

**DISTRICT COURT OF APPEAL, FIRST DISTRICT  
STATE OF FLORIDA**

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**1st DCA Case No. 1D02-2375**  
L.T. Case No. 02-086CF

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**Lori Cooper,**

Appellant,

vs.

**Department of Children and Family Services,**

Appellee.

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**INITIAL BRIEF OF APPELLANT**

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Appeal from the Department of Children and Family Services

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## STATEMENT OF THE CASE AND THE FACTS

### *Nature of the Case*

This is an appeal from an order denying a request for a hearing pursuant to §§120.569 and 120.57(1), Florida Statutes (2001).

### *Course of Proceedings and Disposition Below*<sup>1</sup>

On May 8, 2002, the Employee filed a petition with the Agency seeking an administrative determination, pursuant to §120.569 and §120.57(1), Florida Statutes (2001), that the employment position she occupied from prior to July 1, 2001, until her termination on April 19, 2002, was at all times a Career Service position, as defined by §110.205(1), Florida Statutes (2001). The petition further sought a determination that, because her employment position was a Career Service position by legislative declaration, the Employee was entitled to employment in the absence of “cause” for termination, and to review by the Public Employees Relations Commission (PERC) in the event of termination. (R-1; Emp. App. A-1). This case reached the Agency by an unusual route.

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<sup>1</sup> For ease of reference, the Appellant, Lori Cooper, will be referred to as the “Employee,” or by name. The Appellee Department of Children and Family Services will be referred to as either the “Agency,” or as “DCF.” The record will be referred to by the letter “R” followed by the page number (e.g., R-12, 13). The Appendix to this brief will be referred to by the designation ‘Emp. App:’ followed by the tab and page numbers (e.g., Emp. App: A, 3).

The Employee occupied a Career Service position as an Administrative Assistant II, with permanent status, prior to July 1, 2001. On July 1, 2001, and purportedly as a result of the “Service First” legislation,<sup>2</sup> the Employee’s position was reclassified as a Selected Exempt Service position by the Agency effective July 1, 2002. (R-1-3; Emp. App. A-1-3). The Agency provided the Employee notice of the reclassification decision on or about June 15, 2001, shortly before implementation, but did not provide the notice prescribed by §120.569, Florida Statutes (2001), for determinations affecting substantial interests.<sup>3</sup> The Employee was notified her position was to be reclassified, but was not notified of the basis for the reclassification decision. She was not notified of her right to challenge the reclassification decision, and she was not provided a definite deadline for filing a hearing request. The Employee was not provided a clear point of entry into the administrative process. (R-1, 3; Emp. App. A-1, 3).

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<sup>2</sup> Chapter 2001-043, Laws of Fla., exempted from the Career Service “[m]anagerial employees, as defined in s. 447.203(4), confidential employees, as defined in s. 447.203(5), and supervisory employees who spend the majority of their time communicating with, motivating, training, and evaluating employees, and planning and directing employees’ work, and who have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline subordinate employees or effectively recommend such action,…” The statute is codified as §110.205(2)(x), Florida Statutes (2001).

On April 9, 2002, after years of tenured Career Service employment, the Employee was terminated without cause. The instant petition alleged the Employee was terminated in retaliation for requesting leave under the Family Medical Leave Act (FMLA). The notice of termination stated that, as a Selected Exempt Service employee, the Employee had no recourse to challenge the termination decision. (R-1-2; Emp. App. A-1-2). The Employee, however, timely filed a notice of appeal with the Public Employees Relations Commission (PERC), and requested that agency to stay its review proceeding until the instant petition is finally decided. (R-3; Emp. App. A-3).

On May 8, 2002, the Employee filed the instant petition with the Agency. (R-1-14; Emp. App. A-1-14). The petition alleged that the Employee's position had at all times remained within the statutory definition of a position in the Career Service, and that the Agency's determination to reclassify the position as a Selected Exempt Service position was outside the Agency's lawful authority. The petition alleged that the Employee's substantial interest was affected by the reclassification decision, because the Employee had a substantial interest in remaining employed in a position with Career Service tenure and protection. (R-

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<sup>3</sup> Because the petition was denied without a hearing, the facts alleged in the petition are treated as established for purposes of reviewing the propriety of denying the hearing request.

