SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 466

SPONSOR: Governmental Oversight and Productivity Committee and Senator Garcia

SUBJECT: Public Employment

DATE: April 10, 2001 REVISED: 4/13/01

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White/Wilson	Wilson	GO	Favorable/CS
2.			AGG	Withdrawn
3.			AP	
4.				
5.				
6.				

I. Summary:

This bill substantially revises the employment, recruitment, training, and discipline standards for career employees of State of Florida agencies. Its major provisions increase the number of exempt positions not subject to career protections, change from just cause to reasonable cause the disciplinary standard for employees conduct violations, and reduce the steps involved in the processing of disciplinary appeals through the Public Employees Relations Commission.

This bill substantially amends ss. 20.23, 110.1091, 110.1095, 110.1099, 110.1127, 110.113, 110.1245, 110.131, 110.203, 110.205, 110.211, 110.213, 110.219, 110.224, 110.227, 110.233, 110.235, 110.401, 110.403, 110.601, 110.602, 110.605, 110.606, 288.708, 440.4416, 509.036, 216.262, 447.201, 447.205, 447.207, 447.503, 447.507, 112.215, 447.403, and 216.163, Florida Statutes.

This bill repeals ss. 110.108, 110.109, 110.1246, 110.207, 110.209, 125.0108(2)(d), 945.35(3)(c), and 985.4045(1)(b), Florida Statutes.

This bill creates ss. 110.2035 and 110.1315 of the Florida Statutes.

II. Present Situation:

Chapter 110, Florida Statutes– State Employment: Chapter 110, F.S., is divided into five parts. Part I contains general state employment provisions; Part II addresses the Career Service System; Part III deals with the Senior Management Service System (SMS); Part IV relates to Volunteers; and Part V establishes the Selected Exempt Service System (SES).

Part I of ch. 110, F.S., covers such areas as education and training opportunities for state employees; personnel pilot projects; productivity improvement and personnel audits of executive branch agencies; use of telephone voice mail systems; employee security checks; employee wage deductions; paid holidays; sick leave pool; terminal pay for accumulated sick leave; sexual harassment policy; employee long-term-care plan; state group insurance program; prescription drug program; health insurance; meritorious service awards program; termination or transfer of employees aged 65 years or older; state officers' and employees' child care services; other-personal-services (OPS) temporary employment; adoption benefits; pretax benefits program; the Florida State Employees' Charitable Campaign contribution program; and state employee leasing.

Part II of ch. 110, F.S., establishes the Career Service System,[1] and requires the Department of Management Services (DMS) to develop and maintain a uniform classification and equitable pay plan applicable to all positions in the career service; to determine guidelines for employee recruitment and selection to be used by employing agencies; to adopt rules and procedures for the suspension, reduction in pay, transfer, layoff, demotion, and dismissal of employees; and to develop uniform rules, in consultation with affected agencies and pursuant to the approval of the Administration Commission, regarding employee appointment, promotion, demotion, reassignment, separation, status, attendance, and leave.[2] [3]

The terms "career service" and "career service employee" are not defined in the statutes.[4] A "career service employee" may be a short-term or long-term employee. The rules distinguish among probationary, overlap, temporary, trainee, and permanent status. The rules further provide that an employee "who has been appointed in accordance with this Chapter and granted probationary status will attain permanent status in a class upon successful completion of the designated probationary period for the class." The statutes provide that an employee classified as a "permanent career service employee" may only be suspended or dismissed for cause. Cause includes negligence, inefficiency or inability to perform assigned duties, insubordination, willful violation of the provisions of law or agency rules, conduct unbecoming a public employee, misconduct, habitual drug abuse, or conviction of any crime involving moral turpitude.

Part III of ch. 110, F.S., establishes the SMS,[5] which is a separate system of personnel administration for positions in the executive branch, the duties and responsibilities of which are primarily and essentially policymaking or managerial in nature. The DMS is charged with adopting rules that provide for a system for employing, promoting, or reassigning managers that is responsive to organizational or program needs. Employees in SMS serve at the pleasure of the agency head and are subject to suspension, dismissal, reduction in pay, demotions, transfer, or

[1] In 1999, the State Personnel System consisted of 124,160 employee positions, 119,878 of which were career service employee positions (45 percent male, average salary $33,326; 55 percent female, average salary $28,351). Annual Workforce Report, the Department of Management Services, at 3 and 11 (1999).

[2] The DMS has adopted rules to implement the requirements of Part II, which can be found in Chapters 60K and 60L of the Florida Administrative Code.

[3] Sections 110.207, 110.209, 110.211, 110.213, and 110.217, F.S.

[4] The rules, however, define "career service" as: "All state authorized and established positions not exempted by Section 110.205, F.S." Rule 60K-14.001(9), F.A.C.

[5] Of the 124,160 State Personnel System employee positions, 536 are SMS positions (68.9 percent male, average salary $90,914; 31.5 percent female $85,289). Annual Workforce Report, the Department of Management Services, at 3 and 13 (1999).

other personnel action at the discretion of the agency head. The number of positions included in SMS cannot exceed .5 percent of the total full-time equivalent positions in the career service.

Part IV of ch. 110, F.S., addresses volunteers by setting forth the responsibilities of departments and agencies utilizing volunteers. Volunteers recruited, trained, or accepted by any state department or agency are not subject to any provisions of law relating to state employment nor to any collective bargaining agreement between the state and any employees' association or union.

