STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| FLORIDA PUBLIC EMPLOYEES COUNCIL 79; AFSCME; BETTY HALL; DIANA LOMAS; SARA BATTISTA; MERCEDES VALDEZ; ELIZABETH JUDD; and KENNETH SHOLSTRUM, | ) | |
| Petitioners, | ) | |
| vs. | ) | Case No. 98-4706RU |
| DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, | ) | |
| Respondent, | ) | |
| and | ) | |
| MYRIAM GARCIA, | ) | |
| Intervenor. | ) | |

## FINAL ORDER

Pursuant to notice, a final hearing was conducted in this case on December 11, 1998, at Tallahassee, Florida, before Michael M. Parrish, an Administrative Law Judge of the Division of Administrative Hearings.

## APPEARANCES

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For Intervenor: Linda Barge-Miles, Esquire
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## STATEMENT OF THE ISSUES

This is a rule challenge proceeding pursuant to Section 120.56(4), Florida Statutes, in which the Petitioners and the Intervenor assert that they are substantially affected by an agency statement that violates Section 120.54(1)(a), Florida Statutes. The subject matter at issue here concerns the method of determining the order of layoff of some of the Respondent's employees.

## PRELIMINARY STATEMENT

By means of a Petition filed on October 22, 1998, the Florida Public Employees Council 79, AFSCME, (AFSCME) and six individuals (the individual Petitioners) challenged the validity of an alleged rule of the Department of Labor and Employment Security (Respondent). On November 17, 1998, all of the Petitioners filed a motion seeking leave to amend their Petition. The motion was accompanied by an Amended Petition. The motion was unopposed, and by order Dated December 8, 1998, the Amended Petition was substituted for the original Petition.

On October 26, 1998, Myriam Garcia (Intervenor) filed a Motion to Intervene, in which she asserted, among other things, that she was adversely affected by the same alleged rule which was being challenged by the Petitioners. The motion was unopposed, and by order dated November 6, 1998, the Intervenor was granted party status subject to proof at hearing.

On December 10, 1998, the Petitioners and the Respondent

filed a Prehearing Stipulation in which, among other things, they stipulated to a number of facts. At the final hearing, the Intervenor joined in the stipulations contained in the Prehearing Stipulation.

At the commencement of the final hearing, counsel for the Petitioners announced that two of the individual Petitioners, Kenneth Sholstrum and Sara Battista, wished to be voluntarily dismissed from further participation in this proceeding.

At the final hearing in this case, the Petitioners offered eight exhibits, all of which were received in evidence. The Petitioners also presented the testimony of two witnesses; Theodore R. Buri, a Regional Director of AFSCME, and Louise Lambert, Chief of the Respondent's Bureau of Human Resources. None of the individual Petitioners testified at the final hearing. The Respondent did not offer any exhibits and did not call any witnesses. The Intervenor did not offer any exhibits and did not call any witnesses. Official recognition was taken of Chapter 60K-17, Florida Administrative Code.

At the conclusion of the hearing the parties requested, and were granted, 17 days within which to file their respective proposed final orders. None of the parties elected to file a transcript of the hearing. The Petitioners and the Respondent filed timely proposed final orders. As of the date of this Final Order, the Intervenor has not filed any post-hearing documents.

## FINDINGS OF FACT

Stipulated facts

1. In 1996, the federal government modified and/or reformed welfare to require eligible participants to obtain employment. The Florida Legislature enacted Chapter 414, Florida Statutes, also known as the WAGES law, which required the Respondent to provide certain services to applicants for and participants in the WAGES program, including work activities, training, and other job-related services, which the Respondent termed "front-end services." Those services were primarily provided by Career Service employees of the Respondent.

2. In 1998, the Florida Legislature amended portions of the WAGES law to require that local WAGES coalitions, instead of the Respondent, provide those front-end services to WAGES participants, effective October 1, 1998.

3. As a direct result therefor, the Respondent was required to lay off approximately 700 career service employees.

4. As a part of the implementation of the announced layoff of employees, Respondent requested approval of a method of determining the order of layoff, pursuant to Rule 60K-17.004(3)(g), Florida Administrative Code, which provides:

> (g) Agencies shall then choose and consistently apply one of two methods, or another method as approved by the Department of Management Services, in determining the order of layoff. These methods are commonly referred to as "bumping."
> 1. Option 1: The employee at the top of the list shall have the option of selecting a position at the bottom of the list based on the number of positions to be abolished,

e.g., 20 positions in the affected class, 5 positions to be abolished. The employee at the top of the list can select any of the positions occupied by the 5 employees at the bottom of the list. The next highest employee on the list then has the option of selecting any of the positions occupied by the 4 remaining employees at the bottom of the list with the process continuing in this manner until the 5 employees at the top of the list have exercised their option.

