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Fuller v. Department of Education

Final Order

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STATE OF FLORIDA
DEPARTMENT OF EDUCATION
DEPT OF EDUCATION
TALLAHASSEE FLA

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DIVISION OF ADMINISTRATIVE HEARINGS
FILED

PATRICIA FULLER,

AP

Petitioner,

v.

DOE CASE NO. DOE-2003-893
DOAH CASE NO. 04-0873 SED

CCA
Clos

DEPARTMENT OF EDUCATION,

Respondent.

FINAL ORDER

After review of the entire record of this case, the Department of Education hereby enters this Final Order pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

Preliminary Statement

On July 22, 2003, Respondent notified Petitioner of her right to petition Respondent for review of the decision to reclassify her employment position as Career Service to that of Exempt Service. Petitioner was afforded 21 days from the receipt of the correspondence to file a petition with Respondent's agency clerk. Petitioner availed herself of the opportunity to contest the reclassification by filing a petition with Respondent's agency clerk seeking a formal hearing consistent with Sections 120.569 and 120.57(1), Florida Statutes. That petition was received on August 27, 2003.

On March 15, 2004, the Division of Administrative Hearings (DOAH) received the petition requesting the formal hearing to contest the reclassification as forwarded by Respondent. Upon receipt of the petition and letter of transmittal, the case was assigned to The Honorable Barbara J.

Staros, Administrative Law Judge, pursuant to Section 120.569(2)(a), Florida Statutes (2004), in anticipation that a formal hearing would be conducted to resolve disputed issues of material fact between the parties. Following reassignment, the final hearing was conducted before The Honorable Charles C. Adams, Administrative Law Judge.

Prior to hearing, Petitioner filed a Motion for Summary Disposition or Motion in Limine to Exclude Evidence. That motion was premised on the argument that the Florida Public Relations Commission (PERC) has exclusive jurisdiction to determine employment reclassifications under authority created by Chapter 447, Florida Statutes, and that Respondent had no power to reclassify Petitioner's position. Petitioner through the motion urged the Administrative Law Judge to enter a Recommended Order immediately returning Petitioner's position to Career Service status or, in the alternative, exclude the evidence on subjects that were within the exclusive jurisdiction of PERC. Respondent filed a response in opposition to this motion. On June 15, 2004, Judge Staros entered an order denying the motion.

On August 5, 2004, a formal hearing was held at the DOAH, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida, before Judge Adams. When the hearing commenced, Petitioner filed a Request for Administrative Notice in Support of Motion for Summary Disposition. That pleading referred to an administrative action styled Florida Public Employees Council 79, AFSCME v. State of Florida, CA-201-048, a case before PERC. By this filing Petitioner sought to lend support for her Motion for Summary Disposition previously ruled on. Judge Adams determined that this motion did not set aside the prior ruling by Judge Staros denying Petitioner's Motion for Summary Disposition. Instead, Judge Adams determined that Petitioner sought to provide notice of

the pendency of the PERC action. Additionally, Judge Adams recognized that with this notice Petitioner intended to contend in her proposed recommended order for the present case that DOAH is preempted from considering the case given PERC's exclusive jurisdiction on the subject concerning reclassification of Petitioner's employment.

As reflected in the hearing transcript in this case, Petitioner's Request for Administrative Notice in Support of Motion for Summary Disposition filed at the beginning of the hearing was treated as a notification of the pendency of the action before PERC. But the parties were informed by Judge Adams that Petitioner's case against Respondent before DOAH would proceed independently in keeping with the decision in Reinshuttle v. Agency for Health Care Administration, 849 So.2d 434 (Fla. 1st DCA 2003), without regard for the case before PERC.

Recognizing the nature of the matter at hearing, Respondent first proceeded with its case-in-chief. Respondent presented Amy Hammock and Patty Roberts as its witnesses. Petitioner testified on her own behalf. Respondent presented Amy Hammock and Carol Gordon as rebuttal witnesses.

