

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

1st DCA Case No. 1D02-1505

Robert Reinshuttle,

Appellant,

vs.

Agency For Health Care Administration,

Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the Agency for Health Care Administration

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ARGUMENT

POINT 1

WHETHER THE AGENCY ERRED IN DENYING THE EMPLOYEE A HEARING

In this case, the Court is asked to determine whether a State Career Service employee is entitled to a hearing under Chapter 120, Fla. Stat., in which to challenge a determination by an agency to reclassify an employee's position from a Career Service position to a Selected Exempt Service position.¹

The Employee occupied a non-supervisory position in the Career Service, with permanent status, prior to July 1, 2001. Shortly prior to July 1, he received email notice from the Agency that his position would be reclassified as a non-tenured Selected Exempt Service position, effective July 1, 2001, purportedly as a result of changes enacted as a part of the Service First initiative.

¹ For ease of reference, the Appellant, Robert Reinshuttle, will be referred to as the "Employee" or by name. The Appellee Agency for Health Care Administration will be referred to as either the "Agency," or as "AHCA." The record will be referred to by the letter "R" followed by the page number (e.g., R-12, 13). The Appendix to the Initial Brief will be referred to by the designation 'Emp. App:' followed by the tab and page numbers (e.g., Emp. App: A, 3).

The Agency did not give notice of any right or procedure for challenging the decision to reclassify the position; it did not provide the Employee a clear point of entry into administrative proceedings under Florida's Administrative Procedure Act (APA). The Employee's position title was changed to Senior Management Analyst Supervisor. The duties and responsibilities of the position remained identical, and did not entail supervisory responsibilities, either before or after July 1, 2001. (R-10-11; Emp. App. A-5-6). Less than three months later, the Employee's position was again reclassified — back to the same Career Service class in which it was previously classified.² The Employee, however, was reassigned with probationary status, on the rationale that the change from Selected Exempt Service to Career Service mandated a new probationary period. Again, the Employees duties remain identical. Four months later, the Agency terminated the Employee without cause, giving him notice that, because his status was probationary within the Career Service, he had no recourse to have the termination decision reviewed.

Alleging his substantial interests were adversely affected by the reclassification decisions, the Employee filed a petition under the APA seeking an

² The Career Service class was also retitled from Senior Management Analyst II to Government Analyst II.

administrative determination whether his position remained at all times within the Career Service by statutory mandate. The petition alleged that the Employee's position had never performed duties meriting the reclassification, because it did not entail supervisory duties, as defined by §110.205(2)(x), Fla. Stat. (2001), or managerial or confidential duties, as defined by §447.203(4)(5), Fla. Stat. (2001). The Employee asserted that his position, therefore, fell within the Career Service by statutory definition.

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.

§110.205(1), Fla. Stat. (2001).

Without providing a hearing of any kind, the Agency entered a final order dismissing the petition. To support its denial of the petition, the Agency engaged in fact-finding on issues of fact not alleged in the petition, and which would have been disputed issues of fact had the request for a hearing been granted. The Agency found, under the heading "Findings of Fact," that:

Petitioner by his actions accepted the reclassification [of his position to the Selected Exempt Service] and the benefits accompanying that reclassification....

(R-1-2; Emp. App. B-1-2). The Agency also made a finding of fact that when the Employee's position was reclassified as back within the Career Service less

than three months later, that “[the Employee] accepted the reassignment and reclassification without objection ... [and] accepted the pay and benefits attributable to the new position and status.” (R-2; Emp. App. B-2). Drawing upon these findings of fact, the Agency held that

[b]y accepting the reclassification and accepting the increased benefits available to SES employees, Petitioner is estopped from now contesting the lawful authority of the Agency to take the described personnel action.

(R-3; Emp. App. B-3).

The Agency’s attempt to avoid the scrutiny which accompanies a hearing conducted pursuant to Chapter 120 was patently insupportable.³

A. THE AGENCY ENGAGED IN FACT-FINDING IN VIOLATION OF §120.569 AND §120.57(1)

Where an agency’s determination depends upon disputed factual issues, a formal hearing pursuant to §120.57(1) is unquestionably required. The Employee requested a formal hearing, and identified, as disputed issues of material fact, whether his position performed supervisory duties, as defined by §110.205(2)(x), Fla. Stat. (2001). Rather than affording the Employee a hearing in which to

resolve these factual issues, the Agency found other disputed issues of fact adversely to the Employee's position, to justify its position in the final order that the Employee was equitably estopped from challenging the reclassification determinations, and therefore was not entitled to a hearing. This was error.⁴

The Agency's procedure was patently erroneous, because §120.569(1), Fla. Stat. (2001), mandates that "s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact." See, e.g. *New v. Department of Banking and Finance*, 554 So.2d 1203 (Fla. 1st DCA 1989); *Village Saloon, Inc. v. Division of Alcoholic Beverages and Tobacco*, 463 So.2d 278 (Fla. 1st DCA 1985); *Capeci Brothers, Inc. v. Department of Transportation*, 362 So.2d 346 (Fla. 1st DCA 1978). Because the Petition raised as an issue of material fact whether the Employee's position performed supervisory functions within the meaning of §110.205(2)(x), Fla. Stat. (2001), it was error for the Agency to refuse to resolve this issue in proceedings under §120.57(1), Fla. Stat.

³ In the Answer Brief's statement of the case, and throughout its argument the Agency improperly relies for fact-finding upon interlocutory orders of the Public Employees Relations Commission (PERC) in a related proceeding. Because the record of that proceeding is not before the Court, it is not reasonably reviewable here, and its findings have value neither as precedent nor preclusion.

B. THE EMPLOYEE'S "SUBSTANTIAL INTEREST" WAS AFFECTED BY THE AGENCY'S RECLASSIFICATION DETERMINATION

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. 1st 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,...

