities. Mr. Bielarski is also a charter officer of the City of Gainesville.

On February 8, 2016, Mr. Stanton was given an "Employee Notice"[3] alleging violations of two rules (Rules 13 and 18) contained in City Policy E-3.[4] The notice recommended that Mr. Stanton be terminated and suspended him immediately without pay.

An informal conference was held on February 18, 2016, pursuant to section III.E.2. of Policy E-3. Present were Mr. Stanton and his lawyer; Mr. Bielarski; and Cheryl McBride, the City's human resources director. At that conference, Mr. Stanton provided argument and evidence against his termination. Mr. Bielarski provided no argument or evidence whatsoever.

On February 19, 2016, Mr. Bielarski terminated Mr. Stanton effective at the close of business that day.[5] Mr. Bielarski immediately issued a statement on

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[2] Mr. Stanton's title changed in 2015 to Energy Supply Officer, but his duties remained the same.

[3] *See* Exh. A.

[4] *See* Exh. B.

[5] *See* Exh. C.

behalf of GRU notifying employees of Mr. Stanton's termination and the alleged reasons therefor.[6] This statement was picked up by various news outlets and was published the same day in an article by the Gainesville Sun[7] and in a broadcast from WCJB-TV20, as well as on other websites such as www.vimeo.com, www.us.geonews.com, and www.wopular.com.

On February 26, 2016, Mr. Stanton, through counsel, sent a notice of appeal to Mr. Bielarski requesting a full evidentiary hearing pursuant to City Policy E-3 section III.F.[8] That section specifies that the Charter Officer shall hear any appeal from a notice of termination. As Mr. Bielarski is a Charter Officer and also served as the Department Head who participated in the informal conference and made the initial termination decision, the notice of appeal requested recusal of Mr. Bielarski in order to ensure a fair process. That request was denied,[9] and the evidentiary hearing was set.

At the evidentiary hearing on March 23, 2016, present were Mr. Stanton and his lawyer; Mr. Bielarski; Cheryl McBride, the City's human resources director (termed "management representative" in the final notice upholding the termination); and Shayla McNeill, the City's attorney for utilities (whose presence was not mentioned in the final letter upholding termination). Mr. Stanton again

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[6] *See* Exh. D.
[7] *See* Exh. E.
[8] *See* Exh. F.
[9] *See* Exh. G.

presented argument and evidence against termination. Mr. Bielarski presented nothing.

On April 5, 2016, Mr. Stanton received a letter from Mr. Bielarski notifying him that his termination had been upheld and that he had sixty days in which to appeal to the court system.[10] This petition follows.

FACTUAL BACKGROUND

As Assistant General Manager (AGM) for Energy Supply, a large part of Mr. Stanton's job was ensuring the proper operation and functioning of the multiple power plants that serve GRU's customers. Those plants must be taken out of operating status from time to time for planned maintenance activities (outages), among other things. To assist in managing the ever-changing supply and demand for power, projections must be made for current and future outage scheduling needs for the various plants operated by GRU.

Mr. Stanton created a ten-year outage plan and assumed responsibility for updating the previously-existing 12-month rolling outage schedule, similar to the ten-year plan but with more frequent changes. Both plans coordinated the scheduled outages of GRU's various plants with those of other utilities in Florida to ensure a reliable energy supply for GRU's customers. As conditions changed,

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[10] *See* Exh. H.

the plans were modified under Mr. Stanton's direction to reflect updated forecasts and published to the appropriate GRU employees.

Such modifications were needed when GRU and the Gainesville Renewable Energy Center (GREC) entered into an agreement whereby GREC would build, maintain, and operate a biomass plant in Gainesville that sells power to the City. The governing agreement is called the Power Purchase Agreement (PPA),[11] and as AGM for Energy Supply, Mr. Stanton was heavily involved in its negotiation and creation. Mr. Stanton's duties included oversight of all operational and administrative issues in the PPA, which necessarily encompassed maintenance planning and coordination between GREC and GRU and incorporation of the plant's forecasted outages into the ten-year and 12-month outage schedules.

Section 10.4.1(a) of the PPA requires that, no later than sixty days before the next calendar year, GREC submit an annual maintenance (outage) plan (AMP) to GRU containing a forecast of its planned maintenance activities for the plant. Importantly, there is no requirement that GRU approve of or agree to the AMP. Once the AMP is submitted, <u>then</u> any desired changes to it must be mutually agreeable to GREC and GRU.[12]

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[11] *See* Exh. I.

[12] *See* Exh. I at 12.

