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NOT FINAL UNTIL DISPOSITION
OF TIMELY-FILED MOTION FOR
REHEARING OR CLARIFICATION

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

APPELLATE DIVISION

CASE NO. 2020-248 AP 01

TERRY HENLEY,
Petitioner,
v.

CITY OF NORTH MIAMI,
Respondent.
_____/

OPINION

Opinion filed: January 21, 2022

On Petition for Writ of Certiorari from the October 2, 2019 decision of the City Manager approving recommendation of the City of North Miami Personnel Board to terminate Petitioner's employment

William R. Amlong, Esq.; Karen Coolman Amlong, Esq.; and Rani Nair Bolen, Esq.; Amlong & Amlong, P.A., for Petitioner.

Laura K. Wendell, Esq.; Brett J. Schneider, Esq.; and Richard Rosengarten, Esq.; Weiss Serota Helfman Cole & Bierman, P.L. for Respondent.

Before: TRAWICK, WALSH and SANTOVENIA, JJ.

SANTOVENIA, J.

The Petition filed by Terry Henley ("Petitioner" or "Henley") contests a September 18, 2018 termination by the City of North Miami ("Respondent" or "City") of Henley's employment as the City's Assistant Budget Director. The notice of termination sets forth the reasons for termination[1] and cites two provisions of the City's Civil Service Rules as the bases for the termination:

> (1) Rule XIII, B.1 - That the employee is incompetent or inefficient in the performance of assigned tasks or duties.
>
> (2) Rule XIIII, B.8 - That the employee has violated any lawful or official regulation or order, or failed to obey any lawful and reasonable direction given by a supervisor when such violation or failure to obey amounts to insubordination or serious breach of discipline.

Henley appealed the termination to the City's Personnel Board ("Board").

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[1] The reasons for termination are stated as:

> You have been given written reprimands on two (2) separate occasions, September 12, 2018 and July 30, 2018, when you were also sent home on Administrative Leave with pay. Over the last year both the manager and I have verbally counseled you on numerous occasions about shortcomings in your performance.
>
> Your lack of preparation and knowledge was evident at both budget hearings this year, as you were unable to advise council members on the location of budgeted items and was (sic) unable to explain items or account numbers when questioned by the council members. We have lost confidence in your ability to perform your job functions as the Assistant Budget Director.

The Board held a hearing on January 23 and 24, 2019, which continued on September 25 and 26, 2019 after an intervening mediation. The Board concluded the hearings by voting unanimously that Henley had not met the burden to overcome his firing for cause and recommended affirming the termination. Henley then appealed the Board's decision to City Manager Larry Spring, who affirmed the decision.

STANDARD OF REVIEW

The Court's review is limited to a determination of: "[1] whether procedural due process is accorded,[2] [2] whether the essential requirements of the law have been observed, and [3] whether the administrative findings and judgment are supported by competent substantial evidence." *Broward Cty v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001) (citing *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)).

Essential Requirements of Law

In *Haines City Cmty Dev. v. Heggs*, 658 So. 2d 523, 527 (Fla. 1995), the Supreme Court stated that "applied the correct law" is synonymous with "observing the essential requirements of law." Further, to warrant relief, there must be "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial

[2] Petitioner does not allege a deprivation of procedural due process.

tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Id.* (citation omitted).

The Board vote addressed whether or not Mr. Henley met his burden to overcome a firing for cause. Petitioner contends that the Board departed from the essential requirements of law by improperly shifting the burden of proof to him to show that he was fired for cause.

