IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.

JEFFREY LYON,
Plaintiff/Appellant,

vs.

THE CITY OF HALLANDALE BEACH CIVIL SERVICE BOARD AND THE CITY OF HALLANDALE BEACH,
a Florida municipal corporation,
Defendant/Appellee(s).
_____/

PETITION FOR WRIT OF CERTIORARI

Plaintiff/Appellant, Jeffrey Lyon, by his undersigned counsel, and pursuant to Rule 1.630 of the Florida Rules of Civil Procedure, hereby files this Petition Writ of Certiorari, against Defendant/Appellee, the City of Hallandale Beach Civil Service Board and Defendant/Appellee, the City of Hallandale Beach. In support of the Petition for Writ of Certiorari, Plaintiff/Appellant, Jeffrey Lyon, states as follows:

I. INTRODUCTION

On January 13, 2016; February 11, 2016 and March 9, 2016, administrative hearings were held before the City of Hallandale Beach Civil Service Board, as a result of the termination of former Battalion Chief Jeffrey Lyon, on October 30, 2015, by the former City of Hallandale

Beach City Manager, Renee Miller. On May 11, 2016, the City of Hallandale Beach entered it Recommended Order, affirming the termination.[1]

Thereafter, on May 25, 2016, the City of Hallandale Beach City Manager, Daniel A. Rosemund, adopted the Recommended Order, and formally dismissed the Plaintiff/Appellant from his employment, retroactive to October 30, 2015.[2] Plaintiff/Appellant, Jeffrey Lyon ("LYON"), challenges the Final Order of dismissal, on the following substantive and grounds: (1) LYON was not afforded a mandatory pre-determination hearing; (2) LYON was not provided with the required modicum of procedural due process; (3) The allegedly complaining employees, failed to follow existing internal mitigation procedures; (4) The initial dismissal decision was tainted by the former City Manager's inherent conflict of interest; (5) The CITY Attorney exhibited a clear conflict of interest, compromising the internal investigation, since she had called for a "change in the culture of the Department; and in addition, she had maintained her own discrimination complaint against a CITY Commissioner; (5) The rules of evidence were violated before the City of Hallandale Beach Civil Service Board, through the admission of impermissible and uncorroborated hearsay; (6) LYON was not initially allowed to revert back to Civil Service Status, following the initial termination decision; (7) There was no competent, substantial evidence supporting the findings and conclusions of the City of Hallandale Beach Civil Service Board; and (8) The subsequent City Manager, Daniel Rosemund, intentionally short-circuited the administrative process, which was to be held in the "sunshine," by offering to

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[1] The Recommended Order is attached hereto, as **EXHIBIT A.**

[2] The Final Order of Dismissal is attached hereto, as **EXHIBIT B**.

meet privately with the Plaintiff/Appellant, during the pendency of the on-going City of Hallandale Beach City Service Board hearing.

For all of these procedural and substantive reasons, the Final Order of Dismissal, entered on May 25, 2016 is a legal nullity. Because of these egregious procedural and substantive deficiencies, the Court should enter the writ of certiorari, vacate the Final Order of Dismissal and promptly order the reinstatement of LYON, along with back-pay, seniority status and all of the benefits associated with his prior employment with the City of Hallandale Beach.

II.
FACTUAL ALLEGATIONS

1. Appellant, Jeff Lyon (hereinafter referred to as, "LYON"), began his employment with the Appellee, the City of Hallandale Beach (hereinafter, referred to as, the "CITY"), as a Firefighter/Paramedic, in 2002. [**T: Vol. I, 371**].[3]
2. The CITY promoted LYON, in 2004, to the position of Diver/Engineer. [**T: Vol. I, 371**].
3. Thereafter, in 2006, the CITY promoted LYON to the position of Lieutenant. [**T: Vol. III, 371**].[4]
4. After serving in the position of Lieutenant for seven (7) years, the CITY Promoted LYON to the position of Battalion Chief, in 2013. [**T: Vol. III, 371**].

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[3] The symbol, "**T**," refers to the transcript of proceedings. The symbol, designated as, "**Vol. I**," refers to the first day of the hearing on January 13, 2016; the symbol, **Vol. II**, refers to the second day of the hearing on February 11, 2016; and the symbol, "**Vol. III,**" refers to the third day of the hearing on March 9, 2016.

[4] The CITY recently renamed the position of Lieutenant, to that of "Captain."

5. During the past three (3) calendar years, in the position of Battalion Chief, LYON'S job performance was rated at least at the level of "meets expectations;" by a variety of CITY supervisors. [**T: Vol. III, 372—376, Appellant's EXHIBITS 9A—9C].**

6. The job rating comments of CITY supervisory personnel, on LYON'S job performance, consistently stated that, "Jeff (LYON) demonstrates a terrific example for all employees." [**T: Vol. III, 373**]. Moreover, prior to the initiation of the disciplinary charges in this case leading to dismissal, LYON had not been previously disciplined by the CITY. **[T: Vol. II, 201, Vol. III, 377].**

7. On February 17, 2015, a CITY non-firefighter employee, Stephanie Delgado (hereinafter, referred to as, "DELGADO"), made an internal complaint with the CITY, claiming that Deputy Chief Pagliarulo (hereinafter, referred to as, "PAGLIARULO"), had questioned her ability to perform her job duties, due to her pregnancy. [**T: Vol. I, 46—47; Appellee EXHIBIT 1**].

8. Mark Ellis (hereinafter, referred to as, "ELLIS"), became the Interim CITY Fire Chief on April 3, 2015. [**Vo2l. I, 116**].

9. ELLIS' predecessor, Chief Daniel Sullivan ("SULLIVAN"), voiced concerns of bias, regarding the CITY'S investigation of PAGLIARULO, and then SULLIVAN was terminated from his employment. [**T: Vol. II, 199**][5]

[5] SULLIVAN has filed a wrongful termination claim against the CITY**. [Vol. II, 218].** The CITY has contended that SULLIVAN made inappropriate discriminatory comments in the workplace. **[T: Vol. II, 219].**

10. ELLIS was interviewed by CITY Attorney Lynn Whitfield (hereinafter, referred to as, "WHITFIELD"), as part of the PAGLIARULO Investigation; and during this interview, ELLIS redirected the investigation toward LYON, based upon hearsay workplace comments he had heard about LYON. **[T: Vol. I, 123].**

11. ELLIS was closely aligned with the PAGLIARULO investigation [**T: Vol. II, 122**]; and in addition, ELLIS testified at the CITY Civil Service Board hearing, about certain hearsay allegations of a CITY employee, Jennifer Sneiblich, however, she was not called as a witness at the hearing. [**T: Vol. II, 124**].