Finally, Part V of ch. 110, F.S., creates the SES.[6] The SES is a separate system of personnel administration that includes those positions that are exempt from the Career Service System. The DMS is required to designate all positions included in the SES as managerial/policymaking, professional, or nonmanagerial/nonpolicymaking. The number of positions included in SES, excluding those positions designated as professional or nonmanagerial/nonpolicymaking, cannot exceed 1.5 percent of the total fulltime equivalent positions in the career service. Employees in SES serve at the pleasure of the agency head and are subject to suspension, dismissal, reduction in pay, demotion, transfer, or other personnel action at the discretion of the agency head.

Florida's Career Service System: Florida's Career Service System, as found in ch. 110, F.S., has been in place since 1979, and has been amended several times during the course of its existence. Recently, the system has been criticized.

Florida TaxWatch has worked for a number of years in a bi-partisan effort to modernize the Career Service System. In 1986, Florida TaxWatch recommended legislation to create a performance-based compensation and personnel system coupled with increased public management authority and accountability. Florida TaxWatch has indicated that:

> A thorough, major overhaul of Florida's Career Service is required if Florida is to keep pace with productivity in the private sector. This requires:
>
> - Meaningful management and supervisory authority and accountability for public service results and unit costs.
> - An inviting, challenging workplace and culture that provides employees with opportunities for career growth and mobility.
> - Compensation that is competitive with the private sector for recruitment/retention/promotion purposes.
> - Compensation/career advancement tied to the application of good performance measures and outcome performance (individuals and groups).
> - An ability by managers to reward meritorious performance by employees and to sanction unacceptable, under-performance.
> - A flexible compensation benefits system (defined contribution retirement option). [7]

[6] Of the 124,160 State Personnel System positions, 3,746 are SES positions (61.1 percent male, average salary $67,124; 38.9 percent female, average salary $57, 469). Annual Workforce Report, the Department of Management Services, at 3 and 12 (1999).

[7] "Modernizing Florida's Civil Service: A Necessary Beginning for Meaningful Change," Florida TaxWatch, Briefings, December 2000, at 1.

In 1991, the Commission for Government by the People (Commission), created by then Governor Chiles, reported that Florida's Career Service System, like many other civil service systems, has become a "straight jacket" on managers. The Commission further stated that the career service system was designed for an "Industrial Era government of clerks and manual laborers; it long ago became obsolete. Its job classification system is too rigid; its pay system does not reward high performers; and its 'bumping' system during layoffs makes it difficult to slim down state government without virtually destroying it . . . [W]e urge the Legislature to . . . create an entirely new personnel system to replace Career Service."[8]

One of the most vocal critics of the Career Service System is the Florida Council of 100 (council).[9] The council, in its report entitled "Modernizing Florida's Civil Service System: Moving from Protection to Performance," November 2000, identified numerous problems with state government, including "slower implementation of technology, lack of long-term planning, inefficient use of capital, insufficient flexibility for managers, improper budget incentives, and even at times 'over-management' by past legislatures." More particularly, the council found that chief among the constraints to effective and efficient government performance is the state's Career Service System as found in ch. 110, F.S., and Chapter 60K, F.A.C. "The system makes managing human resources cumbersome, is de-motivating for managers, and damages the reputation of all state employees." In addition, the council enumerates four ways the current career service employment practices damage productivity:

1. Terms of employment constrain hiring and firing. . . . In the private sector, employees can be hired and dismissed "at will" – within the bounds of numerous statutory guidelines designed to ensure fairness and the absence of discrimination.
2. Seniority as the principal retention criterion sacrifices performance. . . . This use of seniority creates the grounds for the practice of "bumping," in which a longer-tenured employee whose position has been eliminated can take the job of a more recently hired employee occupying an equivalent or lower title in the same job classification . . . The bumped employee may be out of work, regardless of performance – unless s/he has "permanent" status, in which case s/he can bump someone else in turn, propagating the disruption and lowering productivity further.
3. Compensation system does not adequately differentiate employees by performance. . . . In Florida's state government, legislative allocations dictate how employees will receive compensation. In most years – though not all – Career Service employees receive an across-the-board salary adjustment . . . The across-the-board adjustment as a management tool has the effect of rewarding under-performing workers and neglecting the high-performing ones.
4. Tight control of daily activities inhibits responsiveness and problem solving. . . . [H]aving to abide by cumbersome, work-increasing rules deadens personal initiative and cooperation and fosters an attitude of indifference among employees.

[8] "Government by the People: A Prescription for Florida's Future," The Report of Governor's Commission for Government by the People, Volume 1991.

[9] The Florida Council of 100 was formed in 1961 at the request of Governor Farris Bryant. It is a private, non-profit, non-partisan association whose members represent a cross-section of key business leaders in Florida. The Civil Service Reform Task Force was established in 1999 to review Florida's human resources management system and to propose improvements. "Modernizing Florida's Civil Service System, Moving from Protection to Performance, " A Report from the Florida Council of 100, November 2000, at 2.

In his "Recommended Budget" for the State of Florida for the fiscal year ending June 30, 2002, Governor Jeb Bush suggested changes to the Career Service System. The electronic version of the budget recommendations highlighted the Governor's priorities as: a smaller, more efficient government with a reduced infrastructure which does more with less; performance pay; the implementation of portable retirement plans; a reduction in the number of boards, councils and commissions; consolidation of multiple information technology operations into an enterprise organization; and pursuit of purchasing, facility and travel economies which produce value and avoid expense. The cumulative effect of these multiple undertakings produced a need for 4,226 fewer positions to achieve the same level of work.

