

STATE OF FLORIDA  
DEPARTMENT OF CHILDREN AND FAMILY SERVICES

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DCF  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

LEONARD V. SMITH

v.

CASE NO. 07-4004SED  
RENDITION NO. DCF-08-126-FO

DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES

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FINAL ORDER

THIS CAUSE is before me for entry of a Final Order. The Recommended Order concludes that the Department appropriately reclassified petitioner's position from Career Service to Select Exempt Service in July 2001, because petitioner was a managerial employee within the meaning of section 447.203(4), Florida Statutes. Petitioner filed exceptions to the Recommended Order that are addressed below.

Petitioner's first exception does not reference any paragraph in the Recommended Order. Rather, the exception contends that the administrative law judge (ALJ) erred in failing to recommend entry of an order favorable to petitioner because of the delay in referring this matter to the Division of Administrative Hearings. This exception must be rejected. To the extent that this is an exception to the Recommended Order, petitioner did not present this argument to the ALJ, and so it is not preserved.<sup>1</sup> To the extent that this a motion presented to the Department, it is not supported by law or the record.

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<sup>1</sup> Petitioner's reference to this issue at the beginning of the hearing did not constitute a motion or any other pleading that would preserve it. (T. 5-6). Petitioner's proposed recommended order does not address the issue.

Petitioner, on August 12, 2003, timely requested an administrative hearing to contest the reclassification of his former position from career service to select-exempt service. It is undisputed that the request for hearing was not referred to the Division of Administrative Hearings until August 30, 2007. Petitioner, citing City of Panama City v. Florida Public Employees Relations Commission, 364 So. 2d 109 (Fla. 1<sup>st</sup> DCA 1978), contends that this delay entitles him to a favorable ruling as a matter of law. This argument is not correct.

Mere failure to comply with the procedural provisions of chapter 120, Florida Statutes, does not automatically entitle petitioner to a favorable ruling. Department of Bus. Reg. v. Hyman, 417 So. 2d 671 (Fla. 1982). Failure to follow procedural requirements in an administrative proceeding is analyzed under section 120.68(8), Florida Statutes. Id. An individual may be entitled to relief if the error impaired the fundamental fairness of the proceeding. Id. In the instant case, petitioner submitted his request for a hearing in 2003 and, so far as the record reveals, was silent thereafter. Petitioner did not establish that he ever contacted the Department to inquire about his petition or demand that it be forwarded to the Division. Petitioner never sought mandamus to compel the Department to refer the matter, a remedy specifically discussed in Hyman. 471 So. 2d at 673. Although the Department erred by failing to act on petitioner's request for a hearing, petitioner made no effort on his own behalf and cannot now claim prejudice.

Petitioner's inaction aside, he has also made no showing of actual prejudice from the delay. Petitioner's exception alleges that the delay resulted in

the unavailability of the position description for petitioner's former position that was in effect at the time of petitioner's dismissal from employment. The record does not establish this fact. The record suggests only that the Department could not produce the position description at the final hearing, not the reason for that inability. Petitioner did not introduce his personnel file into evidence, nor did he elicit testimony or other evidence to establish that the position description was absent from his personnel file due to the passage of time. Petitioner's contention that there is a connection between the two facts is mere speculation.

Finally, even if petitioner had demonstrated that the position description was lost due to the passage of time, petitioner has not demonstrated that he was prejudiced such that the fairness of the administrative proceeding was impaired. In their testimony, both petitioner and his former supervisor described petitioner's actual job duties in detail, despite the missing position description. Petitioner has not asserted that the ALJ findings concerning his job duties lack evidentiary support. Petitioner even testified that the "real inaccuracy" between the sample position description the Department provided in response to discovery and petitioner's actual duties related to supervising subordinate staff, (T. 44), and petitioner's status as a supervisor was not an issue in this proceeding. The absence of the formal written description appears to have had no impact on the ALJ's understanding of petitioner's duties in his former position. Petitioner has fallen far short of clearly demonstrating prejudice that impaired the fairness of the proceeding.

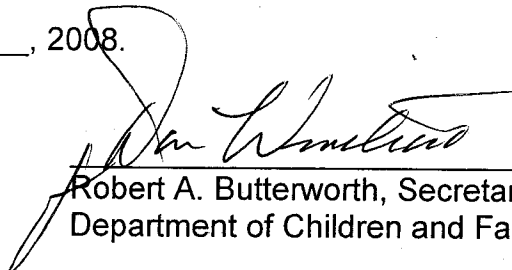
Petitioner's second and third exceptions, respectively, challenge the ALJ's finding that petitioner's job duties met the requirements of sections 447.203(4)(a)1 and 7, Florida Statutes. These exceptions do not comply with section 120.57(1)(k), Florida Statutes, because they do not "identify the disputed portion of the recommended order by page number or paragraph," nor do they "include appropriate and specific citations to the record." The exceptions reference the ALJ's recommendation, but the substance of the exceptions appear to be directed toward paragraphs 29 and 30 in the conclusions of law. The exceptions generally allege a lack of competent substantial evidence to support the ultimate finding that petitioner's job duties were managerial, but petitioner does not take issue with the findings in Recommended Order paragraphs three, four, five, seven, and nine through twelve, which form the basis for the ultimate finding. In essence, petitioner contends that the Department's Final Order should apply a more narrow reading of section 447.203(4), Florida Statutes, to reach a different result from that of the ALJ. The Department, however, is not authorized to make an alternative finding to that of the ALJ.

In the context of classifying a particular employee as career service or select exempt as provided in section 110.205(2)(x), Florida Statutes (2001), the determination of whether an employee's duties render him "managerial" within the meaning of section 447.203(4), Florida Statutes, is a finding of fact squarely within the ALJ's purview. Fuller v. Department of Educ., 927 So. 2d 28, 30 (Fla. 1<sup>st</sup> DCA 2006). Because petitioner has not demonstrated that the ALJ's findings

concerning petitioner's job duties lack support in the record, the Department cannot reject the finding that petitioner was a managerial employee. Id. See also, Stephen Ford v. Department of Mgmt. Serv., Case No. 06-1911SED (Rec. Order Jan. 5, 2007; Final Order Feb. 26, 2007), per curiam aff'd. 976 So. 2d 1099 (Fla. 1<sup>st</sup> DCA 2008).

The Recommended Order is approved and adopted. Petitioner's select exempt status, within the meaning of section 110.205(2)(x), Florida Statutes (2001), is upheld.

**DONE AND ORDERED** at Tallahassee, Leon County, Florida, this 10 day of June, 2008.

  
Robert A. Butterworth, Secretary  
Department of Children and Family Services

**RIGHT TO APPEAL**

**A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF CHILDREN AND FAMILIES, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, IN THE DISTRICT COURT OF APPEAL WHERE A PARTY RESIDES OR IN THE FIRST DISTRICT COURT OF APPEAL. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA RULES OF APPELLATE PROCEDURE. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.**

Copies furnished to:

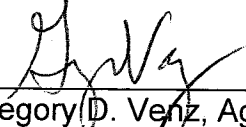
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Final Order was provided to the above-named individuals at the listed addresses, by U.S. Mail, this 11 day of June, 2008.

  
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