12. ELLIS proceeded to testify at the CITY Civil Service Hearing, regarding certain hearsay statements, he had heard about LYON; such as a female employee stating that LYON had asked her to come into his private quarters at the fire station. [**T: Vol. I, 124, 126**].[6]

13. WHITFIELD took thirty (30) witness statements, as part of the PAGLIARULO Investigation; but she only conducted one interview in the CITY'S investigation of LYON, namely, the statement, which was taken from him. [**T: Vol. I, 66**].

14. WHITFIELD made an investigative finding solely against PAGLIARULO, substantiating the disciplinary allegations against him. [**T: Vol. I, 77**].

15. WHITFIELD'S investigation on behalf of the CITY, was compromised by her own inherent bias, since she had previously made statements about accomplishing a "change of culture in the CITY Fire Department; and in addition, she had a pending claim of

[6] ELLIS maintained that other employees had complained to him about LYON'S allegedly offensive work place comments, on gender based issues. [**T: Vol. II, T: 125**].

discrimination against a CITY Commissioner. [**T: Vol. II, 208**, *see also*, **Appellee EXHIBIT 8**].

16. The City Manager, Renee Miller (hereinafter, referred to as, "MILLER"), was then given WHITFIELD'S Investigative Report on PAGLIARULO; and immediately thereafter, MILLER appointed herself as, the "Complainant," in the LYON Investigation. [**T: Vol. I, 64—65**].
17. MILLER perceived no conflict of interest in acting as both the "Complainant," and the ultimate decision-maker in this case. [**T: Vol. II, 83**].[7]
18. WHITFIELD contended that her subsequent interview of LYON, only constituted, "fact gathering;" and it was not part of an investigative process. [**T: Vol. I, 66**].
19. LYON was initially interviewed by WHITFIELD, on April 30, 2015; he was not previously advised that he was under investigation; and furthermore, he was not advised of the nature of the allegations against him. [**T: Vol. III, 438—439**].
20. LYON was unable to retain counsel at that juncture, because he was not advised of any pending disciplinary allegations against him. [**T: Vol. III, 440**]. The CITY had contended that LYON was not actually under investigation until September 4, 2015 [**T: Vol. II, 15**]; however, the CITY also asserted that the disciplinary interview of LYON on September 25, 2015, merely constituted "fact finding." [*See*, **CITY EXHIBIT 8**]. The WHITFIELD disciplinary memorandum was indeed developed and finalized; based upon her interview of LYON and other witnesses. [**T: Vol. I. 55**, *see also*, **CITY EXHIBIT 3**]

[7] Moreover, MILLER had no personal knowledge of the claims, which were made by the complaining employees**. [T: Vol. II, T: 105].**

21. WHITFIELD'S interview questions did not provide LYON with any kind of factual context; in terms of the nature of any possible disciplinary allegations against him; and the April 30, 2015 interview adjourned and it was continued on May 30, 2016; LYON was told by WHITFIELD that he was not "under investigation," but he was advised not to talk about the interview with anyone. [**T: Vol III, 442—443**].

22. On September 4, 2015, LYON was advised by the CITY Manager, that he was under investigation; and on this same day, he was provided with vague purported disciplinary allegations, without being provided with factual background; or factual context, to the purported allegations. [**T: Vol. III, 452**].

23. For the first time, at the Civil Service Hearing, the CITY specifically identified the complaining witnesses; and the nature of their allegations against LYON; however, prior to the Civil Service Hearing, none of the complaining witnesses had come forward to state a complaint against LYON'S conduct in the workplace, when the proscribed conduct had allegedly occurred. [**T: Vol. I, 82, 99; 142—143; 177, 189, 207, 212; 224, 235**].

24. In short, none of the complaining employees had filed internal complaints of discrimination with the CITY, prior to the initiation of the PAGLIARULO Investigation. [**T: Vol. II, 106**]

25. In October of 2012, Firefighter/Paramedic Jalon Johnson (hereinafter, referred to as, "JOHNSON"), had maintained that LYON had uttered a racial epithet, directed at him, in the workplace. [**T: Vol. I, 86**].[8]

26. LYON apologized to JOHNSON; and thereafter, JOHNSON accepted the apology; and since 2012, JOHNSON was able to have a professional workplace relationship with LYON, without any further adverse incidents. [**T: Vol. I, 100, 102, 105**].

27. On January 7, 20111, Firefighter/Paramedic Sasha Elmore Hackett (hereinafter, referred to as, "HACKETT") had maintained that she was subjected to disparate treatment as a female, in the workplace by LYON, since he was allegedly more critical toward her, regarding her failure to complete operation reports, as compared to her male counterparts [**T: Vol. I, 144**]; however, at the time of the incident regarding HACKETT, LYON could not formally discipline her [**T: Vol. I, 154**]; and HACKETT did not feel that the alleged disparate treatment was gender based. [**T: Vol. I, 164, 166**].[9]

28. In 2012, Firefighter/Paramedic Jose Mendez (hereinafter, referred to as, "MENDEZ") claimed, without corroboration, that LYON made national origin epithet[10] directed at him; however, MENDEZ made no effort to report this alleged misconduct, until her heard in 2015, that the CITY Attorney was undertaking a work place investigation regarding discrimination. [**T: Vol. I, 192**].

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[8] JOHNSON submitted an e-mail communication to the CITY Attorney on this incident, some three years later. [**T: Vol. I, 103**].