The Public Employees Relations Commission: The Public Employees Relations Commission (PERC) was established in 1974 to provide statutory implementation of Art. I, s. 6 of the Florida Constitution (the right of public employees to collectively bargain).[10] The PERC is currently composed of a chair and two full-time commissioners appointed by the Governor and confirmed by the Senate.[11] The PERC is housed within the Department of Labor and Employment Security[12] for administrative purposes, but is not subject to control, supervision, or direction by the department.[13]

The PERC decides cases sitting as a quasi-judicial collegial body and issues final orders.[14] Any appeal of a PERC final order is taken to the District Court of Appeals.[15] In addition to hearing cases, PERC is required to determine questions and controversies concerning claims for recognition as the bargaining agent for a bargaining unit; determine or approve units appropriate for purposes of collective bargaining;[16] conduct secret ballot elections to determine whether public employees desire to be represented by a union; process charges of unfair labor practices[17] as well as charges relating to a public employee or employee organization participating in a

[10]The PERC handles public sector cases (unfair labor practice charges, representation petitions, amendments to certification, petitions to revoke certifications, and labor organizations registration), career service appeals, Drug-Free Workplace appeals, Whistle-blower appeals, veterans' preference appeals, attorney's fees appeals, back pay appeals, elections, mediation, and district court appeals.

[11]For Fiscal Year 2000-2001 forty full time equivalent (FTE) positions were assigned to PERC with a Salaries and Benefits expense of $2,658,253.

[12]The restructuring of the services provided by the Department of Labor and Employment Security was initiated by the Workforce Florida Act of 1996. Ch. 96-404, L.O.F. Thereafter, ch. 2000-165, L.O.F., provided legislative intent for the transfer of programs and workforce development from the Department of Labor and Employment Security to the Agency for Workforce Innovation.

[13]Section 447.205, F.S.

[14]PERC hears cases and issues final orders regarding, for example, the suspension, reduction in pay, transfer, layoff, demotion, and dismissal of career service employees. Section 110.227, F.S.

[15]Section 447.504, F.S.

[16]There are currently 10 collective bargaining units: Administrative/Clerical, Operational Services, Professional, Professional Health Care, Law Enforcement, Security Services, Special Agent, Selected Exempt Physicians, and Supervisory. Annual Workforce Report -- 1999, Department of Management Services, at 37.

[17]Unfair labor practices, on the part of the employer, include encouraging or discouraging membership in any employee organization by discrimination in regard to hiring, tenure, or other conditions of employment; refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement; and refusing to discuss grievances in good faith. Unfair labor practices, on the part of the public employee organization, include causing or attempting to cause a public employer to discriminate against an employee because of the employee's membership or nonmembership in an employee organization; and refusing to bargain collectively or failing to bargain collectively in good faith; and, participating in a strike. Section 447.501, F.S.

strike[18] and provide appropriate remedies; assign mediators to assist parties in negotiations when collective bargaining impasse occurs; and administer the impasse resolution process.[19]

In 1986, the Legislature abolished the Career Service Commission and transferred its jurisdiction to PERC.[20] This jurisdiction provides implementation of Art. II, s. 14 of the Florida Constitution (providing a civil service system for state employees). In 1987, the Legislature expanded PERC's jurisdiction over Veteran's Preference Appeals, and in 1988, PERC was assigned jurisdiction over appeals arising under the "Drug-Free Workplace" Act.

According to statistics accumulated by PERC for the Fiscal Year 1999-2000, PERC made 1,368 "final order decisions".[21]

In the decade of the 1970s that system came to be located in a Department of Administration, the forerunner of the current Department of Management Services. It was amended further in 1974 to recognize the addition of collective bargaining for public employees and to provide a dispute resolution and union certifying body, the Public Employees Relations Commission. In the following decade the system was divided into three components with the addition of a new Senior Management Service and Selected Exempt Service. Only the addition of larger numbers of exempt positions and collective bargaining units and a personnel pilot project in the Department of Transportation have materially changed the system from that time until the present.

III. Effect of Proposed Changes:

Note: Sections 3, 6, 10, 12, 22, 23, 24, 27, 29, 30, 35, and 38 of the bill make technical changes.

Section 1. Deletes existing language in s. 20.055(3)(h)1., F.S., which provided that the position of Inspector General for the Department of Transportation shall be in the Career Service System.

Section 2. Repeals s. 110.108, F.S., that authorizes agencies to develop pilot personnel plans that try different approaches to current personnel procedures. Repeals s. 110.109, F.S., that authorizes the DMS to audit state agency personnel systems.

Section 4. Repeals s. 110.1095, F.S., which requires the DMS to establish a basic supervisory skills training program for executive branch supervisors.

Section 5. Amends s. 110.1099, F.S., which permits state employees to attend public universities using tuition waivers or vouchers for work-related courses. The bill makes technical drafting changes and adds that state employees may also attend community colleges.

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[18] Section 447.505, F.S., prohibits strikes by public employees and employee organizations. Such strikes are also prohibited by s. 6, Art. I of the State Constitution

[19] Section 447.207, F.S.

[20] *See* Senate Staff Analysis and Economic Impact Statement, CS/SB 1694, March 19, 1991, at 1.

[21] According to the DMS, the latest available data is for fiscal year 1998-99, and is as follows: 1251 career service employees were dismissed (320 appealed to PERC), 1922 were demoted (21appealed to PERC), 1094 laid off (97 appealed to PERC), and 58 abandoned their positions (O appeals). Annual Workforce Report – 1999, Department of Management Services, at 32.

Section 7. Amends s. 110.113, F.S., which requires state employees appointed after July 1, 1996, to participate in the direct deposit program, except that other-personal-service employees and employees, who demonstrate a hardship, may request an exemption. The bill deletes reference to July 1, 1996; thereby, requiring all state employees to participate in the direct deposit program.

Section. 8. Amends s. 110.1245, F.S., which provides for the meritorious service awards program that is to be developed by the DMS for employees who propose ideas that increase productivity, eliminate or reduce state expenditures, or generate revenue. The agencies set the award amounts, which are capped under the section. This section also provides that agency heads purchase a token of recognition that costs up to $100 for a retiring employee or for an appointed member of a state board or commission, and may expend up to $50 for a state employee who has achieved an increment of 5 years service.

