STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLORIA PRESTON, STEPHEN REID, CAROL WELLS, AND TITUS TILLMAN,	)	
Petitioners,	)	
vs.	)	Case Nos. 08-2126SED 08-2161SED 08-3841SED
DEPARTMENT OF JUVENILE JUSTICE,	)	08-4189SED
Respondent.	)	

RECOMMENDED ORDER

On December 17, 2008, pursuant to notice, a hearing was held in Tallahassee, Florida, by Lisa Shearer Nelson, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Jerry G. Traynham, Esquire
Patterson & Traynham
315 Beard Street
Tallahassee, Florida 32303

For Respondent: Kimberly Sisko Ward, Esquire
Department of Juvenile Justice
2737 Centerview Drive, Suite 3200
Tallahassee, Florida 32399-3100

STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioners' layoffs from employment by the Respondent were lawful and if not, what remedies should be awarded.

PRELIMINARY STATEMENT

This proceeding involves the process used to lay-off the employment of four former employees of Respondent, Department of Juvenile Justice (Department), and whether the applicable rules in place at the time of the employees' lay-off were followed.

Petitioner Gloria Preston filed a Petition for a Section 120.569, 120.57(1) Hearing with the Department on June 22, 2007. The Petition was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge on March 20, 2008.

The case was docketed as Case No. 08-2126, assigned to the undersigned, and an Initial Order issued April 30, 2008. On May 7, 2008, the parties filed a Joint Motion to Place Case in Abeyance, asserting that on March 5, 2008, the Petitioner had filed a Petition for Review in the First District Court of Appeal that concerned issues central to the issues presented in this case. The parties agreed that the case could not proceed until such time as the First District ruled on the petition and relinquished jurisdiction. In light of the Motion, an Order Placing Case in Abeyance issued May 9, 2008, directing the parties to advise of the status of the proceedings on or before June 30, 2008, or upon relinquishment of jurisdiction by the First District in Case No. 1D08-1083, whichever was earlier.

On May 23, 2008, a Notice of Appellate Disposition was filed, indicating that in light of the referral of the case to the Division of Administrative Hearings, the First District denied the petition for review as moot. However, the Court awarded Petitioner Preston appellate attorney's fees and remanded the issue of the appropriate amount to the Division, should the parties be unable to reach agreement. The case was noticed for hearing to be conducted July 29, 2008. On July 3, 2008, a Joint Motion for Continuance was filed, and the matter was rescheduled for August 19, 2008.

Petitioner Steven Reid filed a Petition for a Section 120.569, 120.57(1) Hearing on April 17, 2008. The case was referred to the Division for assignment of an administrative law judge May 1, 2008, and was also assigned to the undersigned and docketed as Case No. 08-2161. Because the parties requested proceedings be conducted by means of video teleconferencing between Tallahassee and Fort Myers, the case was transferred to Administrative Law Judge William Quattlebaum, and noticed for hearing July 17, 2008. On June 20, 2008, the parties filed a Joint Motion for Continuance, which was granted June 26, 2008, with directions that the parties file a Joint Status Report July 17, 2008.

Petitioner Carol Wells filed her Petition for Section 120.569, 120.57(1), Hearing with the Department on July 25, 2008, and the Petition was referred to the Division for assignment of

an administrative law judge August 5, 2008. The case was docketed as Case No. 08-3841. On that same day, the parties filed a Joint Motion for Consolidation, requesting that Case Nos. 08-2126, 08-2161, and 08-3841 be consolidated for the purposes of hearing, that the hearing be conducted in Tallahassee, and that the hearing previously scheduled to take place August 19, 2008, for Case No. 08-2126 be continued.

The three cases were consolidated by Order dated August 11, 2008, and the consolidated proceeding was rescheduled for hearing October 16, 2008. Petitioner Titus Tillman filed the final Petition for Section 120.569, 120.57(1), Hearing with the Department on August 12, 2008, and it was referred to the Division August 25, 2008, with a Motion for Consolidation. The case was docketed as Case No. 08-4189 and consolidated with the other three cases by Order dated September 9, 2008. The Order confirmed that hearing for all four cases remained scheduled for October 16, 2008.