[9] These allegations were part of another investigation in 2012, regarding Complainant Jorge Leon, for which the allegations were not substantiated. **[T: Vol. 11, 76].**

[10] MENDEZ had asserted that LYON told him he would be better suited to "work on lawns," as evidence of a Hispanic stereotype. [**T: Vol. I, 188].** However, such a stereotype typically and solely references individuals of Mexican origin; however, MENDEZ is actually from El Salvador. [**T: Vol. I, 187**].

29. Sometime in 2012, Firefighter/Paramedic David Lublinski (hereinafter, referred to as, "LUBLINSKI"), maintained that LYON made a comment, indicating that female firefighters were not present in the work place on Tuesdays; and therefore, that day of the week was designated, as "no bitch Tuesdays;" [**T: Vol. I, 209**]; and in addition, during the same time frame, LUBLINSKI claimed that LYON disparaged the ability of female firefighters to do their jobs. [**T: Vol. I, 209—211**].

30. In 2010, Captain/Paramedic Raul Perez (hereinafter, referred to as, "PEREZ") maintained that LYON used the term "no bitch Tuesdays," to refer to the absence of female firefighters in the workplace; and he further commented that these comments originated in 2008. [**T: Vol. I, 235, 244**].

31. Prior to providing a statement to CITY Attorney WHITFIELD, CITY Manager MILLER personally met with PEREZ, in order to encourage him to testify in the LYON Investigation. [**T: Vol. I, 242**].

32. Approximately nine months prior to the CITY Civil Service Board Hearing, Firefighter/Paramedic Saray Garcia (hereinafter, referred to as, "GARCIA"), maintained that LYON stated that she and another employee, Firefighter Paramedic Abigail Goldblatt (hereinafter, referred to as, "GOLDBLATT"), should "co-ordinate their forthcoming pregnancies," so that neither one would inconvenience scheduling in the CITY Fire Department. [**T: Vol. I, 273—274**].

33. GOLDBLATT did not take offense to the remark about "coordinating pregnancies," which had occurred approximately one year prior to the CITY Civil Service Hearing [**T:**

Vol. III, 420]; and she considered the comment to be a "light-hearted joke." [**T: Vol. I, 184—185].**

34. Moreover, the hearsay testimony of other alleged complaining witnesses was admitted into evidence over an objection, despite the fact that these witnesses did not appear at the CITY Civil Service Hearing. **[T: Vol. II, 11].**

35. None of the complaining witnesses formally complained about LYON'S conduct, when the misconduct allegedly occurred, allegedly for fear of retaliation [**T: Vol. I, 179; 212; 275**]; even though the CITY requires employees to come forward with internal complaints, pursuant to its policy [**T: Vol. I, 63-64**]; and the alleged fear of retaliation was not reasonable, since LYON had no inherent authority to discipline these employees. **[T: Vol. I, 154; 191].**

36. An employee/complainant is required, under CITY policy, to file an internal discrimination complaint with the Department of Human Resources, and the CITY Manager then makes a decision of how to proceed, in consultation with the Human Resources Director. **[T: Vol. I, 63].**

37. LYON was ordered by PAGLIARULO to drive GOLDBLATT to an interview with the CITY Attorney; during the course of the trip to the CITY Attorney's Office, neither LYON, nor GOLDBLATT spoke about the investigation. **[T: Vol. III, 421-422].**

38. On or about March 31, 2015, after returning from training in North Florida, LYON merely made a comment, in the presence of other CITY Fire Department employees,

indicating that he was apparently being mentioned as a possible subject of the CITY Attorney's investigation. [**T: Vol. III, 425**].

39. On April 3, 2015, the CITY Manager issued a memorandum, admonishing CITY employees not speak about the on-going investigation, which was being conducted by the CITY Attorney's Office. [**T: Vol. III, 426**].

40. On or about May 15, 2015, LYON placed a telephone call to Driver/Engineer Yvette De La Torre, to remind her of his encouragement for her candidacy as a Fire Officer [**T: Vol. III, 428**]; however, she indicated that based upon the CITY Manager's April 3rd memorandum, she did not feel comfortable in continuing the conversation; and therefore, the conversation ended. [**T: Vol. III, 429**].

41. On September 4, 2015, LYON was provided with approximately three thousand (3,000) pages of investigative documents, which comprised the PAGLIARULO Investigation, but he was unable to reasonably discern the disciplinary allegations, which were purportedly being made against him; for example, LYON'S criticism of an employee who could not open a fire hydrant, was actually characterized by the CITY, as part of the disciplinary allegations against him, a conclusion which would never have occurred to LYON. [**T: Vol. III, 450].**

42. Specifically, the purported allegations issued against LYON, stated as follows:

> . . . alleging you disparaged and/or made inappropriate jokes and/or discriminatory comments about subordinates, inquired about employees' sexual orientation, and or took retaliatory actions towards subordinates violating the following rules, policies and/or procedures of the City of Hallandale Beach and/or the City's Fire Department.

Civil Service Rules—Division 9-DISCIPLINARY ACTION-Section 21-242-Grounds for dismissal, suspension and demotion.
(12) Rude, antagonistic or offensive conduct toward the public, supervisors or fellow employees, including abusive language.
(18) Making derogatory racial, ethnic, or sexist remarks and sexual harassment in the presence of the public or other employees while on duty.
(41) Engaging in any other actions which are determined by the city manager to be sufficient cause for disciplinary action. [*See*, **Appellee EXHIBIT 4**]

43. On September 25, 2015, LYON was interviewed by CITY Human Resources Director Taryn Kinglee (hereinafter, referred to as, "KINGLEE"), in the presence of his former counsel and outside counsel for the CITY Attorney, Brett Schneider. [**T: Vol. III, 452].**

44. KINGLEE admitted that there was no document, which specifically apprised LYON, of the disciplinary allegations, which had been made against him. [**T: Vol. II, 21**].

45. Outside counsel for the CITY Attorney, Brett Schneider, informed LYON that KINGLEE'S interview merely constituted "fact gathering;" and he cut-off counsel's objections; such as the staleness of the allegations;[11] the fact that LYON could not retain counsel during the initial interviews with the CITY Attorney, without more and sufficient facts; the fact that the investigation was based and or initiated on uncorroborated hearsay statements and the CITY Manager appointed herself as, the "Complainant," in the investigation, without having personal knowledge of the issues;[12] since the CITY was

[11] Many of the purported disciplinary allegations were five or six years old. [*See,* Appellee **EXHIBIT 8].**

[12] *Id.*

merely trying to gather facts and the proceeding, according to the CITY, was not actually adversarial in nature. [**T: Vol. III, 453**].