On October 14, 2015, GREC sent a letter to GRU announcing its AMP for 2016, noting that GREC planned no outages,[13] as GRU had ordered the plant into standby mode in August 2015 for economic reasons. The AMP was sent both via e-mail and certified mail pursuant to section 23.1 of the PPA.[14] Mr. Stanton acknowledged receipt of the AMP via e-mail to GREC,[15] and no changes were ever made to it.

On the other hand, changes were being made on a regular basis to the rolling 12-month outage schedule and the annually-revised 10-year outage schedule. In a string of e-mails between May 1, 2015 and June 18, 2015, GRU and GREC coordinated and adjusted dates for the biomass plant to take its spring outage in April of 2016.[16] This was within the normal course of business and was completely separate from the AMP required by the PPA.

Mr. Bielarski had a different take on the matter. He believed that the string of e-mails in May and June constituted the AMP and that the October 14, 2015 letter was an attempt by GREC to unilaterally change the AMP in contravention of the PPA. As Mr. Stanton had only operational authority under the PPA, and not

[13] *See* Exh. J.
[14] *See* Exh. I at 27.
[15] *See* Exh. K.
[16] *See* Exh. L.

contractual or legal authority, Mr. Bielarski took the position that Mr. Stanton had acted outside the scope of his duties by approving GREC's change to the AMP.[17]

Based on Mr. Bielarski's position, Mr. Stanton was given the "Employee Notice", suspended without pay, and ultimately terminated.

LEGAL STANDARD

When passing upon a petition for writ of certiorari based on a final decision rendered by a local government agency, the Court reviews three aspects of that decision:

1. whether procedural due process was accorded;
2. whether the essential requirements of law have been observed; and
3. whether the administrative findings and judgment are supported by competent substantial evidence.[18]

The City's action violated all three grounds. Each is discussed in turn.

LACK OF PROCEDURAL DUE PROCESS

Two of the basic components of due process are notice and an opportunity to be heard, and Mr. Stanton does not argue that he was deprived of either. However,

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[17] *See* Exh. M.
[18] Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

Mr. Bielarski filled at least two different roles during the termination process, thus reviewing his own decisions and denying Mr. Stanton a neutral arbiter. The Supreme Court of Florida has declared, "An impartial decisionmaker is a basic constituent of due process."[19] This principle applies to administrative agencies as well as courts.[20]

It is true that the mere combination of investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias.[21] However, it is an entirely different matter when an adjudicator reviews his own decision. The United States Supreme Court noted the distinction when discussing two cases relied upon by the lower court in rendering its opinion:[22]

> These decisions, however, pose a very different question. Each held that when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review. Allowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present [in the instant case].[23]

The Supreme Court of Florida, in Ridgewood Props., Inc. v. Dep't of Cmty. Affairs, agreed with this proposition.[24]

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[19] Ridgewood Props., Inc., v. Dep't of Cmty. Affairs, 562 So. 2d 322, 323 (Fla. 1990).
[20] Gibson v. Berryhill, 411 U.S. 564, 579 (1973).
[21] Winslow v. Dep't of Prof'l & Occ. Reg., 348 So. 2d 352, 353 (Fla. 1st DCA 1977).
[22] Withrow v. Larkin, 421 U.S. 35, 51 (1975).
[23] Id. at 58 n.25.
[24] *See* Ridgewood Props., 562 So. 2d at 323 (finding it improper for a department's secretary to appear as a witness and then issue the final order, noting that the

Such actions warrant the granting of certiorari. In King v. Miami-Dade Cty. Dep't of Corr., the court found a violation of due process where an assistant county manager upheld her own decision to terminate an employee.[25] The manager first initiated an investigation into alleged wrongful conduct by the employee.[26] She subsequently issued a "Notice of Intent to Discipline and Proposal of Action Sought."[27] While an impartial hearing officer presided over the administrative hearing, the manager issued the final decision letter overturning the hearing officer's findings.[28]

In granting certiorari, the court found a violation of due process:

> In the instant case, the Assistant County Manager . . . was called upon to conduct the final review of her own decision and recommendation to terminate [the employee]. Here, [the assistant county manager] approved her own original decision regarding [the employee's] termination . . . ."[29]

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secretary necessarily had to approve his own testimony to do so). *See also* Jones v. Fla. Keys Cmty. Coll., 984 So. 2d 556 (Fla. 3d DCA 2008)(granting certiorari where a Board of Trustees member voted to terminate an employee and then served as the hearing officer on the case).

[25] King v. Miami-Dade Cty. Dep't of Corr., 16 Fla. L. Weekly Supp. 1037a (Fla. 11th. Cir. Ct. Aug, 26 2009).