The City correctly maintains that Henley waived any objection to the burden of proof being placed on him because he did not contemporaneously object at the conclusion of the Board's public hearings on September 26, 2019. Henley had several opportunities to object at the end of the hearing. The discussion of "burden" was mentioned at least twelve times[3] by Board members and the City attorney in the

[3] "Whether or not he has carried the burden of a preponderance of the evidence to overturn being terminated by showing us how he is no --- whatever he was terminated for, I think it was incompetent, insubordination, and inefficient?" (Petitioner's Appendix (hereinafter "A.") 0663: 14-19) "Did he carry the burden?" (A. 0665: 9-10) "Did he carry the burden?" (A. 0675:4). "And then you can deal – it might help you with the burden." (A. 0681: 15-16). "At the end of the day, it is his burden to show us that he was not incompetent, that he was not insubordinate." (A. 0683:24-25 and 0684:1). "And I vote that Mr. Henley was fired for cause; or, has not met his burden that he was fired without cause." (A. 0687:18-20). "I believe Mr. Hindmarsh said whether or not he met his burden to overturn." (A. 0689:5-7). "Met his burden." (A. 0689:10). "- met his burden to overturn." (A. 0689:11-12). "I think you need to choose, Mr. Henley failed to meet the burden, or Mr. Henley met the burden, as the question you are calling." (A. 0690:6-9). "So, the question is, Mr. Henley failed to meet his burden of the preponderance of the evidence, to show that he was fired without cause?" (A. 0690:20-23). "—met his burden." (A. 0691:2-3). "The first question we're going to decide, here, tonight is whether or not Mr. Henley met his burden—" (A. 0691:11-13). "I think it's –Madam Attorney, have we answered the question? He failed to carry his burden." (A. 0693:7-9). "So, with that, we've come to a unanimous decision that Mr. Henley has not met his burden." (A. 0693:20-22).

closing discussion.

"In order for an error to be raised on appeal, it must be preserved by contemporaneous objection, or be fundamental in nature." *Mora v. State,* 964 So. 2d 881, 883 (Fla. 3d DCA 2007). *See also Robins v. Colombo*, 253 So. 3d 94, 97 (Fla. 3d DCA 2018); *Ludeca, Inc. v. Alignment and Condition Monitoring, Inc., et al*, 276 So. 3d 475, 480 (Fla. 3d DCA 2019). "To provide a trial court with the opportunity to correct errors, a timely objection is necessary." *Dorsey v. Reddy*, 931 So. 2d 259, 265 (Fla. 5th DCA 2006) (citation omitted). The Board, at the conclusion of the hearing, deliberated on the burden of proof and decided that it rested with the Petitioner. Henley failed to contemporaneously object to the Board's decision that the burden rested with Henley, nor does Petitioner argue that the error was fundamental in nature. Accordingly, Petitioner cannot raise that argument on appeal.[4] *See Doral Health Center, P.A. v. State Farm Mutual Automobile Ins. Co.*,

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[4]Petitioner also raises a new argument in his reply that the error in shifting the burden of proof cannot be harmless. However, a new argument cannot be made for the first time in a reply brief. *See Rosier v. State*, 276 So. 3d 403, 406 (Fla. 1st DCA 2019). The *Rosier* court stated that:

> For an appellant to raise an issue properly on appeal, he must raise it in the initial brief. Otherwise, issues not raised in the initial brief are considered waived or abandoned. *See Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002) (finding procedurally barred argument made in appellant's reply brief that was not raised in the initial brief), *abrogated on other grounds by Norvil v. State*, 191 So. 3d 406 (Fla. 2016); *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959) ("An assigned error will be deemed to have been abandoned when it is completely omitted from the briefs."); *J.A.B. Enter. v. Gibbons*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992) ("[A]n issue not raised

324 So. 3d 996, 998 (Fla. 3d DCA 2021)(citation omitted) ("[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.").

Even had the issue of the appropriate burden of proof been preserved for review, the Board correctly placed the burden of proof on Henley.

City of North Miami, Florida, Civil Service Rule ("Rule(s)") XIII(A) states:

> Any regular employee in the classified service may be demoted, removed, fined or suspended from an employment by the City Manager or by the head of the department in which employed if so authorized by the City Manager for **any cause** which will promote the efficiency of the service. The affected employee must be furnished with a written statement of the reasons therefore within five (5) calendar days from the date of such disciplinary action and be allowed to answer such reasons in writing, which shall be made a part of the personnel records. Such disciplinary action shall be effective the date when a written notice of disciplinary action is furnished the employee.
>
> Any employee in the classified service who deems that he or she has been demoted, removed, fined or suspended without **just cause** may, within fourteen (14) calendar days

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in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief."); Philip J. Padovano, Waiver, 2 Fla. Prac., App. Practice § 8:10 (2017 ed.) ("Failure to pursue the argument on appeal or review is a waiver of the point.").