46. The CITY further admitted, through KINGLEE, that discipline was to be imposed as a result of this investigation. **[T: Vol. II, 22—23].**

47. However, the very next major development, which occurred, was the summary termination of LYON, from his employment with the CITY, pursuant to a memorandum issued by the CITY Manager, dated October 30, 2015. [**T: Vol. III, 450, Appellee EXHIBIT 9**].

48. KINGLEE had merely provided the transcript of the September 25, 2015, investigatory interview with LYON, and MILLER proceeded to impose her termination decision. [**T: Vol. II, 27-28].**

49. Prior to the issuance of the termination memorandum by the CITY Manager on October 30, 2015 [*See*, Appellee **EXHIBIT 10**], LYON was not given the opportunity to participate in a pre-determination hearing. [**T: Vol. III, 455-456**].

50. Prior to the issuance of the termination memorandum by the CITY Manager, on October 30, 2015 [*See*, Appellee **EXHIBIT 10**], there was no indication, confirmation, or otherwise, indicating that the purported allegations against LYON had been substantiated and or sustained; LYON was further informed that he had no appeal rights, since his status was that of an "at will" employee. [**T: Vol. III, 455—456**].[13]

[13] The CITY subsequently changed its position on the "at will" status of LYON, as an employee; and subsequently granted a Civil Service Hearing. [**T: Vol. III, 456-457**].

51. Based upon this characterization and further, pursuant to Sec. 21-183 of the CITY Code of Ordinances, LYON'S civil service status was to be preserved; and he was to be returned to civil service status; however, the CITY never informed him of this option upon his termination. [**T: Vol. III, 539].**

52. According to the Termination Memorandum, LYON was dismissed from his employment, for the following reasons; and certainly, some of these alleged reasons were not contained within the September 4, 2015 Notice of Investigation: (1) Alleged intimidation of witnesses after April 3, 2015, including Firefighter/Paramedic GARCIA; this allegation is factually incorrect since, first, LYON did not make any statements about the investigation to GARCIA, after April 3, 2015; he had been specifically instructed by supervisory personnel, to transport GOLDBLATT to the interview, which was being conducted by the CITY Attorney; and he did not discuss the facts of the investigation with DE LA TORRE on May 15, 2015. [**T: Vol. III, 421—422, 425, 429].** The termination memorandum also cited a non-legal reason for the dismissal, an allegation pertaining to family matters; nevertheless, this "reason" allegedly also supported the dismissal. [**CITY EXHIBIT 9**].

53. The Termination Memorandum referenced a "pattern and practice" of allegedly offensive comments by LYON [*See*, **Appellee EXHIBIT 10]**, however, the CITY Manager pointed to no specific course of conduct; substantiating this conclusion; and certainly, other than the stale allegations which were referenced at the CITY Civil Service Hearing, there was

no other evidence of discriminatory statements, uttered by LYON. [[**T: Vol. I, 82, 99; 142—143; 177, 189, 207, 212; 224, 235**].

54. After the first day of the CITY Civil Service Hearing; and prior to the conclusion of the second day of the hearing, the new CITY Manager, Daniel Rosemund, offered to meet with LYON; apparently, in order to obtain a factual statement [**T: Vol. III, 463,** *see also*, **Appellant EXHIBIT 15**]; however, LYON declined, since the letter was issued subsequent to the termination; and during the pendency of the CITY Civil Service Hearing. **[T: Vol. III, 464**].
55. The Recommended Order of Dismissal, entered by the CITY Civil Service Board, on May 11, 2016, is attached hereto, as **EXHIBIT A.**
56. CITY Manager Daniel Rosemund affirmed the Recommended Order of Dismissal, thereby implementing a Final Order of Dismissal, on May 25, 2016. [The Final Order of Dismissal, is attached hereto, as **EXHIBIT B]**

II.
LEGAL ANALYSIS

A) REVERSIBLE ERROR WAS CLEARLY COMMITTED BELOW, SINCE LYON WAS NOT AFFORDED A *PRE-DETERMINATION HEARING.*

LYON was not afforded any pre-determination procedural due process considerations, with respect to the purported disciplinary allegations, particularly an opportunity to respond to the disciplinary allegations, as well as the convening of a pre-disciplinary hearing. As we will

explain below, any post-termination remedy is insufficient to address this egregious procedural infirmity.

In *Cleveland Board of Education* v. *Loudermill,* 470 U.S. 532 (1985), the United States Supreme Court held that when a public employee has a property interest in his or her employment, he or she is entitled to a meaningful pre-determination hearing. Such a hearing need not be elaborate, but rather it must be afforded, as "an initial check against a mistaken decision---essentially a determination of whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action." This fundamental right to a pre-deprivation hearing is not abridged by the availability of extensive post-deprivation remedies. "(T)he availability of extensive post-termination procedures does not eliminate the essential requirement of due process that a hearing be provided before discharge." *See*, *Gniotek* v. *City of Philadelphia*, 808 F.2d 241, 243 (3d Cir. 1986) [noting that "(t)he pre-deprivation hearing need not be elaborate, but it is necessary, even if extensive post-deprivation remedies are afforded."].

The lack of a pre-determination hearing exposed the inherent and deficient nature of the CITY'S underlying investigation in this case. CITY Manager MILLER directed the investigation; and she ultimately made the termination decision; and yet, during the CITY Civil Service Hearing, MILLER was unaware that DEPUTY Chief PAGLIARULO had ordered LYON to transport GOLDBLATT to her interview with the CITY Attorney. **[Vol. II, 123-125].** Nevertheless, MILLER restated her conclusion, that "the mere fact that [LYON} drove her [GOLDBLATT] to the interview was inappropriate. **[Vol. II, 126—128].** Prior to taking

testimony in the CITY Civil Service Hearing, undersigned counsel had argued for a dismissal of the disciplinary allegations; based upon the total lack of procedural due process in this case.