[26] Id.

[27] Id.

[28] Id.

[29] Id.

Similarly, in this case, Mr. Bielarski serves as judge, jury, and executioner under City Policy E-3. He is both the General Manager and the Charter Officer, and he acted as the Department Head during the informal conference.

This results in Mr. Bielarski making all decisions from suspension to termination. While the Employee Notice was signed by Chief Operating Officer Tom Brown, it was based on a disagreement between Mr. Stanton and Mr. Bielarski. The policy provides that upon receiving a notice of proposed termination and suspension without pay, the employee is afforded an opportunity to rebut the charges at an informal conference held before the Department Head.[30] Mr. Bielarski presided over Mr. Stanton's informal conference as the Department Head. The policy further provides that after the conference, the Department Head (Mr. Bielarski) shall take action he deems appropriate with the approval of the Charter Officer (Mr. Bielarski).[31] Mr. Bielarski signed the post-conference letter terminating Mr. Stanton.

Under the policy section entitled "Appeals", the employee serves a notice of appeal to the Charter Officer (Mr. Bielarski), [32] who then presides over an

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[30] *See* Exh. B, section III.E.2, at 4.
[31] Id.
[32] Id. at 5 (section III.F.1)

evidentiary hearing.[33] Afterward, the Charter Officer considers all evidence which the manager (Mr. Bielarski) has before him and makes a decision.[34]

In summary, then, Mr. Stanton received an Employee Notice based on a disagreement he had with Mr. Bielarski. He attended an informal conference presided over by Mr. Bielarski, received a termination letter signed by Mr. Bielarski, and attended an appeal/evidentiary hearing presided over by Mr. Bielarski, who upheld Mr. Stanton's termination. Thus, "[e]ven with the best of intentions, this can hardly be characterized as an unbiased, critical review."[35]

Even more troubling is the announcement sent out by Mr. Bielarski the day of Mr. Stanton's termination, over a month before the appeal/evidentiary hearing was held. The announcement stated the following:

> GRU will no longer employ John Stanton effective today at 5pm.
>
> John was not able to comply with the rules I had established for his role as Energy Supply Officer reporting to Chief Operating Officer Tom Brown. John also kept vital information from me dealing with communications concerning the GREC contract. Although John acknowledged these mistakes, his actions prohibited me from making essential decisions, which could have materially affected both GRU and our customers. John's termination had nothing to do with his role as co-negotiator of the GREC Power Purchase Agreement.
>
> Dino De Leo will fill the role of Acting Energy Supply Officer. Please understand, I take no pleasure in terminating an employee and

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[33] Id. at 5 (section III.F.2).

[34] Id.

[35] Ridgewood Props., 562 So. 2d at 323.

> appreciate your continued commitment to this organization and its customers.

Such blatant prejudgment from the very individual who will preside over the appeal/evidentiary hearing renders the hearing a mere formality. This scenario was condemned by the First District Court of Appeal.[36]

In that case, IMC-Phosphates applied to the Florida Department of Environmental Protection (DEP) for a permit to conduct mining activities.[37] Charlotte County objected and petitioned for a formal administrative hearing on the matter.[38] After the administrative law judge recommended that the permit be granted, but before the hearing in front of the secretary of DEP, the secretary issued a statement discussing the recommendation.[39]

The court found that under these circumstances, Charlotte County had a reasonable fear that it would not receive a fair and impartial hearing. Similar to the instant case, the court found that

> [a]t the time the statements in question were made, the secretary was not acting in the role of investigator, prosecutor, or a person responsible for determining probable cause. The statement was made on the day the ALJ issued the recommended order . . . . The statement given at this time was not mandated as part of any of the secretary's statutory duties, but can only be classified as a statement made as part of his political duties.[40]

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[36] Charlotte Cty. v. IMC-Phosphates Co., 824 So. 2d 298 (Fla. 1st DCA 2002).
[37] Id. at 300.
[38] Id.
[39] Id.
[40] Id. at 301.

In discussing its holding, the court first stated, "The timing and content of [the DEP secretary's] statement were inconsistent with his role of adjudicator,"[41] and then went on to note:

> Issuing the statement on the same day that the ALJ issued his recommended order could lead a reasonable person to conclude that, for all practical purposes, the agency head regarded the issuance of the recommended order as the conclusion of the litigation, with the forthcoming final order a mere formality. . . . In this case, the agency head's perceived need to act in his political capacity was outweighed by the need for parties to believe they are involved in a fair process.[42]

Because Mr. Bielarski served as the Department Head, General Manager, and Charter Officer from initial suspension all the way through the appeal, and because he issued a statement about Mr. Stanton's termination before the appeal/evidentiary hearing had been held, this Court should find that Mr. Stanton was denied procedural due process.