The bill amends this section to replace the "meritorious service awards" program with a new "savings sharing" program. Under the bill, the DMS is directed to develop procedures for the savings sharing program, which applies to individuals or groups of employees in the Career Service System, Selected Exempt Service, or judicial branch, when these individuals propose procedures or ideas that are adopted and which result in eliminating or reducing state expenditures. Agency heads are directed to recommend monetary awards for such employees. The awards must be directly related to the cost savings realized and must be approved by the Legislative Budgeting Commission. Agencies are required to annually report their level of participation in the savings sharing program to the Legislature.

The bill also provides for lump-sum bonuses to be paid from funds appropriated by the Legislature for bonuses from unused salary and expense dollars to state employees under certain circumstances. Under the bill, the agency must submit a plan to award lump-sum bonuses to the Office of Policy and Budget (OPB) in the Executive Office of the Governor (EOG) by September 15th of each year. The plan must contain bonus criteria that includes, but is not limited to, requiring that the employee: (a) have been employed prior to July 1 of that fiscal year, but not have been on leave without pay for more than six months, nor have been disciplined during that year; (b) have demonstrated a commitment to the agency mission by reducing the burden on those served, improving the way business is conducted, producing results in the form of increased outputs, and working to improve processes; (c) have demonstrated initiative in work and exceeded normal job expectations; and (d) have modeled the way for others by displaying agency values of fairness, cooperation, respect, commitment, honesty, excellence, and teamwork. Additionally, the plan must include: (a) a periodic evaluation of the employee's performance; (b) peer input to account for at least 40 percent of the bonus award determination; (c) a division of the agency by work unit for purposes of peer input and bonus distribution; and (d) a limitation on bonus distribution equal to 35 percent of the agency's total authorized positions, unless this limitation is waived by the OPB upon a showing of exceptional circumstances.

Finally, the bill increases the amount an agency head may spend for a token of recognition for a state employee who has achieved an increment of 5 years service from $50 to $100.

Section 9. Repeals 110.1246, F.S., which permits the DMS to establish by rule authorization for agency heads to award lump-sum bonuses.

Section 11. Amends s. 110.131, F.S., which provides for other-personal-services (OPS) temporary employment. Agencies may employ an OPS worker for up to 1,040 hours in any 12-month period.[22] An extension requires agency head approval. The time limitation does not apply to board members, consultants, seasonal employees, institutional clients employed as a part of their rehabilitation, or degree-seeking students.

The bill amends this section, effective July 1, 2001, to require EOG approval for extensions of OPS employment beyond 1,040 hours. The bill adds that employees hired to deal with emergency situations that effect the health, safety, and welfare of state citizens, or hired for a project that is identified by a specific appropriation or time-limited grant are not subject to the 1,040 hour limitation.

Section 13. Amends s.110.203, F.S., which provides definitions for various terms used in the statutes with regard to the Career Service System. Effective July 1, 2001, the definitions of "dismissal" and "suspension" are amended to refer to the new standard of "reasonable cause." The definition of "layoff", is also amended to add that a termination of employment due to a material change in the duties or organization of an agency includes "the outsourcing or privatization of an activity or function previously performed by career service employees." The bill also adds the following new definitions: (a) "firefighter" means a firefighter certified under ch. 633, F.S.; and (b) "law enforcement or correctional officer" means a law enforcement officer, special agent, correctional officer, correctional probation officer, or institutional security specialist required to be certified under ch. 943, F.S.

Section 14. Creates s. 110.2035, F.S., to develop a new civil service classification and compensation program. Currently, there are six separate personnel structures: the State Personnel System (Career Service, Selected Exempt Service, Senior Management Service);[23] Legislature; Lottery; State University System; Judicial; Auditor General; and other miscellaneous executive pay plans. Within the Career Service System there are 1,364 classes, 50 occupational groups, and, as of 1997, 86 different pay ranges. In many classes, there is little distinction between duties and responsibilities. Minimum qualification requirements are often based on years of experience, which may not be a good indicator of whether an employee can successfully do the job. The DMS has indicated that the pay grade minimums are too low to attract and maintain well-qualified candidates, and that the actual pay grades have little distinction between them, making it difficult to distinguish between the value of the different jobs.

The new section created by the bill directs the DMS, in consultation with the EOG and Legislature, to develop a model civil service classification and compensation program, which includes a reduced position classification system, that is no more than 50 occupational groups and up to a six-class structure for each occupation within an occupational group, and a pay plan that provides broad, market-based salary ranges for each occupational group. The bill sets forth

[22]There was an average of 12,292 OPS employees per month during Fiscal Year 1998-1999.

[23]There are approximately 124,160 employee positions within the State Personnel System, which includes 119,878 Career Service employee positions , 3,746 Selected Exempt employee positions , and 536 Senior Management employee positions.

various goals to be considered in designing and implementing the model program, which include: (a) reducing the need to reclassify positions; (b) emphasizing pay administration and job performance evaluation by management, rather than use of the classification system to award salary increases; and (c) increasing managerial flexibility in moving employees through pay ranges and in awarding salary increase additives and lump-sum bonuses.

This bill requires the DMS to submit the proposed model civil service classification and compensation program to the EOG, the presiding officers of the Legislature, and the appropriate legislative fiscal and substantive standing committees, on or before December 1, 2001.