> **MR. BERKOWITZ**: Mr. Chairman, I think the law is abundantly clear that if the City is going to terminate an employee who has civil service protection, as admittedly former Battalion Chief Lyon has in this case, that determination has to be has to be done in the correct procedural manner.
>
> And in this case, there are some egregious procedural violations, which we say preclude the Board from going forward at this point. And I have a motion with an attachment that I have prepared and left with the clerk. It's our motion for the dismissal of the case, or alternatively, for the reinstatement of former Battalion Chief Jeffrey Lyon.
>
> The chief issue here is that because there is civil service protection, former Battalion Chief Lyon has a property interest in his position. And before that property interest can be taken away through termination, two things have to have occurred before his termination.
>
> The first is, there has to be a formal statement of the disciplinary allegations against him. The second is, there must be some form of pre-determination hearing, prior to his termination, so that the employee has the opportunity to confront his accusers, and provide his version of events of what happened in terms of what led up to the termination.
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> **[T: Vol. I, 11-12].**

Without including these issues within its recommendation, the CITY Civil Service Board committed reversible error. On this basis alone, the findings of the CITY Civil Service Board; and the adoption of those recommendations by the CITY Manager must be reversed. No interim remedy can possibly cure, at this point, the deprivation of procedural due process, represented by the failure of CITY management to provide a rudimentary and or fundamental pre-determination hearing.

B) <u>REVERSIBLE ERROR WAS COMMITTED BELOW BY FAILING TO PROVIDE THE APPELLANT WITH A MODICUM OF PROCEDURAL DUE PROCESS.</u>

Due process is a flexible concept and it calls for such procedural protections as the particular situation demands. *See*, *Schmenti* v. *School Board*, 73 So.3d 831 (Fla. 5th DCA 2011) [citing, *Morissey* v. *Brewer* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)] Pursuant to the CITY Civil Service Rules, LYON could not be dismissed from his employment on an arbitrary basis. In fact, pursuant to the CITY Civil Service Code, under Section 21-242, the CITY Civil Service Board must find sufficient *cause* for a dismissal. Therefore, under the CITY Civil Service Code, Lyon had a property interest in his continued employment and hence, he is entitled to due process protections. *Depaola* v. *Town of Davie*, 872 So.2d 377 (Fla. 4th DCA 2004).

It is abundantly clear from the record, that LYON was not afforded even the most minimal due process protections, namely, clearly stating the nature of the disciplinary allegations, which had been made against him. Although the CITY Manager maintained that **CITY EXHIBIT 7** was sufficient to apprise the Appellant of the nature of the allegations against him, that document did not completely set forth the associated dates, pertinent facts and the names of the pertinent witnesses. **[T: Vol. II, 91-94].**

Contrary to the CITY Manager's testimony, the Appellant and his counsel should not have to evaluate reams of documents, in order to discern the disciplinary allegations **[T: Vol. II, 94].** the CITY has this important responsibility. *See*, *M.J.W.* v. *Department of Children & Families,* 825 So.2d 1038, 1040 (Fla. 1st DCA 2002). The basic requirement is the notice and opportunity to respond, a requirement which was completely ignored in this case.

The CITY Manager compounded management's egregious procedural errors by stating that **CITY EXHIBIT 7**, complied with the statutory requirements of the Firefighters Bill of Rights. **[T: Vol. II, 90].** The Florida Firefighters Bill of Rights, *Fla. Stat*. Section 112.82(2), reads in pertinent part as follows:

> No firefighter shall be subjected to interrogation without first receiving written notice of sufficient detail of the investigation in order to reasonably apprise the firefighter of the nature of the investigation. The firefighter shall be informed beforehand of the names of all complainants.

The September 25, 2015 interrogation of LYON clearly did not comply with the specific information requirements of the Florida Firefighter Bill of Rights. He was not given underlying or background facts **[T: Vol. III, 452—453];** and in many instances, the "allegations," could not be construed as, "disciplinary," or a violation of policy, but the purported allegations were merely "stories," or narratives, related by employees. **[T: Vol. III, 541].** Moreover, although numerous objections were made by LYON'S counsel, based upon the hearsay nature of the allegations; and the staleness of the allegations, the CITY failed and refused to address these important substantive and procedural issues. [**T: Vol. III, 452—453, CITY EXHIBIT 8].**

Moreover, LYON was indeed interviewed by CITY Attorney WHITFILED, after CITY Manager MILLER received the PAGLIARULO Investigative Report. **[T: Vol. II, 64—65]** At that point, MILLER appointed herself as the "Complainant," in the LYON Investigation [**T: Vol. II, 64—65];** and it cannot reasonably be denied that as of the date of the CITY Attorney's interview April 30, 2015; and the continuation of that interview, management's purpose was indeed investigative. LYON testified that he "was in the dark," during the interview; and

certainly, once again, there was no compliance with the Firefighter's Bill of Rights during the WHITFIELD interview.

Moreover, pursuant to Section 21-66 of the CITY Civil Service Code, the Department Director is required to set forth the pertinent disciplinary allegations against the employee.

> **Amendment of charges prohibited; procedure of hearing; right to counsel at hearing, decision by civil service board**.
>
> (a) The civil service board shall hear the evidence upon the charges and specifications as filed with it by the department head. No material amendment of or addition to such charges or specifications will be considered by the board.

It cannot be disputed that the CITY Department Head never filed formal disciplinary charges, with the CITY Civil Service Board against LYON. The record below does not contain such a filing, or any document which even resembles formal disciplinary charges.

It is abundantly clear that the procedural due process violations are both numerous and egregious. The decision below should be vacated and the Appellant should be reinstated to his position, based upon these severe procedural infirmities.

C) <u>THE FAILURE OF THE COMPLAINING EMPLOYEES TO PREVIOUSLY MITIGATE ANY ALLEGED HARM, PURSUANT TO INTERNAL CITY POLICIES, NEGATES ANY POSSIBLE CLAIM WITH REGARD TO APPELLANT'S ALLEGED CONDUCT</u>.