> 2. Option 2: The employee at the top of the list has the option of selecting any position occupied by any employee on the list with fewer retention points in the class. The next highest employee and remaining employees shall be handled in a similar manner until the list is exhausted.

Rather than selecting Option 1 or Option 2, set forth in the published rule, the Respondent requested approval of an alternative method of determining the order of layoff.

5. By letter dated August 17, 1998, the Department of Management Services (DMS) approved the method of determining order of layoff set forth in its correspondence. The method of determining the order of layoff is described by DMS in its approval letter as:

> The option you have chosen will allow adversely affected employees to select any position in the affected class and series, in the competitive area approved in our August 5, 1998 letter.

6. Neither the Respondent's request for approval of the alternate method of determining the order of layoff, nor DMS' approval of that method, have been adopted in substantial conformity with Section 120.54, Florida Statutes.

7. The Respondent's request for approval of the alternate method of layoff was intended to apply solely to the layoff occasioned by changes in the WAGES law.

Facts based on evidence at hearing

8. Florida Public Employees Council 79, AFSCME, is the certified bargaining agent for approximately 67,000 career

service employees of the State of Florida. As such, it

represents the employees of the Department who were affected by the subject layoff.

9. The individual Petitioners, Betty Hall, Diana Lomas, Mercedes Valdez, and Elizabeth Judd, are members of the AFSCME collective bargaining unit. The challenged bumping procedure was not reached by collective bargaining.

10. Under the alternative layoff method approved for the Respondent by DMS, employees with the greater number of retention points received enhanced bumping rights, permitting them to "bump" employees with fewer retention points in the same class and in the class series. Conversely, by this alternative procedure, employees with fewer retention points were accorded diminished protection against bumping. These employees could be bumped not only by employees with greater retention points in the class, but also by employees with greater retention points in other classes in the class series.

11. For example, Consuelo Casanovas, from Petitioners' Exhibit 8, who was adversely affected in her position of Employment Security Representative I, was accorded bumping rights to positions in her class and to positions in the other two classes in the class series, Customer Services Specialist and Interviewing Clerk. Had the Respondent elected Option 1 or Option 2 in the published rule, Rule 60K-17.004(3)(g), Florida Administrative Code, Ms. Casanovas would not have had the right to bump to positions in the other two classes, and persons in

those other two classes would not have been subject to bumping by Ms. Casanovas.[1]

## CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.56, Florida Statutes.

13. With regard to the individual Petitioners, Kenneth Sholstrum and Sara Battista, the Amended Petition should be dismissed based on their respective notices of voluntary dismissal announced at the commencement of the hearing.

14. With regard to the remaining individual Petitioners, Betty Hall, Diana Lomas, Mercedes Valdez, and Elizabeth Judd, the Amended Petition should be dismissed because there is no competent substantial evidence that any of them were adversely affected by the alleged rule challenged in this proceeding. Therefore, they have no standing to bring the instant action.

15. With regard to the Intervenor, Myriam Garcia, her Motion to Intervene should be denied and the relief she requests should be denied, because there is no competent substantial evidence that she was adversely affected by the alleged rule challenged in this proceeding. Therefore, she has no standing to seek relief in this action.

16. In its proposed final order, the Respondent does not challenge the standing of the remaining Petitioner, AFSCME. Although there are serious doubts[2] as to whether AFSCME has

standing in a case of this nature, the matter does not need to be resolved because, for the reasons set forth below, the Amended Petition must, in any event, be dismissed.

17. In its proposed final order the Respondent sets forth several reasons for which the Amended Petition in this case should be dismissed. All of those reasons, which are quoted immediately below, are persuasive and are adopted into these conclusions of law.

> 13. Because the Department had utilized the alternate method of layoff to effectuate the reduction in force prior to the time the Petition in this case was filed and before the evidentiary hearing was conducted, this case is moot. A determination that the Department's request for approval of the use of the alternate method constitutes an unpromulgated rule will offer no relief to the sole remaining Petitioner, because the layoff has been completed and has no prospective application.
>
> 14. For purposes of Chapter 120, Florida Statutes, the term "rule" is defined, in pertinent part, as follows at Section 120.52(15), Florida Statutes:
>
> > (15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:
> >
> > (a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.
>
> 15. Section 120.56(4), Florida Statutes, provides, in pertinent part, as follows:
>
> > (4) CHALLENGING AGENCY STATEMENTS

DEFINED AS RULES; SPECIAL PROVISIONS.-
(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

16. Rule 60K-17.004(3)(g), Florida Administrative Code, provides as follows:

(3) Procedures for layoff within the competitive area are as follows:

(g) Agencies shall then choose and consistently apply one of two methods, or another method as approved by the Department of Management Services, in determining the order of layoff. These methods are commonly referred to as "bumping."