3, 5-6; Emp. App. A-3, 5-6). The petition alleged the Employee's job duties remained the same, both before and after July 1, 2001, and that the duties of the Employee's position did not justify removing the position from the Career Service. It alleged the Employees did not perform any supervisory duties, and did not perform managerial or confidential duties, as defined by §447.203(4)(5), Florida Statutes (2001). (R-3, 4-6; Emp. App. A-3, 4-6).<sup>4</sup>

In addition, the petition alleged the Employee's position was a position which had been designated by the Public Employees Relations Commission (PERC) as within the State Administrative/Clerical collective bargaining unit, during the course of adversary proceedings between the State of Florida and

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<sup>4</sup> At the time the instant petition was filed, the Agency had not articulated a reason for reclassifying the Employee's position more specific a general reference to the Service First initiative. For that reason, the petition addressed all three possibilities, alleging the position's duties were not managerial or confidential within the meaning of Chapter 447, and were not supervisory within the meaning of §110.205(2)(x).

Florida Public Employees Council 79, AFSCME.<sup>5</sup> The petition alleged that PERC exercises exclusive jurisdiction over determinations whether particular employees are managerial or confidential within the meaning of §447.203(4) or (5). It alleged that PERC had never designated the Employee's position as managerial or confidential, and that the Governor, acting as statutory public employer, had never made a request for such a designation. (R-4-5; Emp. App. A-4-5).

The petition, thus, alleged that the Employee's position remained at all times a position within the Career Service, as defined by §110.205, Florida Statutes (2001).

On May 17, 2002, the Agency Clerk issued a document characterized as an order to show cause. The order quoted a passage from Article 1, Section

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<sup>5</sup> In 1979, employees of the State of Florida were unitized by rule-making proceeding under Chapter 120, Florida Statutes. Rule 38D-17.023 apportioned State Career Service employees among eight potential bargaining units. All units excluded managerial and confidential employees, as defined by §447.203(4) and (5). All supervisory employees were allocated to a unit separate from rank and file Career Service employees. Rule 38D-17.023(1)(d), Florida Administrative Code. A copy of the text of the former rule is reproduced in the Appendix at Tab C. The rule was repealed in 1998 as part of reorganization of PERC's operating rules, aimed at compliance with the Uniform Rules of Administrative Procedure.

3(c) of the Master Contract (collective bargaining agreement) between the Governor and AFSCME<sup>6</sup> which reads as follows:

When the State has decided that a revision of a class specification for positions covered by this contract is needed, the Chief Negotiator of the Department of Management Services shall notify the Union in writing of the proposed changes. The Union shall notify the Chief Negotiator ... within seven calendar days of any comments it has concerning the proposed changes, or of its desire to discuss the proposed change(s). Failure of the Union to notify the Chief Negotiator ... shall constitute a waiver of the right to discuss the change.

The order appeared to imply the conditions precedent to waiver had occurred, and that the contract language applied to reclassification of a position to a different class, rather than revision of the class specification (description of the class) itself. The order directed the Employee to show cause no later than June 10, 2002, “why she is not bound by the terms of Article 1, Section 3(c) of that contract, and accordingly, why this petition should not be dismissed.” (R- ).

On May 21, 2002, the Employee responded to the show cause order, reminding the Agency of the statutory requirement imposed by §120.569 to grant

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<sup>6</sup> The order did not specifically identify the contract or the collective bargaining agent, but the quoted text appears in the July 1, 1998 through June 30, 2001, Master Contract, between the State of Florida and AFSCME. Although the contract expired June 30, 2001, it may represent the “status quo” to which

or deny the hearing request within 15 days — by May 23, 2002. The response also asserted, as a matter of fact, that the conditions described in the quoted contract language had not occurred, and that the contract language was otherwise inapposite to the issues before the Agency. (R- ).

On April 12, 2002, the Agency rendered a final order dismissing the petition and denying the request for a hearing. The final order noted a factual dispute concerning application of the language of Article 1, Section 3(c) of the contract referred to in the earlier show cause order, but asserted the petition was being dismissed on other grounds. (R- ; Emp. App. B- ). In support of “other grounds” for dismissal, the final order then engaged in extensive fact-finding, including the following.

The final order rejected the Employee’s factual contentions that she did not perform managerial or confidential duties within the meaning of Chapter 447, or supervisory duties within the meaning of §110.205(2)(x), Florida Statutes (2001). It found, as fact, that every one of the eight employees of the Executive Staff within the Office of the Secretary of the Department of Children and Family Services, including the Employee, had been properly reclassified as Selected

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parties involved in labor relations must adhere until a subsequent agreement is ratified. Apparently the order treated the agreement as remaining in effect.

