

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

STEPHEN FORD, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 06-1911SED  
 )  
 DEPARTMENT OF MANAGEMENT )  
 SERVICES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, an administrative hearing was held in the above-styled case on September 29, 2006, in Tallahassee, Florida, before the Honorable Diane Cleavinger, Administrative Law Judge at the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jerry G. Traynham, Esquire  
Post Office Box 4289  
Tallahassee, Florida 32315

For Respondent: Avery D. McKnight, Esquire  
Alien, Norton and Blue, P.A.  
906 North Monroe Street  
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's employment position was properly reclassified from Career Service to the Select Exempt Service (SES) on July 1, 2001, pursuant to Section 110.205(2)(x), Florida Statutes (2001).

PRELIMINARY STATEMENT

On July 1, 2001, the Department of Management Services (DMS) reclassified Petitioner's employment position from Career Service to Select Exempt Service (SES) under the "Service First" initiative codified in Section 110.205(2)(x), Florida Statutes. The Department advised Petitioner that he could file a petition challenging the reclassification of his position. On May 24, 2006, Petitioner filed a petition challenging the reclassification. The Petition was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified on his own behalf and offered one exhibit into evidence. The Department presented the testimony of one witness and offered seven exhibits into evidence. The deposition testimony of Richard Youse was also admitted into evidence.

After the hearing, the parties filed Proposed Recommend Orders on November 17, 2006.

FINDINGS OF FACT

1. In 1985, Petitioner was employed by the Department as an Engineer III. He was eventually promoted to Engineer IV and then to Engineer IV coordinator. Prior to July 1, 2001, Petitioner's positions were classified as career service. On July 1, 2001, Petitioner's position was changed from a career service classification to an SES classification and designated

as an Engineer Supervisor IV. A knew job description was also prepared.

2. Throughout his employment, Petitioner's main duty was to inspect, maintain and repair fire and security alarm systems in State office buildings. In that capacity and depending on the particular system, Petitioner worked as part of and coordinated with a team of one to two other inspectors.

3. Petitioner's position as an Engineer IV was a position within the PERC certified Professional Career Service collective bargaining unit, represented by Florida Public Employees Council 79, Association of Federal, State, County and Municipal Employees Union (AFSCME). For inclusion within such a unit the position was considered to not involve managerial or supervisory functions.

4. In fact, Petitioner's positions as an Engineer III and IV did not involve supervisory functions. However, when he became an Engineer IV coordinator, Petitioner had some supervisory duties. Those duties were primarily approving time sheets and performing annual employee performance evaluations. Employee assignments and training were handled as a team with a particular employee's specific equipment knowledge and building knowledge being key factors. When work was performed together, the employee with the greater expertise with the system directed

the work. Prior to his termination, Petitioner supervised Ed McCann and Richard Lamberto.

5. Approximately 90 percent of Petitioner's time was spent responding to calls regarding the malfunctioning of fire and security systems. About five percent of his time was spent performing routine maintenance on such systems and another two to four percent on responding to fire marshall's inspection reports. Less than one percent of his time was spent on supervisory duties. Petitioner's primary duties involved the exercise of independent judgment. His duties were not routine or clerical in nature. Petitioner did not have the power to hire and fire an employee or the power to make purchase decisions. He could make effective recommendations regarding those decisions. He did not have authority over any budgetary matters. There was no evidence that Petitioner's position dealt with confidential matters. In fact, Petitioner's actual job performance did not change after his position was reclassified to Engineer Supervisor IV, SES. His day-to-day performance did not change primarily because his office was seriously understaffed for the statewide duties of their office.

6. However, the new SES description expanded the supervisory or managerial duties of Petitioner's old career service position description. In pertinent part, the position description as of July 2, 2001, stated the following:

**20% Supervisory:**

1. Supervision of Fire & Safety employees in their duties and responsibilities. Evaluations and review of job performance, recommendation of disciplinary action if necessary, training and continued education.
2. Supervise the project management duties that include the approval of timesheets, project specification, drawings, purchase orders, requisitions, correspondence, travel, purchase order completion of contract pay requests.
3. Meet regularly with subordinate staff to discuss office procedures, work assignments and Division issues and goals.
4. Addresses performance issues promptly and uses progressive and corrective action to resolve employee performance problems.
5. Updates, discusses and presents Performance Planning and review forms, position descriptions and office procedures to subordinate staff.
6. Provides each employee with a performance review within the designated time period in accordance with established rules and procedures.
7. Ensure staff attend necessary training with designated time frames.
8. Follows established rules, regulations and procedures for attendance and leave, travel reimbursements, appointment procedures, affirmative action and invoice processing.

Duties contained in numbers three through eight were expanded from his earlier 1999 position description.

7. The 2001 position description also had expanded supervisory or managerial duties contained in its other sections. The description stated, in relevant part:

**40% preventive Maintenance:**

\* \* \* \*

2. Ensure the desired maintenance is being performed on a timely basis that does not fall within normal operations.

\* \* \* \*

4. Assist in providing engineering direction on system modifications, installations, upgrades and also see that the actual preventive maintenance efforts are being carried out.

5. Set priorities for maintenance projects;  
\* \* \* .

\* \* \* \*

**10% Specifications:**

\* \* \* \*

2. Monitor contractors through contract period for compliance with specifications.

\* \* \* \*

7. Instruct user personnel on the prescribed utilization, operation, testing and maintenance of alarms on the alarm systems installed.