Section 15. Amends s. 110.205(2), F.S., which enumerates the positions that are exempted from the career service, and provides that no position may be exempted if it reports to a position in the career service. Under the bill, the prohibition on exempting positions that report to a career service supervisor is deleted. Furthermore, the bill transfers specified managerial, confidential and supervisory employees from the Career Service to the Selected Exempt Service, and provides that employees may be exempted and moved to the Selected Exempt Service by way of an agreed upon collective bargaining agreement. The bill states that all annual, sick, and compensatory leave transfer with any employee transferred into the Selected Exempt Service.

Section 16. Repeals s. 110.207, F.S., which authorizes the structure of the current state personnel system, and repeals s. 110. 209, F.S., which authorizes the current state employee pay plan. The repeals are effective June 30, 2002.

Section 17. Amends s. 110.211, F.S., which requires the DMS to adopt model recruitment rules that agencies *may* use. Under the bill, the DMS must adopt uniform recruitment rules that *must* be used by the agencies, unless the Administration Commission grants an exception to the agency.

Section 18. Amends s. 110.213, F.S., which provides that the DMS must adopt model selection rules that employing agencies *may* use. Under the bill, the DMS must adopt uniform selection rules that *must* be used by the agencies, unless the Administration Commission grants an exception to the agency.

Section 19. Amends s. 110.219, F.S., to add that leave benefits provided to Senior Management Service employees shall not exceed those provided to Select Exempt Service employees, and to create a year-end annual leave cash out. Pursuant to the bill, career service employees, subject to available funds, would be permitted to cash-in 24 hours of unused annual leave each December. This benefit is limited as follows: (a) it is only available to those employees with at least 48 hours of annual leave; and (b) no employee is permitted to cash out more than 240 hours annual leave over the course of the employee's career with the state.

Section 20. Amends s. 110.224, F.S., to rename the state's "Review and Performance Evaluation System" to the "Public Employee Performance Evaluation System." The bill further adds that the performance evaluations are to be used to award lump-sum bonuses in accordance with s. 110.1245, F.S.

Section 21. Amends s. 110.227, F.S. to change the standard for suspensions and dismissals in the career service, and to change the procedures for appealing disciplinary actions. Under the bill, suspensions and dismissals of law enforcement and correctional officers, and firefighters remain subject to existing law's "for cause" standard, while suspensions and dismissals of all other career service employees become subject to a new "reasonable cause" standard. The bill defines "reasonable cause" as "a set of facts or circumstances that would lead a prudent person to take the same or similar action taken by the agency head." Such reasonable cause includes, but is not limited to, poor performance, negligence, inefficiency or inability to perform assigned duties, insubordination, violation of the provisions of law or agency rules, conduct unbecoming a public employee, misconduct, habitual drug abuse, or conviction of any crime. The bill specifies that suspension or dismissal based on patronage, discrimination, or arbitrariness or for any conduct that is otherwise protected under state or federal law shall not constitute reasonable cause.

The bill prohibits "bumping," by stating that rules regarding layoff procedures may not include any system whereby a career service employee with greater seniority has the option of selecting a different position not being eliminated, but which is vacant or already occupied by an employee of less seniority. The DMS is directed to develop layoff rules that require consideration to be given to comparative merit, demonstrated skills, and the employee's experience. The bill provides, however, that collective bargaining units may seek to incorporate "bumping" in their agreements.

The bill creates a new grievance process. Under the bill, a career service employee who believes that any condition affecting the employee is unjust, inequitable, or a hindrance to effective operation may file a grievance with the agency. The employee is entitled to an informal hearing, referred to as Step One, with his or her supervisor within seven calendar days thereafter, and to an informal hearing, referred to as Step Two, with the agency head within 14 days thereafter. The agency head is required to respond to the employee in writing within 7 calendar days after the hearing. The bill provides that the agency head is the final authority for all grievances not related to dismissal, suspension, demotion and reduction in pay.

The bill provides that if a career service employee is subject to dismissal, suspension, demotion, or reduction in pay, the employee must first be notified in writing by the agency before taking action. This notice may be personally delivered or sent regular mail. The employee is entitled to remain in his or her position until receiving both a Step One and Step Two hearing. After the agency has taken its final action, the employee is entitled to file an appeal with the PERC within 10 days after receiving the response from the agency head required after the Step Two hearing.

The bill provides the following procedures for PERC hearings: (a) the hearing must be conducted within 30 days of the filing of the notice of appeal, unless exceptional circumstances warrant an extension, which may last no longer than 30 days and must be agreed to by all parties; (b) discovery may only be granted after a showing of extraordinary circumstances by the party requesting discovery; (c) the proposed recommended order must be filed by the hearing officers within 21 days after the hearing; (d) exceptions to the order must be filed within five working days after the proposed recommended order is filed; and (e) the final order must be issued no later than 7 days after the filing of exceptions or oral arguments if granted. Final orders may be reviewed by the district court of appeals pursuant to s. 447.504, F.S. The bill specifies that

ch.120, F.S., the Administrative Procedures Act, no longer applies to PERC's hearings regarding disciplinary actions.

The bill requires the PERC to affirm the agency head's decision whenever it finds reasonable cause, and to reverse the decision, with or without an award of back pay, whenever it finds that no reasonable cause existed. Under the bill, the PERC would no longer be permitted to reduce the penalty imposed by the agency head.

The bill restricts the PERC's and judiciary's review of disciplinary cases by providing as follows: "Each suspension, dismissal, demotion, or reduction in pay must be reviewed without consideration of any other case or set of facts. An action shall not be considered arbitrary if the employer has reasonable cause for the action taken based upon the employee's conduct without regard for the conduct of any similarly situated employee and any action."

Section 25. Amends s. 110.403, F.S., to add that the DMS shall establish a program that develops managerial, executive, or administrative skills, and that includes the following topics: (1) improving the performance of individual employees; (2) improving the performance of groups of employees; (3) relating the efforts of employees to the organization's goals; (4) strategic planning; and (5) team leadership.