Exempt Service “due to the confidential nature of their duties.” The order set forth verbatim language purporting to represent the Employee’s “position description,” and accepted that language as factually establishing the duties the Employee had actually performed. The final order did not find, however, that the position description was “current,” as required by Rule 60K-1.0081(3), Florida Administrative Code.<sup>7</sup> The final order, in addition, did not specifically find the Employee actually performed the duties described by the purported position description. The final order did not examine or weigh any countervailing evidence. (R- ; Emp. App. B- ).

The final order then applied the factual findings summarized above, and, first, determined “there is no question that the [Employee] acted as a confidential employee as defined in subsection (5) of 447.203, F.S.” (R- ; Emp. App. B- ). Further relying on the foregoing fact-finding, the final order found that the Employee’s Administrative Assistant II position had “duties establish[ing] that the [Employee] was significantly involved in activities defined within 447.203(4) as ‘managerial employee’ activities.” (R- ; Emp. App. B- ).

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<sup>7</sup> This rule was repealed effective January 1, 2002, but was effective on the date of the reclassification action, July 1, 2001. The rule provided: “Any classification action to be taken by an employing agency shall be initiated by preparation of a current position description.”

The final order also held that “[i]n addition to being a managerial and confidential employee, the injury the [Employee] is seeking to redress is not of the type or nature that a hearing under the Act is designed to protect.” (R- ; Emp. App. B- ). Citing the Supreme Court’s decision in *Department of Corrections v. Florida Nurses Ass’n.*, 508 So.2d 317 (Fla. 1987), the Agency reasoned that a tenured employee’s right to continued employment is contingent on the continued existence of the employment, and that a hope that such employment will continue indefinitely is, at most, a mere hope. (R- ; Emp. App. B- ).

Finally, the order held the Employee had no substantial interest in the determination sought by her petition. The Agency reasoned that a substantial interest is one based upon a legal entitlement, and may not be based upon a unilateral expectation. Because the Employee had no entitlement to remain in the Career Service while remaining on the Secretary of the Agency’s executive staff, the final order argued, she did not suffer an injury capable of being redressed by administrative review. (R- ; Emp. App. B- ).

The Employee filed a notice of appeal on June 11, 2002. (R- ).

### ***Statement of Facts***

Because there have as yet been no evidentiary proceedings in this case, the record facts consist of those alleged in the Petition and admitted in the final order of the Agency.

## SUMMARY OF THE ARGUMENT

Prior to July 1, 2001, the Employee occupied a non-supervisory State Career Service position. A Career Service position “includes all positions not specifically exempted by [§110.205], any other provisions of the Florida Statutes to the contrary notwithstanding.” §110.205(1), Florida Statutes (2001). Shortly before July 1, she was provided a notice by her Agency superiors, telling her the position would be reclassified on July 1, 2001, as a Selected Exempt Service position. Although the reclassification of the Employee’s position adversely affected her substantial interest, the Agency message did not comply with §120.569, Florida Statutes (2001), by providing the Employee with a clear point of entry into the administrative process. It did not reveal the basis for the Agency decision, it did not give notice that the Employee was entitled to a hearing, and it did not provide a definite time within which a hearing must be requested. The Agency provided no other notice.

Although the Agency reclassified the position on the notion that it was a supervisory position, the Employee’s position was a non-supervisory position prior to July 1, and it remained non-supervisory after July 1. The Employee’s position remained at all times a Career Service position, within the statutory definition of §110.205, Florida Statutes (2001).

In January 2002, the Agency terminated the Employee's employment without cause, informing her that as a Selected Exempt Service employee she had no right to appeal to PERC. The Employee nevertheless perfected an appeal to PERC, which stayed the appeal to allow the Employee to pursue the instant petition. The Employee then filed the instant petition with the Agency, seeking an administrative determination that her position was erroneously reclassified as Selected Exempt Service, and that it had remained at all times within the Career Service by virtue of the statutory mandate of §110.205, Florida Statutes (2001).

The Agency dismissed the petition, with a cryptic reference to §110.604, Florida Statutes, and no further explanation. Section 110.604, however, exempts terminations from the Selected Exempt Service from the requirement of Chapter 120. It does not exempt reclassification decisions, or dismissals from the Career Service. An agency's decision to reclassify an employee's position to a class outside the Career Service affects the "substantial interest" of the employee, entitling the employee to a hearing of the correctness of the decision. A free-form agency decision which affects a person's substantial interest, however, remains preliminary irrespective of its tenor until the substantially affected person is afforded or waives proceedings satisfying Chapter 120. Because the Agency did not provide the Employee a clear point of entry into administrative proceedings, as required by §120.569, Florida Statutes, its decision to reclassify

her position remained preliminary until she filed her petition on March 27, 2002.