\* \* \* \*

**10% Other:**

\* \* \* \*

3. Keeps supervisor fully informed regarding work-related activities, relevant issues, upcoming events and potential problems.

4. Ensures requests for leave are submitted and approved in accordance with established rules and Division procedures.

\* \* \* \*

8. Petitioner remained employed under the new classification until his termination on August 12, 2002. Petitioner was terminated in part for failing to perform his duties as a supervisor in overseeing the timely performance of repairs and setting priorities for accomplishing those tasks.

9. The evidence demonstrated that Petitioner's supervisory duties were expanded to include a significant amount of supervision and management. However, the evidence did not demonstrate that Petitioner actually spent a majority of his time supervising his staff. The evidence did show that he did spend some amount of time engaged in non-routine, non-clerical activities that involved the exercise of independent judgment, combined with a significant role in employee personnel administration in that he had the authority to effectively recommend employment actions. The fact that he did not exercise such authority is not controlling and only demonstrates that the need for such action had not arisen. Given these duties, the

reclassification of Petitioner's position was appropriate under the Service First Initiative.

#### CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005;) and Reinshuttle v. Agency for Healthcare Administration, 849 So. 2d 434 (Fla 1st DCA 2003).

11. In 2001, the legislature amended Section 110.205, Florida Statutes, to exempt from career service supervisory, managerial and confidential employees. This legislation became known as the Service First initiative. As a result of the Legislature's mandate, Respondent was authorized to transfer certain positions to SES that met the exemptions set forth in Section 110.205(2)(x), Florida Statutes. Florida Administrative Code Rule Chapter 60K-1 dealt with reclassification of positions, prior to the Service First Initiative. The rule, while not repealed until after passage of Service First, cannot be construed to supersede the provisions of Section 110.205(2)(x), Florida Statutes, since the rule predates enactment of the statute. See Cleveland v. Florida Department of Children and Families District, 868 So 2d 1227, 1229 (Fla. 1st DCA 2004) (agency's construction of rule rejected because of conflict with legislative purpose and obsolescence due to



subsequent statutory measures), Willette v. Air Prods., 700 So. 2d 397, 401 (Fla. 1st DCA 1997) ("A statute takes precedence over a rule.").

12. Section 110.205, Florida Statutes (2001), states:

(1) CAREER POSITIONS.— The career service to which this part applies includes all positions not specifically exempted by this part, . . . .

(2) EXEMPT POSITIONS.— The exempt positions that are not covered by this part include the following:

\* \* \* \*

(x) 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. Excluded are employees also designated as special risk or special risk administrative support and attorneys who serve as administrative law judges pursuant to s. 120.65 or for hearings conducted pursuant to s. 120.57(1)(a). Additionally, registered nurses licensed under chapter 464, dentists licensed under chapter 466, psychologists licensed under chapter 490 or chapter 491, nutritionists or dietitians licensed under part X of chapter 468, pharmacists licensed under chapter 465, psychological specialists licensed under

chapter 491, physical therapists licensed under chapter 486, and speech therapists licensed under part I of chapter 468 are excluded, unless otherwise collectively bargained.

13. Section 447.203(4) and (5), Florida Statutes (2001), states:

(4) "Managerial employees" are those employees who:

(a) Perform jobs that are not of a routine, clerical, or ministerial nature and require the exercise of independent judgment in the performance of such jobs and to whom one or more of the following applies:

1. They formulate or assist in formulating policies which are applicable to bargaining unit employees.

2. They may reasonably be required on behalf of the employer to assist in the preparation for the conduct of collective bargaining negotiations.

3. They have a role in the administration of agreements resulting from collective bargaining negotiations.

4. They have a significant role in personnel administration.

5. They have a significant role in employee relations.

6. They are included in the definition of administrative personnel contained in s. 228.041(10).

7. They have a significant role in the preparation or administration of budgets for any public agency or institution or subdivision thereof.

(b) Serve as police chiefs, fire chiefs, or directors of public safety of any police, fire, or public safety department. Other police officers, as defined in s. 943.10(1), and firefighters, as defined in s. 633.30(1), may be determined by the commission to be managerial employees of such departments. In making such determinations, the commission shall

consider, in addition to the criteria established in paragraph (a), the paramilitary organizational structure of the department involved.

However, in determining whether an individual is a managerial employee pursuant to either paragraph (a) or paragraph (b), above, the commission may consider historic relationships of the employee to the public employer and to co-employees.

(5) "Confidential employees" are persons who act in a confidential capacity to assist or aid managerial employees as defined in subsection (4).

14. Because Respondent sought to reclassify the employment position from Career Service to Select Exempt Service, it bears the burden of proof by a preponderance of the evidence that the reclassification met statutory expectations. See Florida Department of Transportation v. J.W.C., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977); and Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993).

15. In this case, the evidence did not demonstrate that Petitioner was a confidential or supervisory employee. Thus, the only basis for reclassifying Petitioner's position must be based on whether he was a managerial employee.

16. The evidence did demonstrate that Petitioner was a managerial employee since his job was not routine and or clerical and he had effective authority to recommend personnel

action. Therefore the reclassification of Petitioner's position was appropriate.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law reached it is

RECOMMENDED that a final order be entered finding that Petitioner's position was appropriately reclassified as Select Exempt Service.

DONE AND ENTERED this 5th day of January, 2007, in Tallahassee, Leon County, Florida.

*Diane Cleavinger*

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Filed with the Clerk of the  
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this 5th day of January, 2007.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.