Section 26. Amends s. 110.403, F.S., which provides that the number of positions included in the Senior Management Service must not exceed .05 percent of the total full-time equivalent positions in the career service. Under the bill, this cap is increased to 1 percent, effective July 1, 2001.

Section 28. Amends s. 110.602, F.S., which provides that the number of positions included in the Selected Exempt Service must not exceed 1.5 percent of the total full-time equivalent positions in the career service. Under the bill, this cap is removed effective July 1, 2001.

Section 31. Amends s. 288.708(2), F.S., to provide that the executive director of the Florida Black Business Investment Board is subject to law governing the Senior Management Service, rather than law governing "Volunteers" as provided in current law.

Section 32. Amends s. 440.4416(3), F.S., to provide that the executive director of the Workers' Compensation Oversight Board is subject to law governing the Selected Exempt Service, rather than law governing "Volunteers" as provided in current law.

Section 33. Amends s. 509.036, F.S., to provide that a public food service inspector may be subject to suspension or dismissal for "reasonable cause."

Section 34. Amends s. 216.262, F.S., to provide that a state may be eligible to retain salary dollars for authorized positions that are eliminated after July 1, 2001. The bill requires these positions to be certified to the Legislative Budget Commission. The commission is then required to authorize the agency to retain at least 20 percent of the salary dollars. The amount authorized must be used for permanent salary increases.

Section 36. Amends s. 447.205, F.S., to move the PERC from the Department of Labor and Employment Security to the DMS effective January 1, 2002.

Section 37. Amends s. 447.207, F.S., to provide that the PERC shall hear appeals arising out of any suspension, reduction in pay, demotion, or dismissal as provided in s. 110.227, F.S. The bill removes the PERC's current jurisdiction over career service employee appeals from transfers and layoffs.

Section 39. Amends s. 447.507, F.S., to provide that employees who strike in violation of s. 447.505, F.S., may only be appointed or employed as public employees if they are on probation and at-will for 18 months (current law specifies six months).

Section 40. Amends s. 112. 215, F.S., to provide that when permitted by federal law the deferred compensation administrator may provide for a pre-tax trustee to trustee transfer of amounts in a participant's deferred compensation account for the purchase of prior service credit in a public sector retirement system.

Section 41. Repeals s. 125.0108(2)(d), F.S., to remove reference to the now non-existent Career Service Commission.

Section 42. Repeals ss. 944.35(3)(c), and 985.4045(1)(b), F.S., which provide that a PERC finding that a Department of Corrections employee has physically or sexually battered an inmate, or that a Department of Juvenile Justice employee has engaged in sexual misconduct with a juvenile offender shall constitute cause for termination.

Section 43. Creates an undesignated section of law to provide that the PERC, along with its statutory powers, duties, and functions, is transferred from the Department of Labor and Employment Security to the DMS effective January 1, 2002.

Section 44. Creates an undesignated section of law to provide that the DMS shall adopt rules to effectuate the provisions of the bill regarding ch.110, F.S., and that all existing rules related to ch.110, F.S., are repealed January 1, 2002.

Section 45. Creates an undesignated section of law to require the DMS to develop a performance agreement between the management employees and their agency head that specifies performance measures and levels of performance expected. The bill requires at least five percent, but no more than 10 percent of the manager's salary to be paid upon achievement of the performance expectations.

Section 46. Creates an undesignated section of law to permit the DMS to contract for the implementation of an alternative retirement income security program for eligible temporary and seasonal employees of the state that is funded from appropriations for other personal services.

Section 47. Amends s. 447.403, F.S., to provide that no mediator shall be appointed to assist in the resolution of impasses if the Governor is the employer.

Section 48. Amends s. 216.163, F.S., to delete the reference to special master or mediators in collective bargaining impasses and the required notifications.

Section 49. Provides that the act takes effect upon becoming a law, except as otherwise provided.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None. The bill applies exclusively to employees of the State of Florida.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Florida Civil Service: Since 1956, the Florida Constitution has required a civil service system for state employees. Section 14 of Article 3, Florida Constitution, currently provides:

> By law there shall be created a civil service system for state employees, except those expressly exempted . . . .

The constitution does not define the term "civil service system." Legal commentators, however, have stated:

> While security of tenure in office is an important object of the civil service system, and it has been said that civil service statutes have been enacted to afford state and municipal employees with reasonable job security by protecting them from political considerations and partisanship, and that civil service statutes are designed to secure adequate protection to career public employees from political discrimination, the civil service was not established for the sole benefit of public employees, but also to ensure efficient public service for state, county, and municipal government.[24]

Currently, Florida's constitutional "civil service system" requirement is implemented by a series of statutes. Section 110.201(1)(a), F.S., provides:

> The department [the DMS], in consultation with agencies that must comply with these rules, shall develop uniform personnel rules, guidelines, records, and reports relating to employees and positions in the career service.

[24] 15A Am Jur 2d *Civil Service* s. 1 (2000)(footnotes omitted).

Section 110.227, F.S., provides for suspensions, dismissal, reductions in pay, demotions, layoffs, transfers, and grievances, and authorizes the DMS to address these matters by rule. Furthermore, this section provides that suspensions and dismissals may only be "for cause."