Id.

> of such action, request in writing a hearing before the Personnel Board to determine the reasonableness of the action...

(emphasis added).

Rule XIII, C(8) (Appeal Proceedings) provides:

> The Board shall be free to make its determination of appellant's innocence or guilt in keeping with the public interest, based solely on the Board's reasonable interpretation of all the pertinent information available. The Board shall not be bound by a presumption of the appellant's innocence or guilt; such presumption does not prevail in administrative law. The findings of the Board shall be based on competent substantial evidence before it.

"The general rule is that, apart from statute, the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal." *Espinoza v. Dep't of Bus & Pro. Regul.,* 739 So. 2d 1250, 1251 (Fla. 3d DCA 1999); *Withers v. Metro. Dade Cty.*, 290 So. 2d 573, 574 (Fla. 3d DCA 1974). Here, the party asserting the affirmative of the issue was Henley. Moreover, the Rules are silent on the burden of proof. Accordingly, the Board correctly imposed the burden of proof on Henley.

Competent substantial evidence

Petitioner also argues that the Board's decision is not supported by competent substantial evidence of his alleged incompetency, inefficiency or insubordination. However, the record of the hearing before the Board reflects that Henley was terminated following a negative performance review, two written reprimands, and a paid leave of absence. Furthermore, record evidence supports that Henley's

mistakes caused the City to issue corrected tax notices to residents. Moreover, his work on the 2018 and 2019 budget was inadequate. Arthur Sorey, Deputy City Manager discovered significant mistakes in the 2019 budget, which Henley neglected to correct. In addition, Henley ignored requests that he produce an analysis concerning the City's temporary employment contracts. Accordingly, the Board's decision is supported by competent substantial evidence.

In reviewing a decision of an administrative body, a circuit court in its appellate capacity cannot reweigh the evidence where there may be conflicts in the evidence nor substitute its judgment about what should have been done for that of the administrative body. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 529 (Fla. 1995); *School Bd. of Hillsborough Cty. v. Tenney*, 210 So. 3d 130, 134 (Fla. 2d DCA 2016); *Dep't of Highway Safety & Motor Vehicles v. Stenmark,* 941 So. 2d 1247, 1249 (Fla. 2d DCA 2006). *See Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs.*, 794 So. 2d 1270, 1276 (Fla. 2001) (The test is whether there exists any competent substantial evidence to support the decision maker's conclusion, and any evidence which would support a contrary decision is irrelevant.). Accordingly, we decline Petitioners' invitation to reweigh the evidence.

Requested Reversal of Personnel Board Decision

Petitioner requests that the Court grant his Petition with directions that Henley be reinstated because there is allegedly no neutral panel of the Personnel Board to

which this cause could be remanded. However, on certiorari review, the Court lacks authority to direct the City to reinstate Henley. *See Broward County v. G.B.V. Intern., Ltd., supra.*, 787 So. 2d at 844 ("The appellate court has no power in exercising its jurisdiction in certiorari to enter a judgment on the merits of the controversy under consideration nor to direct the respondent to enter any particular order or judgment."); *Gulf Oil Realty Co. v. Windhover Ass'n, Inc.*, 403 So. 2d 476, 478 (Fla. 5th DCA 1981) ("[W]hen an appellate court reviews a lower court order, there is a procedural distinction between review by certiorari and review by appeal. On appeal, an appellate court has authority to reverse an order or judgment and remand with directions or instructions for the trial court to follow. However, after review by certiorari, an appellate court can only quash the lower court order; it has no authority to direct the lower court to enter contrary orders.").

For the foregoing reasons, the Petition for Writ of Certiorari is **DENIED**.

TRAWICK and WALSH, JJ. concur.

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