It was therefore error to deny the petition.

The Agency's dismissal of the petition should be reversed, and this case should be remanded with instructions to grant the Employee a hearing.

## ARGUMENT

### POINT 1

#### WHETHER THE AGENCY ERRED IN DENYING THE EMPLOYEE A HEARING

The standard of review to be applied in reviewing a question of law is *de novo* review. *Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001). Because the Agency's action in dismissing the petition is necessarily taken as a matter of law, the question to be addressed is a question of law, and *de novo* review is appropriate.

Accepting the factual allegations of the petition as true, the Employee occupied a position as an Administrative Assistant II in the Career Service, with permanent status, prior to July 1, 2001. The duties of the position did not change, either prior to July 1, 2001, or afterward, and did not entail supervisory duties, as defined by §110.205(2)(x), Florida Statutes (2001), or managerial or confidential duties, as defined by §447.203(4)(5), Florida Statutes (2001). Nevertheless, the Agency erroneously reclassified the Employee's position as a Selected Exempt Service position, on the theory that it performed either "managerial" or "confidential" duties, or both. The Agency's reclassification action, and its continued maintenance of the position as a Selected Exempt

Service position, therefore, violated the mandate of §110.205(1), Florida Statutes (2001). The statute provides:

The career service to which this part applies includes all positions not specifically exempted by this part, any other provisions of the Florida Statutes to the contrary notwithstanding.

If, as alleged in the position, the Employee's position was a position within the Career Service by legislative definition, the Agency cannot by free-form action make it otherwise. An administrative agency has only those powers delegated by the Legislature, and those powers do not include the power to modify or contravene a statutory definition. Thus, a hearing on the Employee's petition would have served to vindicate the statutory mandate embodied in §110.205, Florida Statutes (2001).

The Agency attempts to avoid the scrutiny which accompanies a hearing conducted pursuant to Chapter 120 by a series of procedural maneuvers and legal findings, which are quite patently insupportable.

The Agency provided the Employee notice of the reclassification shortly before July 1, 2001. The notice did not comply with §120.569, Florida Statutes (2001). The notice did not provide the basis for the decision, did not notify the Employee she had a right to a hearing of any kind, and did not provide notice of

a definite time within which a hearing must be requested. The Agency did not provide a clear point of entry to the administrative process.

It is well established that a Career Service employee's "substantial interest" is affected by reclassification of his or her position from the Career Service to the Selected Exempt Service. In *Burgess v. Department of Commerce*, 400 So.2d 1258 (Fla. 1<sup>st</sup> DCA 1981), this Court held that the reclassification of an employee's position to the Selected Exempt Service affects the employee's "substantial interest" and entitles the employee to a hearing in which to test the validity of the Agency decision to reclassify.

The respondents miss the point: Burgess may be only lawfully deprived of any particular position. Here, she alleges, successfully enough to require a hearing, that DOC and DOA acted in violation of the statutory requirements for designating her position exempt. Article III, Section 14, of the Florida Constitution provides that the legislature shall except from the civil service only those expressly exempted by law. Section 110.205(2)(h), Florida Statutes (1979), implementing this directive, lawfully exempts a maximum of ten policy-making positions. Because there has been no hearing, formal or informal, the policy-making quality of the position has not been established,...

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Further, Burgess' substantial interest were affected in that the redesignation required her to choose between a job in the CSC which necessarily resulted in a layoff, or she could remain in her position without Career Service protection.

*Burgess*, 400 So.2d at 1259, 1260. See also, *Hasper v. Department of Labor & Employment Security*, 459 So.2d 400 (Fla. 1<sup>st</sup> DCA 1984); *Webster v South Florida Water Management District*, 367 So.2d 734 (Fla. 4<sup>th</sup> DCA 1979). In this case, the Employee's substantial interests were plainly affected by the Agency's reclassification effort.

The Employee's petition was a timely application to invoke a statutory right pursuant to §120.569 and §120.57(1), Florida Statutes (2001), to have her substantial interest in remaining employed with Career Service protection determined in appropriate administrative proceedings.<sup>8</sup> Agency action which adversely determines the substantial interest of a person in free-form proceedings is ineffective to do so, absent waiver. *Capeci Brothers, Inc. v. Department of Transportation*, 362 So.2d 346, 348 (Fla. 1<sup>st</sup> DCA 1978).

