STATE OF FLORIDA

DEPARTMENT OF JUVENILE JUSTICE

GLORIA PRESTON, STEPHEN REID, CAROL WELLS, and TITUS TILLMAN,		
Petitioners,	**DJJ Case No.:**	**09-0007**
v.	DOAH Nos.:	08-2126SED 08-2161SED 08-3841SED 08-4189SED
DEPARTMENT OF JUVENILE JUSTICE,		
Respondent,		

FINAL ORDER

This matter is now before the undersigned for issuance of final agency action in regard to the Petitioners' challenge to their layoffs from employment pursuant to sections 120.569 and 120.57(1), Florida Statutes. At issue was whether the Respondent (hereafter "Department") followed the applicable rules governing layoffs. A formal hearing was conducted in Tallahassee, Florida on December 17, 2008, before Administrative Law Judge Lisa Shearer Nelson.

A "Recommended Order" was entered on February 5, 2009, which is attached and incorporated within this Final Order. Pursuant to section 120.57(1)(k), Florida Statutes, the parties were

allowed 15 days within which to submit written exceptions. Petitioners timely filed four exceptions. The Department did not file exceptions.

Findings of Fact

The Department adopts the "Findings of Fact" set out in paragraphs 1 through 28 of the Recommended Order.

Conclusions of Law

The Department generally accepts the "Conclusions of Law" set out in paragraphs 29 through 37 of the Recommended Order. There, the ALJ concluded, based upon the facts presented, that the Department used a procedure to reduce its workforce in January 2002 that complied with Rule 60L-33.004. The ALJ further concluded that Rule 60L-33 was applicable to the subject layoffs, and that the Petitioners, though they may not have been identified as Career Service, received the necessary protection commensurate with that status.

Exceptions

1. The Petitioners' first exception appears to be directed to the conclusion of law in paragraph 31 addressing the burden of proof.[1] There, the ALJ concluded that it was the Department's

[1] Section 120.57(1)(k), Florida Statutes, requires that exceptions "clearly identify the disputed portion of the recommended order by page number or paragraph," and an agency need not rule on exceptions that fail to do so. Although the Petitioners' exceptions are deficient in this regard, the

burden to demonstrate that its workforce reduction was accomplished using the appropriate procedure; it was then the Petitioners' burden to show that they should have been retained.

The Petitioners assert that because they were employed, and the Department affirmatively asserted a change in the status quo by imposing a layoff, the Department should bear the burden. (Petitioners Exceptions, p.3). The exception is denied.

The Petitioners correctly cite the general rule that the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Young v. Dept. of Community Affairs, 625 So.2d 831, 835 (Fla. 1993). The ALJ was aware of the rule, cited it, and applied it to the circumstances of the instant case - i.e., a layoff.

The ALJ recognized that the Department had the burden to show that the layoffs were accomplished according to the proper procedure. In fact, the Department carried this burden by demonstrating that the layoffs occurred on January 4, 2002, at which time they were governed by Florida Administrative Code Rule 60L-33. (T.42-43, 45; Jnt.Exh.2, 4, 6, 8). Further, the Department demonstrated that it satisfied the requirements of Rule 60L-33 in determining that the Petitioners were among 77 employees to be laid off out of 94 employees in the Office of Prevention and Victim Services. (T.20, 23-24, 26-27, 32, 34-35, 41; Jnt.Exh.1; RO.¶¶ 11-15).

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undersigned has identified, where possible, the source of the

Having identified and applied the proper procedure to accomplish the layoffs, it was then incumbent upon the Petitioners to demonstrate that, for whatever reason, they should have been among the few who were retained. See Powers v. Dept. of Children and Family Services, No. 05-4360, 2006 Fla. Div. Adm. Hear. Lexis 208 (Fla. Div. Adm. Hear. May 16, 2006, Recommended Order) (laid off employee had the burden to establish that the layoff was retaliatory); Mathias v. Southwest Florida Water Management Dist., No. 85-10, 1985 Fla. Div. Adm. Hear. Lexis 4919 (Southwest Florida Water Management Dist. Sept. 4, 1985, Final Order) (employee had the burden to establish that the elimination of his position was for some reason improper).

The Department did not submit evidence of "retention points" or provide a quantitative demonstration of the difference between the 17 retained employees and the 77, including the Petitioners, who had to be laid off. But Rule 60L-33, which governed the layoff, required no such showing. Rather, the rule only required an assessment of the positions to be deleted and a basic assessment of employees' comparative merit and skills to carry out the remaining mission of the agency.

In this regard, the Department established that Petitioners Preston, Reid and Wells worked in one of the divisions that was completely eliminated. (Prehearing Stipulation, p.10; T.27, 32, 41; RO.¶ 7). They did not perform the contract monitoring duties

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exception.

that remained in the retained division (T.94). For his part, Petitioner Tillman worked in the retained division, but only since 1996, and he was put on a corrective action plan during his tenure (T.68-72; Resp.Exh. 3).

In sum, the Department carried its burden, and the Petitioners' exception is denied.

2. Petitioners' second exception references the findings of fact in paragraphs 13 through 15, and the ALJ's finding that the Department performed an adequate assessment of its employees. According to the Petitioners, the Department's admittedly erroneous classification of them as Selected Exempt Service (SES) when, in fact, they were entitled to treatment as Career Service (CS) employees, essentially precluded the Department from accomplishing a proper layoff. The relevant rule required additional considerations for CS employees, including consideration of the employees' "commitment, cooperation, excellence, fairness, honesty/integrity, initiative, respect and teamwork," none of which were properly assessed as the Department mistakenly treated the Petitioners as SES. (Petitioners' Exceptions, p.4). The exception is denied.