Petitioner's Exhibits A and B were admitted. Respondent's Exhibits C, E, and D were admitted, the latter exhibit limited to the manual referred to as LAS/PBS. Respondent's Exhibits F, G, and H were denied admission. They are included with the record under proffer in relation to evidence by both parties concerning the significance of the master contract between the State of Florida and the Florida Public Employees Council 79, American Federation of State, County and Municipal Employees (AFSCME) and the consequences which adherence to that master contract would have on Petitioner's right to proceed in her own right with the challenge to her job reclassification by Respondent. As explained in the transcript pertaining to the present case, the

circumstances between the State of Florida and AFSCME were not considered in resolving the dispute between Petitioner and Respondent by Judge Adams. Judge Adams made this decision given his reading of Reinshuttle, supra, in which he concluded that the court intended that Petitioner be afforded an opportunity to contest her reclassification by Respondent outside the experience of the master contract between the State of Florida and AFSCME. Nonetheless, Judge Adams allowed the parties to proffer evidence that would facilitate review of this ruling by the appropriate court.

Judge Adams took official recognition of Chapter 60K-1, Florida Administrative Code, predating January 2002, as well as Chapter 2001-043, Laws of Florida.

The parties prepared a joint Pre-Hearing Statement. Certain facts were agreed to by the parties in that statement. Those agreements were acknowledged by Judge Adams and the undisputed facts are found at paragraphs 1, 2, and 3 of the Findings of Fact of the Recommended Order.

At hearing, Petitioner requested that the first sentence of Respondent's answer to Interrogatory 2 propounded to Respondent be admitted. Judge Adams granted that request and the issue is found at paragraph 4 of the Findings of Fact in the Recommended Order.

On August 17, 2004, a hearing transcript was filed with DOAH. Petitioner, without opposition, moved to extend the time for filing proposed recommended orders until September 10, 2004. The motion was granted. The parties filed proposed recommended orders on the extended schedule. On October 7, 2004, Judge Adams issued his Recommended Order.

On October 22, 2004, Respondent timely filed Respondent's Exceptions to Hearing Officer's Recommended Order. On November 4, 2004, Petitioner timely filed her Response to Exceptions.

Exceptions

Respondent filed two basic exceptions. The first exception concerns Judge Adams' ruling on whether Petitioner's right to a hearing in this matter was previously waived. (See Transcript, pages 7 - 22 and 81-108; See also Petitioner's Motion for Summary Disposition or Motion in Limine to Exclude Evidence, Respondent's Response to Motion for Summary Disposition or Motion in Limine to Exclude Evidence, Joint Pre-Hearing Statement, and Petitioner's Request for Administrative Notice in Support of Motion for Summary Disposition) The second exception concerns Judge Adams' Conclusion of Law at paragraph 60 found at pages 31 and 32 of the Recommended Order in which he concludes Petitioner was not a managerial employee. Both exceptions are addressed below.

Respondent's Exception 1

The Administrative Law Judge Erred as a Matter of Law in Determining that Petitioner Did Not Waive Her Right to a Hearing as a Result of the Failure of the Petitioner's Bargaining Unit Representative to Timely Challenge the Reclassification of Her Position.

After review of the entire record of this case, including Respondent's argument relating to this issue at pages 1 - 7 of Respondent's Exceptions to Hearing Officer's Recommended Order and Petitioner's Response to Exceptions, Respondent's exception is denied under protest pursuant to s. 120.57(1)(l), F.S.¹ This conclusion of law is made under

¹See Barfield v. Department of Health, 805 So.2d 1008, 1013 (Fla. 1st DCA 2002) (an agency harmed by recommended conclusions, including evidentiary rulings, it cannot reject has the option of entering a final order under protest and thereafter appealing from its own order as a party adversely affected, or of seeking immediate judicial review from the Administrative Law Judge's recommended order).

protest for the reasons set forth in the attached exceptions.