On October 13, 2008, the Department filed a Motion for Summary Order. On October 14, 2008, Petitioners filed an Unopposed Motion to Continue Hearing based upon the illness of one of the Petitioners, and the case was rescheduled for December 17, 2008. On October 17, 2008, Petitioners filed a Motion for Leave to file an Amended Petition, followed on October 22, 2008, by a Memorandum Opposing Agency Motion for Summary Order and Cross-Motion for Summary Order.

By Order dated November 12, 2008, the undersigned noted that no authority existed for issuance of summary orders where no final agency authority exists, denied both Motions for Summary Order and granted the Motion for Leave to File an Amended Petition. The parties filed a Joint Prehearing Stipulation containing certain stipulated facts that, where relevant, have been incorporated into this Recommended Order.

At the hearing conducted December 17, 2008, the parties requested, and the undersigned agreed, that issues regarding rate of pay and back pay would be addressed by separate hearing should one be necessary. The parties also requested that the issue of appellate attorneys ordered by the First District in Case No. 08-2126 be delayed as the parties might still agree. A settlement of the attorney's fees and costs award was subsequently filed January 21, 2009, and no further action is necessary with respect to those fees. All four Petitioners testified at hearing, and Petitioners' Exhibits 1-6 were admitted into evidence. The Department presented the testimony of three witnesses and Respondent's Exhibits 1-3 were admitted. Joint Exhibits 1-9 were also admitted. The proceedings were recorded and the Transcript was filed with the Division on January 5, 2008. Both Proposed Recommended Orders were timely filed and have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On or about April 2, 2001, the Department notified Petitioners that their positions were recommended for transfer from Career Service to Select Exempt Service.

2. On July 1, 2001, the Petitioners' positions were transferred from Career Service to Select Exempt Service.

3. Prior to Special Legislative Session C of 2001, the Department's Office of Prevention and Victim Services consisted of 94 positions, organized into four bureaus: the Office of Victim Services; the Office of Partnership and Volunteer Services; the Prevention Office; and the Intensive Learning Alternative Program.

4. During Special Legislative Session C, the Florida Legislature passed Committee Substitute for Senate Bill No. 2-C, which reduced appropriations for state government for fiscal year 2001-2002. This special appropriations bill was approved by the Governor on December 13, 2001, and was published as Chapter 2001-367, Laws of Florida.

5. As a result of Chapter 2001-367, 77 positions were cut from the Office of Prevention and Victim Services budget entity. The appropriations detail for the reduction from the legislative appropriations system database showed that the reduction of positions was to be accomplished by eliminating the Intensive Learning Alternative Program, which consisted of 19 positions; eliminating the Office of Victim Services, which consisted of

15 positions; eliminating the Office of Partnership and Volunteer Services, which consisted of 23 positions; and by cutting 20 positions from the Office of Prevention. Seventeen positions remained.

6. Immediately after conclusion of the Special Session, the Department began the process of identifying which positions would be cut. A workforce transition team was named and a workforce transition plan developed to implement the workforce reduction. The workforce reduction plan included a communications plan for dealing with employees; an assessment of the positions to be deleted and the mission and goals of the residual program; a plan for assessment of employees, in terms of comparative merit; and a placement strategy for affected employees.

7. Gloria Preston, Stephen Reid and Carol Wells were Operations and Management Consultant II's and worked in the Partnership and Volunteer Services Division. According to the budget detail from Special Session C, all of the positions in this unit were eliminated.

8. Titus Tillman was an Operations and Management Consultant II and worked in the Prevention and Monitoring division. According to the budget detail provided from Special Session C, 20 of the positions in this unit were eliminated.

9. On December 7, 2001, the Department notified Petitioners that effective January 4, 2002, each of their positions were eliminated due to the Florida Legislature's reduction of staffing

in a number of Department program areas during the special session. Petitioners were provided with information regarding what type of assistance the Department would provide. Specifically, the notices stated that the employees would be entitled to the right of a first interview with any state agency for a vacancy to which they may apply, provided they are qualified for the position; and that they could seek placement through the Agency for Workforce Innovation. The notice also provided information regarding leave and insurance benefits, and identified resources for affected employees to seek more clarification or assistance.