1. Option 1: The employee at the top of the list shall have the option of selecting a position at the bottom of the list based on the number of positions to be abolished, e.g., 20 positions in the affected class, 5 positions to be abolished. The employee at the top of the list can select any of the positions occupied by the 5 employees at the bottom of the list. The next highest employee on the list then has the option of selecting any of the positions occupied by the remaining 4 employees at the bottom of the list with the process continuing in this manner until the 5 employees at the top of the list have exercised their options.

2. Option 2: The employee at the top of the list has the option of selecting any

position occupied by any employee on the list with fewer retention points in the class. The next highest employee and remaining employees shall be handled in a similar manner until the list is exhausted.

17. The decision of the Department to request approval from the Department of Management Services to utilize another method in determining the order of layoff, as permitted by the clear provision of rule 60K-17.004(3)(g), Florida Administrative Code, does not constitute a "rule" as defined in Section 120.52(15), Florida Statutes.

18. In Groves, et al. v. State Department of Transportation, 2 FALR 1513A (1980), it was held that an agency's definition of a competitive area associated with a layoff did not constitute a rule because even though its application was general, it was limited to a given layoff determination. "The actual choice of a competitive area, however, declares matters based on present facts under rules already existing." Id. 1515A. Similarly, the Department's choice to request an alternate method of layoff in the instant situation is limited to the current layoff and is not intended to be utilized in any future layoff the Department may be required to effectuate.

19. In Department of Commerce v. Mathews Corporation, 358 So. 2d 256 (Fla. 1st DCA 1978), the Department was charged with the responsibility of setting prevailing wage rates on public works projects. A contractor on one of those projects challenged a prevailing wage rate schedule that was established by the Department, contending that it constituted an invalid rule. While the DOAH Hearing Officer concluded that the prevailing wage rate schedule was a rule, the court reversed on the following grounds:

> The wage determinations were not statements of general applicability. While the wage rate determinations must be included within the specifications of each public works contract in the state, the determination by agency Rule 8C-2.05, Florida Admin. Code, is applicable only to the construction of the particular public building or other work specified in the determination. The determination thus has temporal as well as geographical limitations. The determinations have no prospective

application to any other contract - only to the specific project involved in the particular location. Nor do they set wage standards for affected persons extending some indefinite time in the future.

20. As in Mathews, the Department's decision to seek approval from DMS for the alternate layoff method has no prospective application. It is, therefore, not an agency statement of general applicability as contemplated by Section 120.52(15), Florida Statutes.

21. In Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81 (Fla. 1st DCA 1997), the court reversed an Administrative Law Judge's determination that three policies which the Florida Highway patrol followed in investigating allegations of employee misconduct were invalid rules not adopted in compliance with Section 120.54, Florida Statutes. The court stated that the policies "cannot be considered as statements of general applicability because the record establishes that each was to apply only under "certain circumstances." Id. 82.

22. The decision of the Department to seek the approval of DMS for the alternate method of layoff is likewise not a statement of general applicability because it only applies to the Career Service employees of the Department and only for this particular layoff situation.

23. Additionally, that decision is not self-executing, it does not, in and of itself, create or adversely affect rights, and it does not have the direct and consistent effect of law. See Lawrence v. Department of Health and Rehabilitative Services, 18 FALR 1435 (1996), affirmed, 690 So. 2d 594 (Fla. 1st DCA 1997).

24. Furthermore, the Department's letter to DMS requesting approval for the alternate layoff method merely constitutes an internal agency memorandum that does not affect any plan or procedure important to the public and which has no application outside the Department of Labor and Employment Security. See Section 120.52(15)(a), Florida Statutes.

18. An additional reason which compels the dismissal of the Petition in this case is the fact that the Respondent is not the author of any "statement" that made any difference to any of the employees subject to layoff. The "statement" that made all the difference was the statement by the Department of Management Services that approved the layoff procedure requested by the Respondent. The Department of Management Services has not been made a party to this case. Accordingly, the statement by the Department of Management Services is not properly at issue in this proceeding.

## CONCLUSION

For all of the foregoing reasons, it is ORDERED:

That the Amended Petition in this case is hereby DISMISSED and all relief requested by the Petitioners and the Intervenor is hereby DENIED.

DONE AND ORDERED this 23rd day of February, 1999, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
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Filed with the Clerk of the
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this 23rd day of February, 1999.

## ENDNOTES

1/ It is important to note, however, that the evidence in this case fails to establish that any specific employee who was laid off under the procedure chosen by the Respondent would have been better off under either of the procedures described in Rule 60K-17.004(3)(g), Florida Administrative Code, than under the alternative method used by the Respondent.

2/ This doubt arises primarily from the conflict of interest inherent in this type of situation. While the layoff procedure chosen by the Respondent clearly diminished the job retention prospects of some employees, it also enhanced the job retention prospects of other employees. AFSCME's charge is to represent the best interests of all of the employees in its bargaining units. It is questionable whether AFSCME has a proper role in advancing the interests of some bargaining unit members at the expense of other bargaining unit members.

COPIES FURNISHED:

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## NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.