The pertinent rule, set out in paragraph 34 of the Recommended Order, did not require completion of a checklist, nor did it mandate strict adherence to a formula, as suggested by the Petitioners. Rather, the rule merely required an assessment of the positions to be deleted, and consideration of the knowledge,

skills and abilities that employees would need to carry out the remaining mission of the agency. To the extent CS employees would be impacted -- which, in the instant case, was inevitable given the 82% reduction -- an assessment of employees was required:

> (d) Assess employees.
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> . . . .
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> 2. If the workforce reduction affects any other career service employee . . . consider the comparative merit, demonstrated skills, and experience of each employee. In determining which employees to retain, *consider* ***which employees will best enable the agency to advance its mission***; in this context, consider how each employee fares with respect to the following factors: commitment, excellence, fairness, honesty/integrity, initiative, respect, and teamwork.

Rule 60L-33.004(2), Fla. Admin. Code (emphasis added). The rule does not require a quantitative analysis of each employee's "respect" or "fairness," but rather states that these factors may be considered as a subordinate inquiry to selecting - in this case - those few employees best able to advance the agency's remaining mission.

It was undisputed that three of the four Petitioners were in programs that were completely eliminated. Mr. Tillman, who was the only Petitioner performing the remaining duty of contract monitoring, was disciplined in 2000 (T.70-72). It was also undisputed that the Petitioners were assessed based upon the positions remaining and the residual mission of the Department

(T.27, 41). In sum, there is competent substantial evidence to support the ALJ's findings of fact in paragraphs 13 through 15 and, as such, the exception is denied.

3. Petitioners' third exception restates their previous exceptions, and further fails to identify the disputed portion of the recommended order by page number or paragraph. The Petitioners seem to seek the functional equivalent of a 94-item spreadsheet, complete with quantitative assessments of all 94 employees, so that the four Petitioners might be assured that they were not properly among the 17 who were retained.

The applicable rule did not require this, and the Department adequately carried its burden as found by the ALJ. The exception is denied.

4. Petitioners' fourth and final exception is presumably directed to the ALJ's conclusions of law. The Petitioners argue that the ALJ was required to apply City of Panama City v. Public Employees Relations Commission, 364 So.2d 109 (Fla. 1st DCA 1978), to conclude that the Department's past procedural errors somehow mandated a particular ruling on the merits of their claims. The exception is denied.

In Panama City, the court concluded that PERC's failure to enter a final order within the required 90-day period impaired the fairness of the proceedings and necessitated a ruling in favor of the aggrieved parties. In that case, PERC entered a final order more than a year after the hearing, and the delay

effectively prevented the City from giving effect to its local option ordinance. The instant order is entered within the required 90-day period, so it is unclear how Panama City mandates a particular result.

Moreover, the procedural infirmities involved in the instant case are not as egregious in nature and did not have as significant an impact as those in Panama City. In this case, much of the delay alleged by the Petitioners involved their individual challenges to SES reclassification. The delay in getting the Petitioners' cases to DOAH following the July 2003 decision in Reinshuttle v. Agency for Health Care Administration, 849 So.2d 434 (Fla. 1st DCA 2003), pertained to the issue of reclassification and was dealt with in that separate litigation. Once each reclassification case was resolved, with the Department agreeing that each of the Petitioners was improperly reclassified, the litigation challenging the layoffs could proceed. When each Petitioner then filed a petition to challenge his or her layoff, the Department timely forwarded the cases to DOAH. The exception was Gloria Preston's petition, which the Department sent to DOAH only after she filed for a petition for writ of mandamus in the First District Court of Appeal. Though regrettable, the Department's mistake in failing to timely refer Preston's case was inadvertent, and did not betray an intent to preclude relief, as was the case in Panama City.

Layoffs are unfortunate for employees whose livelihoods are disrupted, and for employers who must part with workers who would be retained in less trying times. The subject layoffs were further complicated by ancillary litigation and procedural delays. But the delay here complained of, did not produce the layoffs, nor did it alter the fact that the layoffs were accomplished according to the requirements of the law as found by the ALJ. The exception is denied.

Order

Based upon the foregoing it is hereby **ORDERED**:

1. The Administrative Law Judge's Findings of Fact and Conclusions of Law are adopted as described above.

2. The petitions are dismissed.

Entered this 30 day of April, 2009, in Tallahassee, Florida.

KELLY A. LAYMAN, CHIEF OF STAFF
Department of Juvenile Justice

Chakita Jenkins, Agency Clerk

Filed this 1st day of
May, 2009

Notification of Right to Appeal

In accordance with the provisions of section 120.68(1), Florida Statutes, a party who is adversely affected by this Final Order is entitled to judicial review. 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, Department of Juvenile Justice, 2737 Centerview Drive, Suite 3200, Tallahassee, Florida 32399-3100, and a second copy, accompanied by filing fees prescribed by section 35.22, Florida Statutes, with the District Court of Appeal, First District, 301 Martin Luther King, Jr. Boulevard, Tallahassee, Florida 32399-1850, 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.

COPIES FURNISHED:

Lisa Shearer Nelson
Administrative Law Judge
Div. of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Jerry G. Traynham, Esq.
Patterson & Traynham
315 Beard Street
Post Office Box 4289
Tallahassee, FL 32315-4289

Lezlie A. Griffin, Esq.
Melissa Ann Horwitz, Esq.
AFSCME Council 79
3064 Highland Oaks Terrace
Tallahassee, FL 32301

Manny Anon, Jr., Esq.
AFSCME Council 79
99 Northwest 183rd Street, Ste. 224
North Miami, FL 33169

Kimberly Sisko Ward, Esq.
Department of Juvenile Justice
2737 Centerview Dr., Ste. 3200
Tallahassee, FL 32399-3100