It cannot be disputed that the CITY possesses an internal discrimination complaint policy, mechanism and or procedure, whereby employees are *required* to report purported claims of discrimination in the workplace. [**T: Vol. I, 63, Appellant's EXHIBIT 2].** It is also undisputed that none of the complaining employees had filed internal complaints of discrimination with the CITY, prior to the beginning of the PAGLIARULO Investigation in

2015. **[T: Vol. II 106]** No reasonable basis was articulated in the record to excuse these employees, from making a timely complaint, pursuant to the CITY'S internal policy. **[T: Vol. I, 154, 191; Vol. III, 468, Appellant EXHIBIT 17**].

In order to properly perfect a discrimination complaint, the complaining employees must initially mitigate damages, through participation in the employer's internal complaint policy, otherwise, there alleged complaints are presumptively not viable.

The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 231, n. 15, 73 L.Ed.2d 721, 102 S.Ct. 3057 (1982) (quoting C. McCormick, Law of Damages 127 (1935) (internal quotation marks omitted) An employer may, for example have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably been mitigated no award against a liable employer should award a plaintiff for what her own efforts could have avoided.

> *See*, *Faragher* v. *City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

Even assuming *arguendo*, that the complaining employees did in fact properly perfect their discrimination claims, the time for filing a formal complaint of discrimination for virtually all of these purported claims, has passed. Florida is a deferral state; and for a formal complaint of discrimination to be timely under federal law, it must be filed with the Equal Employment Opportunity Commission within three hundred (300) days of the last act of discrimination. *See*, *Hipp* v. *Liberty National Insurance Co*., 252 F.3d 1208 (11th Cir. 2001).

Alternatively, under Florida law, a formal charge of discrimination must be filed with the Florida Commission on Human Relations, within three hundred sixty-five (365) days of the last act of discrimination. *See,* Fla. Stat. Section 760.11 (1). The CITY cannot reasonably claim at this late date that it needed to take prompt remedial action; to remedy alleged acts of discrimination, since the first the purported claims were not perfected under CITY policies and procedures; and second, the purported claims were largely stale under state and federal statutory provisions; and nothing in the record indicated that any of these made any effort to file a formal charge of discrimination, with regard to LYON'S conduct in the workplace. Based upon these blatant procedural infirmities, there is no factual or legal basis to sustain disciplinary allegations against the Appellant.

D) <u>THE CITY MANAGER EXHIBITED A CLEAR CONFLICT OF INTEREST, IN THIS CASE, IN HER ROLES AS BOTH COMPLAINANT AND DECISION-MAKER, THEREBY VITIATING HER TERMINATION OF THE PLAINTIFF/APPELLANT</u>.

Pursuant to the professional contract of the CITY Manager, her professional conduct is governed by the International City/County Management Association. ("ICMA") [**T: Vol. II, 86, Appellant EXHIBIT 5].** Tenet Eleven (11) of the ICMA Code of Ethics with Guidelines reads in pertinent part as follows:

. . . Handle all matters of personnel on the basis of merit so that fairness and impartiality govern a member's decisions, pertaining to appointments, pay adjustments, promotions and discipline.

In this case, the CITY Manager failed and or refused to abide by the applicable code of ethics in this case. The CITY Manager admitted during the course of her testimony that although

she had no personal knowledge of the allegations, which had been made against LYON, she saw no conflict of interest, in being the "Complainant"[14] in the LYON Investigation, as well as directing the investigation and acting as the ultimate decision-maker on his employment status. **[T: Vol. II, 81--83.**

Courts have invalidated the official actions of city officials, where the alleged conflict of interest has been less acute and egregious. *See*, *Zerweck* v. *State,* 409 So.2d 57 (Fla. 4th DCA 1982). [City official's outside employment posed a recurring conflict with his public duties]. In the instant case, the CITY Manager committed the classic conflict of interest offense, using her public office, in a position of trust, to further a personal agenda in the dismissal of LYON. *See*, *Coral Gables* v. *Weksler*, 164 So.2d 260 (Fla. 3d DCA 1964). The CITY Manager's conduct in this case was so overbearing, and clearly saturated with gross partiality, to render her personnel action void and of no binding effect. An impartial decision-maker is a basic component of minimal due process, *see*, *Charlotte County* v. *IMC -Phosphastes Co*., 824 So.2d 298 (Fla. 1st DCA 2002), a process which was wholly absent in this case.

E) <u>THE CITY ATTORNEY ALSO EXHIBITED A CLEAR CONFLICT OF INTEREST, COMPROMISING THE INVESTIGATION, SINCE SHE HAD CALLED FOR A "CHANGE IN THE CULTURE OF THE DEPARTMENT;" AND IN ADDITION, SHE HAD LEVELED HER OWN DISCRIMINATION COMPLAINT AGAIST A CITY COMMISSIONER</u>.

WHITFELD had a direct interest in finding LYON'S workplace conduct culpable, since she had openly stated, in the presence of CITY employees; that there needed to be a change in

[14] There is no CITY policy or procedure specifically enabling the CITY Manager from serving as the "Complainant," in an employee discipline case.

the "culture of the CITY Fire Department." [**T: Vol. II, 208].** This presumably meant that it was her role to root out and find offending employees, who allegedly contributed to this atmosphere. Moreover, she had filed her own discrimination complaint against the CITY, creating doubt that she could be impartial in the LYON investigation. [*See,* **Appellee EXHIBIT 8**].

Fla. Stat. Section 112. 311 applies conflict of interest standards to public officials:

> (1) It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the re-numeration provided by law. The public interest, therefore, requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.
>
> *Fanizza* v. *State,* 927 So.2d 23, 26 (Fla. 4th DCA 2006).