By specifying "for cause", the Florida statutes give career service employees a property right in their state employment. When a property right in employment is provided by the state, an employee cannot be deprived of that right without procedural due process.[25] The United States Supreme Court has held that procedural due process consists of providing the tenured employee with, "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before the employee may be terminated.[26] "That hearing is not a mini-trial and need not definitely resolve the propriety of the discharge."[27] The final resolution regarding the discipline may occur at the post-termination hearing.[28]

Florida's statutes provide procedural due process by requiring that career service employees receive at least 10-days written notice prior to the suspension or termination, and be given an opportunity to appear before the agency or official taking the action to answer orally and in writing the charges against him or her before action is taken.[29] Moreover, the Florida statutes provide for post-termination review of the employer's decision by the PERC and the appellate courts.[30]

Current law's "for cause" standard is removed by the bill, and replaced with "reasonable cause." The term "reasonable cause" is defined by the bill to mean, "a set of facts or circumstances that would lead a prudent person to take the same or similar action taken by the agency head." The question that arises due to this change in standards is whether the new standard abolishes a career service employee's property right in state employment.[31]

In order to determine if a state has created a protected property interest by statute, it is necessary to determine if the statute places substantive limitations on official discretion.[32] The contours of "substantive limitations" have been discussed in a concurring opinion by Justice Brennan,[33] as requiring that "particularized standards" and "objective and defined criteria" guide the state's decision makers.

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[25] *Mckinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).
[26] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).
[27] *McKinney*, 20 F.3d at 1561.
[28] *Loudermill*, 470 U.S. at 546.
[29] Section 110.227, F.S.
[30] Sections 447.208 and 447.504, F.S.
[31] It appears that the Legislature is permitted to eliminate this property right, assuming that the civil service constitutional provision is never construed to require that state employees have a property right in their employment. *See* 67 C.J.S. *Officers* s. 51 (1978) (stating that the legislature may abolish or modify any civil service rights which it has granted and it may adopt a new civil service system and terminate all rights acquired under the prior system); *Department of Corrections v. Florida Nurses Association*, 508 So.2d 317 (Fla. 1987)(stating that any employee's expectation that career service or any particular position therein will exist for infinity is at most a mere hope, as implicit in the employment arrangement is the possibility that the Legislature may consider such employment no longer consistent with the public welfare).
[32] *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983).
[33] *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1971) *cited with approval* in *Olim*, 461 U.S. at 1747.

There does not appear to be any binding precedent for this state regarding whether the standard of "reasonable cause" as defined in the bill creates a property interest in state employment; however, a somewhat similar issue has been reached by the Ninth Circuit. In Nevada, a statute provided that gaming licenses could be denied for "any cause deemed reasonable" by the commission. The Ninth Circuit ruled that the statute did not create a property interest as, "[t]he only substantive restriction imposed upon the Commission's exercise of authority is the requirement that the basis for its decisions be reasonable. This wide discretion resting with the Gaming Commission negates Jacobson's claim to a protected property interest created by the state."[34]

The new standard created by the bill is not precisely the same as the Nevada standard. The bill does not require ***any*** reasonable cause as did the Nevada statute. Instead, it requires that "reasonable cause" be "a set of facts or circumstances that would lead a prudent person to take the same or similar action taken by the agency head." The bill's standard appears to provide more defined criteria than the Nevada statute; however, it can still be argued that the bill's criteria is not sufficiently objective and particularized to create a property right. It is difficult to predict how a court might rule on this issue given the lack of binding precedent on the issue.

In any case, the bill may provide sufficient procedural due process in the event the "reasonable cause" standard is construed by a court to afford career service employees a property right in state employment. Under the bill, a suspended or terminated employee is entitled to pre-termination/suspension notice and a hearing with his or her supervisor and agency head. Moreover, the employee may appeal the disciplinary action once it has been taken to the PERC and the courts.

Consideration of case law when reviewing disciplinary appeals: The bill provides in s. 110.227(6), F.S., that: "Each suspension, dismissal, demotion, or reduction in pay must be reviewed without consideration of any other case or set of facts." Strictly construed, this provision appears to mean that each time the PERC or the court reviews an employment case, it would not be permitted to consider any previous PERC order, nor any prior case law. Moreover, the judiciary would effectively be prohibited from issuing binding precedent when reviewing PERC orders.

From a pragmatic standpoint, this provision will result in a substantial increase in labor for both the PERC and the courts. Furthermore and more importantly, this provision likely contravenes *stare decisis* principles and violates the separation of powers doctrine. As explained by the Tenth Circuit:

> Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177-78, 2 L.Ed. 60 (1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S.Ct. 2439,

[34] *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980).

115 L.Ed.2d 481 (1991); *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L.Ed. 257 (1821).[35]

Thus, one purpose of the stare decisis doctrine is to keep the law stable. Another purpose is:

> . . . according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the "judicial power," i.e., that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." 1 Blackstone,Commentaries 258-59. If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions...." *Id.* at 259.[36]

The purposes of *stare decisis* appear to be defeated by the provision in the bill. There would be no stability in the law as each time the PERC or the court reviewed a case, it would be one of first impression; i.e., each time the PERC and the court will have to interpret anew what the law means and how it should be applied to the instant facts. Moreover, the bill may violate the separation of powers doctrine by prohibiting the judiciary, which is constitutionally responsible for interpreting the law, from rendering binding interpretations.

The bill continues in s. 110.227(6), F.S., by adding that, "An action shall not be considered arbitrary if the employer has reasonable cause for the action taken based upon the employee's conduct without regard for the conduct of any similarly situated employee and any action." Article I, s. 2 of the Florida Constitution and section 1 of the 14th Amendment in the United States Constitution sets forth constitutional guarantees of equal protection, which require reasonable conformity when dealing with similarly situated persons.[37] This provision of the bill may be challenged on equal protection grounds in that it may result, particularly when read in conjunction with the sentence discussed above, in similarly situated state employees being treated differently with regard to discipline. In order for this provision to be constitutional, the classification created by the legislation must be rationally related to achievement of a statutory purpose. In other words, any disparate treatment of state employees, which may ensue from this provision, must be rationally related to achievement of the apparent statutory purposes of increasing employee accountability and providing supervisors with greater flexibility to manage their employees.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

[35] *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000).
[36] *Anastasoff*, 223 F.3d at 902.
[37] *Meola v. Department of Corrections*, 732 So.2d 1029 (Fla. 1998).