* * *

⁴ In its Answer Brief, the Agency has seemingly abandoned, as insupportable, the final order's sole rationale. The Agency first faults the Employee for treating the final order's articulation of the reason for dismissal of the petition seriously. It then searches somewhat ruefully for some other justification for the dismissal.

Further, Burgess' substantial interests 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. In this case, the Employee's substantial interest was plainly affected by the Agency's reclassification determination, and, because there has been no hearing, "the [supervisory] quality of the position has not been established." *Id.* A hearing is required to resolve the factual issue.

The Agency attempts to distinguish *Burgess* by arguing, at pages 7 and 8 of the Answer Brief, that *Burgess* addressed a single discretionary agency reclassification, whereas this case addresses what the Agency characterizes as "en masse mandatory legislative reclassification." Answer Brief at p. 7. The Agency's characterization is more ostentatious than reality requires. Service First simply amended §110.205, Fla. Stat., to exempt three additional categories of employment:

Managerial 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, including all employees serving as supervisors, administrators, and directors.

§110.205(2)(x), Fla. Stat. (2001). The distinction the Agency attempts to make is not readily apparent, and, in application, must result in procedures conceptually indistinguishable from *Burgess*. Whether an agency is presented with circumstances potentially calling for the reclassification of one or of many positions, a factual determination must still be made regarding whether any particular position falls within the language of a statutory exception to the Career Service. An agency has no delegated legislative authority to treat a position as outside the Career Service, unless it falls within an exception. In making a factual determination that a Career Service employee's position falls within a particular statutory exception, an agency determines that employee's substantial interest.

The Employee in this case was a tenured Career Service employee. He had a right to continued employment in his Career Service position for so long as the position remained within the Career Service. His petition sought a determination that his position properly remained within the statutory definition of a Career Service position as prescribed by §110.205, Fla. Stat. (2001). The Agency did not have unfettered discretion to reclassify the Employee's position; its discretion was limited by statute and by rule. Thus, the Agency's determination that the Employee lacked a substantial interest in its determination is error.

The Agency also argues, at pages 7 through 11 of the Answer Brief, that it did not take agency action in reclassifying the Employee's position. Rather, the Agency argues, the reclassification was the result of legislative action. I have difficulty believing this is a serious argument. Chapter 01-043, § 15, Laws of Fla., which amended §110.205(2), Fla. Stat., did not identify this Employee's, or any specific employee's, position for exemption or reclassification. The Legislature did not identify any specific positions or classes for exemption or reclassification. It simply provided the statutory description now codified at §110.205(2)(x), Fla. Stat. It was plainly the Agency that identified and determined which positions met the statutory description, and acted to reclassify those positions. To characterize these determinations as "ministerial," as the Agency does at page 8, is quite unreasonable.⁵

The Agency's argument, at pages 11 through 15, that it was excused from the requirements of Chapter 120 by the operation of Rule 60K-4.012, Fla. Admin. Code, is also poorly conceived. The argument, apparently, is that the

⁵ In the course of this argument, the Agency improperly relies upon an unreviewed, interlocutory order of a PERC hearing officer in another case, making reference to still another unresolved proceeding in Florida Public Employee Council 79, AFSCME v. Bush, Case No. CA-2001-042. The records of neither proceeding are before this Court, and are not appropriately considered here. Because these matters are outside the record, it is not appropriate for the Employee to respond to this argument.

rule requires an agency to accommodate the substantial interests of employees by providing proceedings under Chapter 120, but only in circumstances where “no right of appeal is provided by these rules.” The Agency argues that because the rules provide an employee grievance procedure, it was not required to comply with Chapter 120. The argument is flawed in numerous respects. First, and most obvious, an administrative rule, standing alone, cannot excuse an agency from the requirements of a statute, Chapter 120. Second, the grievance procedure identified — Rule 60K-9.004, Fla. Admin. Code — is not a “right of appeal.” It is a grievance procedure; nothing more. The Agency’s statement, at page 12 of the Answer Brief, that the grievance procedure did not exist and thus a hearing was required at the time of *Burgess*, is simply incorrect. The rule has provided a grievance procedure since at least 1978, and is derived from former Rule 22A-10.04, Fla. Admin. Code, which also provided a grievance procedure.

Finally, the Agency argues, at pages 15 and 16 of the Answer Brief, that the Employee’s failure to immediately challenge the reclassifications results in an

abandonment of his rights under Chapter 120.⁶ This theory, however, runs contrary to several decades of precedent. To establish waiver of rights under Chapter 120, “the 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. 5th DCA 2001). See also, *City of St. Cloud v. Department of Environmental Regulation*, 490 So.2d 1356 (Fla. 5th 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. 1st DCA 1982).

The Employee’s petition was a timely application to invoke a statutory right pursuant to §120.569 and §120.57(1), Fla. Stat. (2001), to have his

⁶ In this argument, the Agency also makes an improper, and entirely misleading, reference to the Employee temporarily serving in an acting capacity as a bureau chief. The reference is improper because there is no factual record before the Court to facilitate a meaningful discussion. Because the Agency dismissed the Petition, the factual record is limited to the allegations of the Petition. Nevertheless, the insinuation that the Employee received any kind of

substantial interest in remaining employed with Career Service protection determined in appropriate administrative proceedings.

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

CONCLUSION

For the foregoing reasons, the Court should reverse the Agency's dismissal of the petition, and this case should be remanded with instructions to grant the Employee a hearing.

Respectfully submitted,

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“appointment” to a bureau chief level position is both flatly wrong and very misleading.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by prepaid United States Mail this 6th day of January, 2003, to the following:

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CERTIFICATE OF TYPESTYLE

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

JERRY G. TRAYNHAM