Although there is no bright line test to "be applied to determine if the requirements of procedural due process have been met," *see*, *Citrus County* v. *Florida Rock Indus*., 726 So.2d 383, 388 (Fla. 5th DCA 1999), WHITFIELD'S dual roles and expression of inherent bias, further deprived LYON of procedural due process Id; in that she had expressed her role to actively change the culture of the CITY Fire Department, which she thought was grounded in a "culture" of impermissible and invidious discrimination. [**T: Vol. II, 208].**

F) <u>INADMISSIBLE HEARSAY EVIDENCE WAS ENTERED BELOW, THEREBY CONSTITUTING A FURTHER BASIS FOR REVERSIBLE ERROR.</u>

As part of the CITY'S Investigative Report in the PAGLIARULO Case, as well as, the additional statements related to the "investigation" of LYON, numerous hearsay statements of

allegedly complaining witnesses were admitted into evidence below. [*See*, **CITY'S EXHIBIT 3**] The CITY Civil Service Board was permitted to review and consider the hearsay statement of several witness,[15] whose testimony against LYON, was highly prejudicial; and yet, they were not called as witnesses in the administrative hearing. [**Vol. II, T: 11**].

The fundamental essence of the hearsay rule is the requirement that testimonial assertions must be subjected to the test of cross-examination. *See*, *Dolla*r v. *State*, 685 So.2d 901 (Fla. 5th DCA 1996). The rule in Florida is firmly established that unverified out of court writings attempted to be introduced for the purpose of establishing the truth of the matters cont ained in the writings constitutes hearsay, in exactly the same manner as the out of court declaration. *See*, *Garrett* v. *Morris Kirschman & Co., Inc*., 336 So.2d 566 (Fla. 1976). The admission of the entire investigative reports below clearly constituted prejudicial, reversible error. *See*, *Ruprecht* v. *Cone Distrib*., 95 So.3d 950 (Fla. 5th DCA 2012).

G) PURSUANT TO CITY MUNICIPAL CODE SECTION 21-183, APPELLANT WAS TO REVERT BACK TO CIVIL SERVICE STATUS, IF IN FACT HE HAD BEEN APPOINTED TO A NON-CIVIL SERVICE POSITION.

Upon his termination, LYON was informed by the CITY Manager that he had no appeal rights, since his employment status was that of an "at will" employee. [**T: Vol. III, 455—456**].

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[15] For example, statements of CITY Fire Department employees Jo Shapins and Jennifer Scheiblich, were included in the Investigative Report, and they clearly made fallacious out of court statements against LYON, and the CITY Civil Service Board was undoubtedly unduly, improperly and prejudicially influenced by their inadmissible hearsay statements. [*See*, **CITY'S EXHIBIT 3**]. In addition, the initial source of the information for the LYON Investigation, Fire Chief Ellis, made numerous hearsay statements in his testimony, which also unduly prejudiced the Appellant.
[T: Vol. I, 122--124].

Based upon this explanation; and further, pursuant to Sec. 21-183 of the CITY Code of Ordinances, LYON'S civil service status was to be preserved; and he was to be returned to civil service status.

Section 21-183 of the CITY Civil Service Code reads in pertinent part, as follows:

> (a) Any employee of the city who holds permanent civil service status and is appointed or assigned as director of a department, or to any other position not under civil service, shall be returned to the rank from which the employee has been promoted under personal request of the employee or when the non-civil service employment ceases, or when the employee is removed from the non-civil service employment. Seniority credits in the permanent civil service classification held by such employee shall accrue to the employee while assigned to such non-civil service employment.

However, the CITY never informed him of this option upon his termination, or effectuated its implementation. [**T: Vol. III, 539].** Certainly, consistent with the CITY'S initial position that LYON was an "employee at will," he was entitled to be put back and or reinstated, to his prior position of Lieutenant, with the CITY Fire Department. *Id*.

H) THERE WAS NO *SUBSTANTIAL, COMPETENT* EVIDENCE SUPPORTING THE FINAL ORDER OF DISMISSAL.

It is axiomatic that administrative findings of fact must be supported by substantial, competent evidence. *See*, *M.H.* v. *Department of Children & Family Services*, 977 So.2d 755 (Fla. 2d DCA 2008); *Adam Smith Enters*. v. *State Department of Environmental Regulation*, 553 So.2d 1260 (Fla. 1st DCA 1989). Otherwise, without such a modicum of proof, agency action is considered to be arbitrary and capricious. *See*, *Island Harbour Beach Club* v. *Department of Natural Resources*, 495 So.2d 209 (Fla. 1st DCA 1986). Moreover, pursuant to Section 21-242 of

the CITY Municipal Code, the CITY must have "*cause*," based upon a breach of duty, to sustain disciplinary action, including termination.

The CITY failed to produce such grounds for *cause*[16] here; for example, management relied upon non-legal based reasons for dismissal, such as the rejection of family considerations of employees by LYON. [*See*, **Appellee EXHIBIT 9**] Moreover, although LYON was terminated for allegedly interfering with an on-going investigation, by accompanying GOLDBLATT to her witness interview with WHITFIELD, but he was ordered to do so by supervisory personnel, based upon operational reasons. [**T: Vol. III, 421-422**]. Similarly, as of March 31, 2015, LYON was not under a "gag" order from the CITY Manager, not to discuss the on-going investigation, three days later on April 3, 2015, MILLER entered such an order; however, in any event, LYON'S comments on March 31, 2015 to fellow employees did not prejudice the investigation. [**T: Vol. III, 425].**

The purported allegations against LYON were too remote in time to be formally actionable in 2015.[17] Furthermore, none of the complaining witnesses formally complained about LYON'S conduct, when the misconduct allegedly occurred. occurred, allegedly for fear of retaliation [**T: Vol. I, 179; 212; 275**]. Even though the CITY requires employees to come forward with internal complaints, pursuant to its policy [**T: Vol. I, 63-64,** see also, **Appellant**

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[16] Under Florida law, the term "cause," must be based upon the magnitude and certainty of the pertinent evidence. *See*, *Austin's Rack* v. *Austin,* 396 So.2d 1161 (Fla. 3d DCA 1981).

[17] For example, the same allegations from 2012 were made once again by HACKETT, even though these allegations had been previously dismissed, as being without a proper factual foundation, in the prior Jorge Leon investigation. **[T: Vol. II, 76].** Similarly, JOHNSON'S allegation against LYON originated in 2012; and further, the incident was previously resolved to JOHNSON'S approval and satisfaction. [**T: Vol. I, 100, 102—103**, **105**].