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill provides for the transfer of certain managerial, confidential, and supervisory employees from the Career Service to the Selected Exempt Service. The OPB has estimated that 16,320 employees will be transferred. Due to the costs of increased benefits for these employees, the fiscal impact is estimated to be $17.3 million.

The cash value of accrued leave is not funded in the ordinary sense of the term. Agencies use the budgetary devices of position lapse and salary rate to manage their appropriated funds.

The alternative OPS benefits provisions of the bill are designed to provide part-time, seasonal, and temporary workers with a personally-owned pension outside of Social security. This program, authorized for government employers under s. 3121 of the Internal Revenue Code permits public employers to provide such workers with a defined contribution pension plan, similar to an Individual Retirement Account, for their service. The advantage to the public employer is that it is forgiven the 6.2 percent employer match for the Social Security payroll contribution. For the employees the advantage is that the alternative benefit plan provides a greater expectation of return that Social Security. The overall rate of investment return on Social Security contributions is less than 2 percent per year. A conservative allocation of funds in a personally managed account should result in a minimum return of 5 percent per year. Estimated maximum employer savings through this provision in the bill is $10 million to $12 million annually.

The reduction in maximum earned leave for senior managers will not materially affect savings. The reasons for this stems from the fact that both senior managers and selected exempt service employees have a maximum leave carryover of 480 hours under present DMS rules. Only those employees terminating prior to reaching this accrual limit will experience an actual loss from this provision. The leave provisions for management and exempt classes are set by rule of the DMS, not by statute. The agency has the ability itself under current law, to change these limits irrespective of the contents of this bill.

Further fiscal information on this bill has not been provided by the agency.

VI. Technical Deficiencies:

Throughout the bill, law enforcement and correctional officers, and firefighters are exempted from the newly created “reasonable cause” standard. The bill provides that these groups of employees remain subject to the “just cause” standard; however, it does not specify whether the new grievance process created by the bill applies to these exempted employees, or if existing law’s grievance procedure applies.

On pages 37 through 39, the bill refers to “informal hearings” and “proposed recommended orders” when describing the grievance process. These are terms of art used in ch.120, F.S., the

Administrative Procedures Act. The bill, however, exempts the grievance process from the requirements of ch.120, F.S. Moreover, it would appear, given the context of the terms within the bill, that the ch.120, F.S., meaning of these terms is not intended.

On page 37, the bill provides that a career service employee may file a grievance when he or she believes something is unjust, inequitable, or a hindrance to effective operation. The bill does not, however, specify any time frame for when the grievance must be filed. Consequently, a grievance relating to a matter that occurred several years earlier could be filed. Furthermore, under the bill, the grievance could be made orally as there is no requirement that it be in writing.

On page 37, the bill provides for an initial hearing with the employee and his or her supervisor to be held within seven calendar days following the employee's filing of the grievance. A second hearing with the agency head is automatically thereafter required by the bill, notwithstanding whether the employee's grievance is sufficiently resolved by the supervisor.

On page 40, the bill deletes existing language that provides that a career service employee may be immediately terminated if retention of the employee would result in damage to state property, would be detrimental to the best interest of the state, or would result in injury to the employee. Under the bill, all career service employees are entitled to remain in their positions until they receive hearings with both their supervisors and their agency heads.

On pages 37 through 39, the bill describes the grievance hearing process and exempts the process from ch. 120, F.S. In so doing, the requirement in s. 120.57(1)(g), F.S. that the agency maintain an official transcript which it must provide to the parties upon request at cost does not apply. If such transcripts are not required to be made available to the parties, effective appellate review will not be feasible.

VII. Related Issues:

Exemption from Chapter 120: Under existing law, legislatively mandated uniform procedures for PERC hearings on employee discipline are provided by ch. 120, F.S., the Administrative Procedures Act. The central purpose of the act is to provide:

> [B]asic fairness which should surround all governmental activity, such as the opportunity for adequate and full notice of agency activities, the right to present viewpoints and to challenge the view of others, the right to develop a record which is capable of court review, the right to locate precedent and have it applied, and the right to know the factual bases and policy reasons for agency action.[38]

The bill exempts the DMS from ch. 120, F.S., requirements when conducting the career service grievance process under s. 110.227(4) and (5), F.S. Thus, it would appear that the DMS and PERC is not required adopt any rules that specify procedures for the grievance process.[39] However, s. 110.227(2), F.S., in the bill retains existing law that requires the DMS to establish

[38] *Friends of the Hatchineha, Inc. v. State, Dept. of Environmental Regulation*, 580 So.2d 267, 271 (Fla. 1st DCA 1991).
[39] Sections 120.52 and 120.54, F.S.

rules and procedures for the suspension, reduction in pay, transfer, layoff, demotion, and dismissal of employees in the career service.

As a result, it is unclear as to whether rules that prescribe the grievance process must be promulgated. If rulemaking is not required, procedures for the grievance process may be developed without public input and without the need for specific statutory authority, and may routinely be changed without any public notice.

It is clear that under the ch. 120, F.S., exemption, in the bill that the grievance hearings need not be conducted in accordance with the extensive uniform hearing procedures provided in ch. 120, F.S., which include specifying permissible pleadings and motions, subpoena powers, evidentiary procedures, requirements for maintaining a record of the proceedings, and publication requirements.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.