10. At the time Petitioners were notified that their positions were being eliminated, Florida Administrative Code Rules 60K-17.001 through 60K-17.004 remained in effect. These rules required agencies to determine the order of layoff by calculating retention points, based upon the number of months of continuous employment in a career service position, with some identified modifications. However, by the express terms of the "Service First" Legislation passed in the regular session of 2001, the career service rules identified above were to be repealed January 1, 2002, unless otherwise readopted. § 42, Ch. 2001-43, Laws of Fla. Consistent with the legislative directive new rules had been noticed and were in the adoption process.

11. On January 4, 2002, each of the Petitioners were laid off due to the elimination of their positions. At the time the layoff became effective, new rules regarding workforce reductions had been adopted. Florida Administrative Code Rule 60K-33, effective January 2, 2002, did not allow for the "bumping" procedure outlined in Rule 60K-17.004. Instead, it required the Department to appoint a workforce transition team for overseeing and administering the workforce reduction; assess the positions to be deleted and the mission and goals of the remaining program after the deletion of positions; identify the employees and programs or services that would be affected by the workforce reduction and identify the knowledge, skills and abilities that employees would need to carry out the remaining program.

12. The workforce transition team was required under one of the new rules to consider the comparative merit, demonstrated skills, and experience of each employee, and consider which employees would best enable the agency to advance its mission.

13. Although the Department created a workforce reduction plan and Career Service Comparative Merit Checklist, it did not complete a checklist for any of the Petitioners because it had previously reclassified their positions as Selected Exempt Service. No checklist is expressly required under Rule 60L-33. While no checklist was completed on the Selected Exempt Service employees, each employee in the Office of Prevention and Victim Services was assessed based on the positions remaining and the

mission of the Department in order to determine which employees to keep and which to lay off.

14. Of the 17 remaining positions, the Department considered the legislative intent with respect to the elimination of programs and the individuals currently performing the job duties that were left. It also evaluated the responsibilities remaining, which included overseeing the funding of statewide contracts and grants. The Department also considered which employees should be retained based upon their ability to absorb the workload, their geographic location, and their skill set.

15. The Department determined that the employees selected for the remaining positions were the strongest in their field, had fiscal management and programmatic experience, and were best equipped to undertake the workload.

16. At the time of the layoff, Petitioners were each long-serving, well-qualified and highly rated employees of the State of Florida. Each was prepared to move in order to retain employment.

17. In April 2002, AFSCME Florida Public Employees 79, AFL-CIO (AFSCME), filed an unfair labor practice charge with the Public Employees Relations Commission (PERC) against the Departments of Management Services and Juvenile Justice. AFSCME alleged that the Department failed to bargain in good faith over the layoff of Department employees.

18. The parties entered into a settlement agreement, effective June 28, 2002. The settlement agreement required the Department to provide timely notice to AFSCME of impending layoffs, bargain over the impact of workforce reductions, and provide assistance for employees who were laid off between December 31, 2001, and January 4, 2002, but who had not attained other full-time Career Service employment. There is no evidence the Petitioners in this case were members of AFSCME. Nor is there any evidence that the Department failed to assist Petitioners in seeking new employment.

19. In July of 2003, the First District Court of Appeal decided the case of Reinshuttle v. Agency for Health Care Administration, 849 So. 2d 434 (Fla. 1st DCA 2003), wherein the court held that employees whose employee classifications were changed from Career Service to Selected Exempt Service must be afforded a clear point of entry to challenge the reclassification of their positions.

20. The Department notified those persons, including Petitioners, whose Career Service positions had been reclassified to Selected Exempt Service, that they had a right to challenge the reclassification.

21. Each of the Petitioners filed a request for hearing regarding their reclassifications, which was filed with the Agency Clerk in August of 2003. However, the petitions were not

forwarded to the Division of Administrative Hearings until May 2007.

22. All four cases were settled with an agreement that their positions were reclassified as Selected Exempt Service positions in error, and that they should have been considered Career Service employees at the time their positions were eliminated.

