

Petition for Writ of Certiorari to Review Quasi-Judicial Action, Agencies, Boards, and Commissions of Local Government: EMPLOYMENT – Due Process. Procedural due process was not accorded when the City Manager who approved Petitioner’s termination also presided over the internal appeal. Petition granted. Jason Shipley v. City of Zephyrhills, No. 16-CA-1257-ES (Fla. 6th Cir. App. Ct. Dec. 2, 2016).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

**JASON SHIPLEY,
Petitioner,**

UCN: 512016CA001257CAXES

v.

**CITY OF ZEPHYRHILLS,
Respondent.**

_____ /

Petition for Writ of Certiorari,

R. Jeffrey Stull, Esq.,
for Petitioner,

Brian Koji, Esq.,
for Respondent.

ORDER AND OPINION

Petitioner’s due process rights were violated when the City Manager who approved Petitioner’s termination also presided over the internal appeal. The Petition is granted.

STATEMENT OF THE CASE AND FACTS

Petitioner, Jason Shipley, was a sergeant in the City of Zephyrhills Police Department. He was terminated for allegedly violating his supervisory responsibilities, failing to submit reports and documents, and failing to report violations of orders, policies, directives, or procedures. While the Police Chief made the decision to discharge Petitioner, the City Manager approved the decision, as required by City

policy. Petitioner filed an internal appeal to the City Manager and made an informal disqualification request asking the City Manager to appoint an independent arbitrator. The City Manager refused. At the appeal proceeding, the City Manager also refused to testify. After a two-day appeal hearing, the City Manager entered an order upholding three of the six charges and the discharge penalty based on those three charges. Petitioner now seeks review in this Court of the order upholding the termination.

STANDARD OF REVIEW

A circuit court reviews administrative action to “determine: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and, (3) whether there was competent, substantial evidence to support the administrative findings and judgment.” *McDougall v. Van House*, 801 So. 2d 118, 121 (Fla. 2d DCA 2001) (citation omitted).

LAW AND ANALYSIS

Petitioner contends that the appeal proceedings violated his due process right to a fair and impartial hearing because the City Manager who reviewed and approved the termination acted as the hearing officer who ultimately upheld the termination. “[A]n impartial decision-maker is a basic component of minimum due process in an administrative proceeding.” *Charlotte County v. IMC-Phosphates Co.*, 824 So.2d 298, 300 (Fla. 1st DCA 2002). Petitioner asserts that the City Manager should have granted the informal disqualification request because “the facts alleged would prompt a reasonably prudent person to fear that they [would] not obtain a fair and impartial hearing.” *Id.* (citation omitted). Respondent counters that the reasonably prudent person standard only applies to agencies under the Administrative Procedure Act (“APA”), and that in proceedings outside the scope of the APA “only a hearing with constitutional due process minimums is required.” Citing *Carillon Cmty. Residential v. Seminole County*, Respondent states that due process is “a flexible concept [that] requires only that the proceeding be ‘essentially fair.’” 45 So. 3d 7, 9 (Fla. 5th DCA 2010). While true, the court in *Carillon* elaborates:

The extent of procedural due process protection varies with the character of the interest and nature of the proceeding involved. There is, therefore, no single unchanging test which may be applied to determine whether the requirements of procedural due process have been met. Courts instead

consider the facts of the particular case to determine whether the parties have been accorded that which the state and federal constitutions demand.

Id.

Considering the facts of this particular case, Petitioner has not been accorded the required due process. The Court finds the situation analogous to *Jones v. Florida Keys Cmty. Coll.*, 984 So. 2d 556, 557 (Fla. 3d DCA 2008). In *Jones*, a member of the College Board of Trustees who voted to terminate Mr. Jones was appointed as the hearing officer to conduct the appeal hearing. *Id.* The court held that “[t]he circumstances would prompt a reasonably prudent person to fear that he will not obtain a fair and impartial hearing.” *Id.* Although Respondent attempts to distinguish *Jones* by arguing that it only applies to agencies under the APA, Petitioner asserts that while many statutes, including the APA, establish specific procedures that are intended to provide due process, due process is a fundamental constitutional requirement that exists independently of any statute. We agree. Due process transcends the APA.

Respondent further alleges that unlike the reasonably prudent person standard used in a formal administrative hearing arising under APA, the “well-settled” standard in informal review cases is actual bias. In support, Respondent cites the United States Supreme Court case of *Withrow v. Larkin*, 421 U.S. 35 (1975). The relevant portions of *Withrow* state:

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.

...

Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to [an] ultimate decision, a substantial due process question would be raised. But in our view, that is not this case.

421 U.S. at 47, 58 (citations omitted) (emphasis added). Although the lack of “fair and effective consideration at a subsequent adversary hearing” was not the case in *Withrow*, in a footnote the Court expanded on when that may be the case, explaining that “[a]llowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present here.” *Id.* at 58, n. 25.

In the instant Petition, those due process problems are present. The City Manager was allowed to review and evaluate his own prior decision. At the appeal hearing, the Police Chief testified that he had to get the City Manager’s “agreement” to terminate. Although the City Manager stated that his role was only “endorsing the recommendation of the Police Chief, based on the investigation and the [Internal Affairs Report],” the ultimate decision was his. The termination could not have occurred without the City Manager’s approval. Because “[a]llowing a decisionmaker to review and evaluate his own prior decisions raises [due process] problems,” an independent party should have been appointed to consider the appeal. See *Withrow*, 421 U.S. at 58, n. 25; *Jones*, 984 So. 2d at 557.

CONCLUSION

Procedural due process was not accorded when the City Manager who approved Petitioner’s termination also presided over the internal appeal. The Petition is granted.

It is **ORDERED AND ADJUDGED** that the Petition is hereby GRANTED.

DONE AND ORDERED in Chambers, at New Port Richey, Pasco County, Florida, on this ____ day of _____, 2016.

KIMBERLY CAMPBELL
Circuit Judge, Appellate Division

SHAWN CRANE
Circuit Judge, Appellate Division

LINDA H. BABB
Circuit Judge, Appellate Division

Copies furnished to:

Brian Koji, Esq.
R. Jeffery Stull, Esq.