"Free-form" proceedings are nothing more than the necessary or convenient procedures, unknown to the APA, by which an agency transacts its day-to-day business. See H. Levinson, *Elements of the Administrative Process*, 26 *Amer.L.Rev.* 872, 880, 926 et seq. (1977). ... The vast majority of an agency's free-form decisions become conclusive because they are not challenged in Section 120.57(1) or (2) proceedings. Yet the agency's rules must clearly signal when the agency's free-form decisional process is

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<sup>8</sup> The Agency did not expressly challenge the timeliness of the petition in its final order.

completed or at a point when it is appropriate for an affected party to request formal proceedings, if authorized, or to accept his statutory opportunity for informally structured proceedings under Section 120.57(2). In other words, an agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under Section 120.57.

*Id.*, (footnotes omitted). Absent waiver by substantially affected persons, “an agency’s free-form action ... [remains] as only preliminary irrespective of its tenor.” “Until proceedings are had satisfying Section 120.57, or an opportunity for them is clearly offered and waived,” a agency is powerless to finally determine substantial interests. *Id.*

An agency can establish waiver of formal proceedings under Chapter 120 only by showing substantially affected persons were provided a clear point of entry into the administrative process. “[T]he agency must demonstrate that the person has been advised of the action to be taken and the basis thereof, the right to an administrative hearing, a clear point of entry into the administrative process, and a deadline by which a hearing must be requested.” *McIntyre v. Seminole County Sch. Board*, 779 So.2d 639 (Fla. 5<sup>th</sup> DCA 2001). See also, *City of St. Cloud v. Department of Environmental Regulation*, 490 So.2d 1356 (Fla. 5<sup>th</sup> DCA 1986).

In any event, actual notice of ... agency action which did not inform petitioner of his right to request a hearing and his time limits for doing so would be inadequate to trigger the commencement of the administrative process.

*Sterman v. Florida State University Board of Regents*, 414 So.2d 1102, 1104 (Fla. 1<sup>st</sup> DCA 1982). See also, *Higgins v. Florida Keys Aqueduct Authority*, 403 So.2d 1042 (Fla. 3<sup>rd</sup> DCA 1981); *Wahlquist v. School Board of Liberty County*, 423 So.2d 471 (Fla. 1<sup>st</sup> DCA 1983); *Manasota-88, Inc. v. Department of Environmental Regulation*, 417 So.2d 846 (Fla. 1<sup>st</sup> DCA 1982).

Because the Employee requested administrative proceedings on a matter affecting her substantial interest, she was entitled to a hearing under Chapter 120, and it was error to dismiss the petition.

The only rationale actually given in the final order for denying the petition is the rather cryptic reference to §110.604, Florida Statutes. This articulation by the Agency provides little explication of the Agency's rationale. Yet, however considered, the articulated reason is erroneous. The given reference is to a statutory provision which exempts from Chapter 120 termination decisions from the Selected Exempt Service. The Employee was seeking a determination whether her position was actually a position within the Career Service by virtue of legislative definition. Section 110.205(1), Florida Statutes (2001), defines a Career Service position as "including all positions not specifically exempted by

[§110.205], any other provisions of the Florida Statutes to the contrary notwithstanding.” The Agency’s reference to §110.604 assumes the principal factual issue on which the hearing request is made, and uses that assumption to avoid the hearing request. If an agency could avoid a hearing by simply assuming the contested issue in a manner contrary to the hearing request, §120.569 and §120.57 would be rendered meaningless.

If the Employee is successful in this appeal, she will simply be entitled to a hearing, in which, whatever the outcome, the public policy of the State of Florida, expressed by the Legislature in §110.205, Florida Statutes (2001), will be vindicated.

The Employee was entitled to a hearing.

CONCLUSION

For the foregoing reasons, the Court should reverse the order of the Agency dismissing the petition, and remand with instructions that the Employee be accorded a hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by prepaid United States Mail this 5<sup>th</sup> day of August, 2002, to the following:

Julie Waldman, Esquire  
Tacachale District Legal Counsel  
Florida Department of Children  
And Family Services  
1621 Waldo Road  
Gainesville, Florida 32609

-----  
JERRY G. TRAYNHAM

CERTIFICATE OF TYPESTYLE

I certify that this brief has been prepared using a Times New Roman typeface which is 14 points in size.

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JERRY G. TRAYNHAM

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No.	Item	Date
A	Petition For §120.569, 120.57 Hearing	3/27/2002
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