23. Petitioners and the Department also agreed that any challenge by Petitioners to the layoffs would be forwarded to the Division of Administrative Hearings.

24. Gloria Preston began work for the State of Florida in 1975. Her evaluations showed that she continuously exceeded performance standards, and she had training and experience in managing and monitoring grants and contracts. However, no evidence was presented regarding how many retention points she would have been awarded under former Rule 60K-17.004, and it is unclear whether she was in a Career Service position during the entire tenure of her employment with the State.

25. Stephen Reid began work for the State of Florida in 1977. He left state government for a short time and returned in 1984. With the exception of his initial evaluation with the Department of Corrections, he has received "outstanding" or "exceeds" performance evaluations. Reid has experience in contract creation and management. However, no evidence was presented regarding how many retention points he would have been

awarded under former Rule 60K-17.004, or whether he was in a Career Service position during the entire tenure of his employment with the State.

26. Carol Wells began employment with the State of Florida in 1975. Similar to Mr. Reid, all of her evaluations save her first one were at the "exceeds" performance level, and she has experience in writing and managing contracts. However, no evidence was presented regarding how many retention points she would have been awarded under former Rule 60K-17.004, or whether she was in a Career Service position during the entire tenure of her employment with the State.

27. Titus Tillman began employment with the State of Florida in 1993. He was subject to a Corrective Action Plan in May 2000, but received "above average" or "exceeds" performance evaluations. Like the other Petitioners, no evidence was presented regarding how many retention points he would have been awarded under former Rule 60K-17.004, or whether he was in a Career Service position during the entire tenure of his employment with the State.

28. Likewise, no evidence was presented regarding the retention points that were earned by any of the people who were retained by the Department to fill the remaining positions. No evidence was presented regarding the qualifications of those retained employees, in terms of their comparative merit,

demonstrated skills, and experience in the program areas the Department would continue to implement.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes (2008).

30. Petitioners are challenging the elimination of their positions, and in the Amended Petition Petitioners request that "corrective action" be taken to address their unlawful layoff, "including, but without limitation, rescinding the layoffs, correcting pay and benefits records and contributions, awarding overtime pay where appropriate and other appropriate relief."

31. The party asserting the affirmative of an issue bears the burden of proof. Florida Department of Transportation v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1997). Thus, the Department has the burden to show the appropriate procedure was used in implementing the workforce reduction. Petitioners have the burden to show that they should have been retained.

32. The resolution of the issues in this case is clouded by the erroneous classification of Petitioners as Selected Exempt Employees at the time their positions with the Department were eliminated. There is no question that Selected Exempt employees

would not be entitled to the procedures under either Rule 60K-17 or 60L-33 because they serve at the pleasure of the agency head. § 110.604, Fla. Stat. (2001). Petitioners, however, were entitled to the procedures provided in the rules for reduction in workforce.

33. The initial question to be answered, however, is which rule governs the process used with respect to the layoffs in 2002. Petitioners argue that Rule 60K-17 must prevail because it was the rule in effect at the time the Petitioners were notified of the intended layoffs, citing Florida Public Employees Council 79 v. State, 921 So. 2d 676 (Fla. 1st DCA 2006)(FPEC I). In FPEC I, The First District held that Rule 60K-17 was repealed January 1, 2002, by the express terms of Section 42, Chapter 2001-43, Laws of Florida, as opposed to being repealed on May 14, 2001, upon the Service First legislation becoming law. However, a different, and controlling, result occurred in Florida Public Employees Council 79 v. State, 939 So. 2d 121 (Fla. 1st DCA 2006)(FPEC II). In FPEC II, the court stated:

> This case is remarkably similar in its facts to those in Florida Public Employees Council v. State, 921 So. 2d 676 (Fla. 1st DCA 2006)(FPEC I). . . . This court reversed PERC's dismissal of the ULP for the reason that rule 60K-17 remained operative during the applicable time the layoffs occurred, which were the subject of the ULP charge. We do not reach the same result in the present case because at the time the reduction in the workforce of the Department of Children and

> Families took place, rule 60L-33.004 had already become effective, with the result that the state was no longer required to follow the procedure controlling layoffs as provided in rule 60K-17. [Emphasis Supplied.]