Respondent's Exception 2

The Administrative Law Judge's Conclusion of Law at Paragraph 60 of the Recommended Order in which he determined that Petitioner was not a Managerial Employee is Contrary to Law and Unsupported by Competent Substantial Evidence.

After review of the entire record of this case, including Respondent's argument relating to this issue at pages 1 and 2 and pages 7 - 12 of Respondent's Exceptions to Hearing Officer's Recommended Order and Petitioner's Response to Exceptions, RESPONDENT'S EXCEPTION 2 IS GRANTED. Accordingly, the last three sentences of paragraph 60 are rejected and the paragraph is, as a matter of law, concluded with the following sentence.

Petitioner's role in the preparation and administration of budgets at the Department of Education was significant and her position of Senior Management Analyst I meets the definition of "managerial employee" justifying the reclassification of her position from Career Service to Select Exempt Service.

Findings of Fact

The Administrative Law Judge's Findings of Fact, paragraphs 1 - 51 of the Recommended Order, are hereby adopted as the Findings of Fact of this Final Order and made a part hereof as if fully set forth herein.

Conclusions of Law

The Administrative Law Judge's Conclusions of Law are made a part hereof as if fully set forth herein. The Administrative Law Judge's Conclusions of Law, paragraphs 52 - 59, 61 and 62 of the Recommended Order, are hereby adopted as the Conclusions of Law of this Final Order. Paragraph 60 of the Conclusions of Law found at pages 31 and 32 of the Recommended Order is

rejected to the extent it conflicts with the findings concerning Respondent's Exception 2 granted above.

Disposition

Based upon the foregoing Findings of Fact, Conclusions of Law, and rulings on Respondent's Exceptions, the following disposition is **ORDERED and ADJUDGED**:

1. Petitioner's role in the preparation and administration of budgets at the Department of Education was significant and her position as Senior Management Analyst I meets the definition of "managerial employee" justifying the reclassification of her position from Career Service to Select Exempt Service. As a properly classified Select Exempt Service employee, Petitioner is not entitled to rights pertaining to Career Service employees as of the time of her reclassification. Therefore, Petitioner's petition is dismissed.
2. Respondent's first exception is denied under protest. Based on the proffer of evidence by Respondent, Petitioner's collective bargaining unit, as a matter of law, waived her right to a hearing on the reclassification of her position as a result of its failure to timely challenge reclassification of her position in 2001.

DONE AND ORDERED, this 4th day of March, 2005, in

Tallahassee, Leon County, Florida



John Winn
Commissioner of Education
State of Florida

COPIES FURNISHED TO:

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Florida Administrative Law Reports

² Mr. Hilligas filed notice of withdraw as attorney for Petitioner with the Division of Administrative Hearings.

NOTICE OF RIGHTS

Pursuant to Section 120.68(2), Florida Statutes and Florida Rules of Appellate Procedure 9.110(b) and (c), the parties are advised that a judicial review of this Final Order may be obtained by filing Notice of Appeal within 30 days of the date of this Final Order. The Notice of Appeal must be filed with the Agency Clerk, Department of Education, Suite 1514 Turlington Building, 325 West Gaines Street, Tallahassee, Florida 32399-0400, and by filing a second copy of the Notice of Appeal, along with the appropriate filing fee, with the Clerk of the District Court of Appeal, First District, 300 Martin L. King, Jr., Boulevard, Tallahassee, Florida 32399-1850, or with the Clerk of the District Court of Appeal wherein the party resides.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Final Order has been furnished by U.S. Mail to:

Attorneys for Petitioner:

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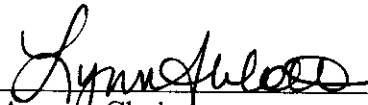
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this 4th day of March, 2005.



Agency Clerk

³ Mr. Hilligas filed notice of withdraw as attorney for Petitioner with the Division of Administrative Hearings.