LACK OF COMPETENT, SUBTANTIAL EVIDENCE AND DEPARTURE FROM ESSENTIAL REQUIREMENTS OF THE LAW

There was no competent, substantial evidence present in this case to support Mr. Stanton's termination. "Reason, logic, and the law" dictate that when "an

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[41] id.

[42] Id.

agency terminates an employee for certain stated grounds . . . the agency [must] affirmatively carry the burden of proving the essence of its allegations."[43]

Where there is a complete lack of evidence supporting an agency decision, Florida courts consider that a departure from the essential requirements of the law;[44] thus, this argument is presented under both grounds.

The term "competent substantial evidence" has been defined as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred."[45] In DeGroot, the Supreme Court added the following interpretation: "We are of the view . . . that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." [46] The First District Court of Appeal notes that it "must be based on something more than mere probabilities, guesses, whims, or caprices, but rather on evidence in the record that supports a reasonable foundation for the conclusion reached."[47]

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[43] Perez-Borroto v. City of Miami, 6 Fla. L. Weekly Supp. 23b (Fla. 11th Cir. Ct. Sep. 11, 1998).
[44] Dresner v. Tallahassee, 164 So. 2d 208, 211 (Fla. 1964); Wolkowsky v. Goodkind, 14 So. 2d 398 (Fla. 1943).
[45] DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)(citations omitted).
[46] Id.
[47] Dep't of Highway Safety and Motor Vehs. v. Trimble, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002).

A review of circuit court caselaw demonstrates that when competent and substantial evidence has been found, it comes in the form of witness testimony or, at the very least, written documents.

In Hurley v. City of Gulfport, the court found competent, substantial evidence where several city employees were interviewed and their testimony included in a nine-page report submitted by the agency's director.[48] In Lee v. Miami-Dade County, the court pointed to the testimony of three witnesses who testified as to their interactions with the employee in finding "a substantial basis of fact" from which the hearing officer could reasonably find that the employee had engaged in official misconduct.[49]

Competent, substantial evidence has also been found where documents are provided to support the allegations of misconduct. In Harrison v. McCutcheon, the court recounted the written evidence produced at the hearing below, including the employee's own work schedules and diaries and his signature on certain key documents, as well as entries in cash-release logs.[50]

Here, Mr. Bielarski provided no evidence whatsoever at either the informal conference or the evidentiary hearing. He sat and received the evidence and

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[48] Hurley v. City of Gulfport, 15 Fla. L. Weekly Supp. 410a (Fla. 6th Cir. Ct. Mar. 7, 2008).
[49] Lee v. Miami-Dade County, 17 Fla. L. Weekly Supp. 247a (Fla. 11th Cir. Ct. Feb. 9, 2010).
[50] Harrison v. McCutcheon, 7 Fla. L. Weekly Supp. 94a (Fla. 15th Cir. Ct. Nov. 10, 1999).

the employee's rights are properly preserved. When an employee is taken through a process that involves a single individual serving as a department head, a general manager, and a charter officer, he is not given due process. When that individual issues an announcement before the appeal/evidentiary hearing that is published in multiple media outlets, the employee is not given due process. When the employee is terminated based on no more nothing more than an employee notice, the agency has departed from the essential requirements of the law. This Court should grant the petition for writ of certiorari and quash the order of termination.[54]

ATTESTATION

I CERTIFY that I have read the foregoing petition and believe all facts stated therein to be true and correct.

/s/ *John W. Stanton*
JOHN W. STANTON, Petitioner

Respectfully submitted this ______ day of May, 2016.

TURNER O'CONNOR KOZLOWSKI, P.L.

/s/ Peg O'Connor

[54] When granting certiorari, the Court may not "enter a judgment on the merits of the controversy under consideration [or] direct the respondent to enter any particular order or judgment." Broward Cty. v. G.B.V. Int'l, 787 So. 2d 838, 844 (Fla. 2001); it is "limited to . . . quashing the order reviewed." Hollywood Firemen's Pension Fund v. Terlizzese, 538 So. 2d 934, 935 (Fla. 1989).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this notice has been filed on this ____ day of May, 2016 with the Florida Courts E-Filing Portal which will automatically provide notice to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition is presented in Times New Roman 14-point font and is in compliance with Florida Rule of Appellate Procedure 9.100(*l*).

TURNER O'CONNOR KOZLOWSKI, P.L.

/s/ Peg O'Connor

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