939 So. 2d at 122. In this case, when the layoffs actually occurred on January 4, 2002, Rule 60L-33 was in effect. The terms of that rule control the personnel reduction in this case.

34. The Department has met its burden to show that the layoff complied with the procedures contained in Rule 60L-33.004. The pertinent procedures provide:

> (2) Each agency shall have a Department-approved transition plan. The goal of the plan is to ensure that the agency makes reasonable efforts to provide a smooth transition for the career service employees adversely affected by the workforce reduction. The plan shall identify the steps the agency will take during the workforce reduction to advance this goal. The following steps are reasonable and shall be included in any plan, unless the plan justifies in writing why they are not included:
>
> (a) Appoint a workforce transition team, which is responsible for overseeing and administering the workforce reduction.
>
> (b) Develop a communications plan, designed to ensure open, honest, and frequent communication regarding staffing changes. Provide clear avenues for employees to seek and obtain information and assistance. Address necessary communications with the Department, the Agency for Workforce Innovation, and unions.

(c) Assess the positions to be deleted and the mission and goals of the residual program (that is, the program area that will remain after the deletion of functions and positions). Identify the employees and programs or services that will be affected by the workforce reduction. Identify the knowledge, skills, and abilities that employees will need to carry out the residual program.

(d) Assess employees.

* * *

2. If the workforce reduction affects any other career service employee [other than law enforcement, firefighters, or professional health care providers], 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.

(3) A permanent career service employee facing layoff as a result of a workforce reduction shall have an opportunity for first interview within any agency for a vacancy for which the employee is qualified and has applied.

(4) Before laying off a permanent career service employee as part of a work force reduction, an agency shall provide the employee reasonable notice of the intended action. Where possible, the agency shall provide at least thirty days notice, and in all cases the agency shall provide at least ten days notice or, in lieu thereof, pay or a combination of notice and pay.

35. Rule 60L-33.004 was amended in 2003. However, those amendments affected subsection (6) only and not the provisions quoted above and have no relevance to this proceeding.

36. The procedure used in the reduction in workforce at issue complied with the requirements of Rule 60L-33.004. As noted in the findings of fact, a workforce transition team was established and a workforce transition plan was developed for implementing the workforce reduction. The employees were evaluated in terms of their comparative merit and the remaining mission of the agency. Petitioners, whether or not they were correctly identified as Career Service, were provided adequate notice of the impending layoff and were provided the right of first interview for job vacancies for which they were qualified, as well as other assistance in finding employment.

37. Even assuming that Rule 60K-17 were to apply, Petitioners could not prevail. Rule 60K-17.004(3)(q) provided that "in the event the employee elects to appeal the action taken, such appeal must be based upon whether the layoff was in accordance with the provisions of this chapter." It is undisputed that bumping rights were not accorded to any of Petitioners. However, in order to prevail, Petitioners must show that the layoffs were not accomplished in accordance with the rules in force and, had they been implemented appropriately, Petitioners would have been entitled to be retained. In other words, it would be necessary to determine how many retention

points each Petitioner had earned and compare those points with the retention points of other employees subject to the layoff. Petitioners would be required to demonstrate that they held positions, in terms of seniority, superior to those retained. No such evidence exists in this record.

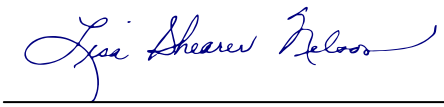
RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered dismissing the petitions for relief.

DONE AND ENTERED this 5th day of February, 2009, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of February, 2009.

COPIES FURNISHED:

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

Kimberly Sisko Ward, Esquire
Department of Juvenile Justice
2737 Centerview Drive
Tallahassee, Florida 32399-100

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

Manny Anon, Jr., Esquire
AFSCME Council 79
99 Northwest 183rd Street, Suite 224
North Miami, Florida 33169

Jennifer Parker, General Counsel
Department of Juvenile Justice
2737 Centerview Drive
Tallahassee, Florida 32399-1300

Frank Peterman, Jr., Secretary
Department of Juvenile Justice
2737 Centerview Drive
Tallahassee, Florida 32399-1300

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.