EXHIBIT 2]; and the alleged fear of retaliation[18] was not reasonable, since LYON had no inherent authority, either as a Lieutenant, or as a Battalion Chief, to discipline these employees. [**T: Vol. I, 154; 191].**

There was no evidence of retaliation, set forth and or proffered by the CITY, in the record of the administrative hearing below before the CITY Civil Service Board. To the contrary, LYON presented credible evidence below, at the administrative hearing, that the so-called "complaining employees," had actually continued to volunteer to serve on his shift.[19] Based upon these actual factual circumstances, the CITY presented insufficient evidence under its own municipal code, to justify the disciplinary action.

I) THE CITY MANAGER UNLAWFULLY SOUGHT TO SHORT-CIRCUIT THE ADMINISTRATIVE PROCESS, WHICH WAS BEING ADMINISTERED BY THE CITY CIVIL SERVICE BOARD, THEREBY IMPROPERLY PREJUDICING LYON.

After the first day of the CITY Civil Service Hearing; and prior to the conclusion of the second day of this administrative hearing, the new CITY Manager, Daniel Rosemund ("ROSEMUND"), offered to meet with LYON; apparently, in order to obtain a factual statement [**T: Vol. III, 463,** *see also*, **Appellant EXHIBIT 15**]. ROSEMUND made the Final Termination Decision, which was based upon the prior recommendation of the CITY Civil Service Board; and yet, he sought to take an end run around the administrative process, thereby compromising the fact finding authority of the CITY Civil Service Board. LYON declined the invitation to meet

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[18] This purported "fear" was apparently a major reason justifying the termination.

[19] *See*, the Employee Shift Roster, identified as Appellant **EXHIBT 17.**

with ROSEMUND [T: Vol. III, 464]; and the declination certainly could have further prejudiced ROSEMUND'S outlook and perspective in the case.

The proceedings of the CITY Civil Service Board are to be open and held in the "Sunshine."[20] *See*, *Wood* v. *Marston*, 442 So.2d 934 (Fla. 5th DCAB 1983); *Krause* v. *Reno*, 366 So.2d 1244 (Fla. 3d DCA 1979). ROSEMUND abused his authority as the final decision-maker in the administrative process, by requesting a private meeting with LYON, taking the entire administrative process out of the "Sunshine," and thereby undermining the inherent authority of the Civil Service Board, as the designated fact finder in the proceedings below, under the CITY Code of Ordinances.

IV.
REQUEST FOR REMEDY AND AFFIRMATIVE RELIEF

Plaintiff/Appellant LYON respectfully requests that the Court issue a Rule to Show Cause against the Appellees, confirming the existence of procedural and substantive legal violations in his dismissal, order an evidentiary hearing; and upon conclusion of the hearing, afford back pay and reinstatement to LYON, along with all other benefits of his prior employment, including seniority and pension benefits; based upon the blatant and egregious procedural and substantive legal violations, committed by both the CITY Civil Service Board and the CITY of Hallandale Beach below.

IV.
CONCLUSION

[20] *See*, the Florida Sunshine Law, *Fla. Stat*. Section 286.011.

The unlawful dismissal of Appellant LYON must be promptly vacated by the Court; and in addition, the remedy of reinstatement, along with all prior associated benefits of employment, should be promptly ordered, based upon the following egregious procedural and substantive legal violations:

(1) The absence of a pre-termination hearing, affording LYON the opportunity to address and respond to "substantiated" disciplinary allegations, or any stated "allegations;"

(2) The lack of a clear statement of the purported disciplinary "allegations," by the CITY Department Head, or otherwise, with a sufficient factual context, to enable LYON to meaningfully respond to the allegations;

(3) The failure of the CITY to adhere to the Florida Firefighters Bill of Rights, upon the initial interview of LYON by the CITY Attorney on April 30, 2015;

(4) The failure of the CITY to adhere to the Florida Firefighters Bill of Rights, upon the interview of LYON by the CITY'S Human Resources Director on September 25, 2015;

(5) The lack of an impartial final decision-maker, with regard to the October 30, 2015 termination, further prejudicing and denying LYON, a modicum of procedural due process;

(6) The use of "non-legal" reasons to convict LYON, and to deprive him of continued employment;

(7) The conflict of interest exhibited by the CITY Attorney, compromising the internal investigation, since she had called for a change in the culture of the CITY Fire Department;" and in addition, she had leveled her own discrimination complaint against a CITY Commissioner;

(8) The admission of hearsay statements, which tainted the entire administrative proceeding; and unduly prejudiced the CITY Civil Service Board against LYON;

(9) The failure of the CITY to address, implement and apply Section 21-183 of the CITY Civil Service Rules;

(10) The total lack of substantial, competent evidence allegedly supporting, the purported "disciplinary" charges; and

(11) The compromising of the administrative process, namely, the very the operation of the City Civil Service Board, as well as its overall deliberative process, by the new CITY Manager/Final Decision-Maker ROSEMUND, thereby vitiating any notion of fundamental fairness and or procedural due process.

The nature of procedural and substantive violations in this case are so egregious that additional post termination remedies, short of reinstatement; and restoration of all pay and benefits would be grossly inadequate. The immediate implementation of the requested relief is mandated under applicable law, as set forth and explained above.

Respectfully submitted,

Mark J. Berkowitz, P.A.
Attorney for Plaintiff/Appellant
800 S.E. Third Avenue
Suite 400
Ft. Lauderdale, Florida 33316
(954) 527-0570 Telephone
(954) 767-0483 Telecopier
E-mail: labor@markjberkowitz.com
Fla. Bar No. 368391

/s/ Mark J. Berkowitz
Mark J. Berkowitz

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by e-mail on this 13th day of June, 2016, to Brett Schneider, Esq., Counsel for the City of Hallandale Beach, Weiss, Serota, Helfman, *et al*., 200 E. Broward Blvd., Suite 2100, Ft. Lauderdale, Florida 33316 and to Leslie Langbein, Esq. Counsel for the City of Hallandale Beach Civil Service Board, 8181 N.W. 154th Street, Suite 105, Miami Lakes, Florida 33016.

/s/ Mark J. Berkowitz
Mark J. Berkowitz