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.)

Prepared By: Governmental Oversight and Productivity Committee

BILL:	CS/SB 956
INTRODUCER:	Governmental Oversight and Productivity Committee and Senator Argenziano
SUBJECT:	Career Service System
DATE:	April 25, 2006 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson	GO	**Fav/CS**
2.			JU	
3.			WM	
4.				
5.				
6.				

I. Summary:

The bill amends s. 110.227, F.S., by providing that a career service employee may be suspended or dismissed only for *just* cause, instead of simply for cause. The bill provides that certified law enforcement officers, correctional officers, or correctional probation officers may seek review of agency actions affecting their employment by the Division of Administrative Hearings (division or DOAH) as an alternative to review by the Public Employee Relations Commission (commission or PERC), and that *any* employee may apply for review to either the council or the division under *extraordinary* circumstances.

The bill requires the division to develop a standard application for use by certified law enforcement, correctional officers, and correctional probation officers in seeking review, and requires an agency to provide the application to the employee upon notice of its intent to take action against the employee.

The bill limits circumstances under which extensions of time for hearings may be granted, changes the standard for requesting discovery, and eliminates a provision for prehearing orders. The bill changes a standard of review from cause to *sufficient* cause, changes the provision for awarding back pay, and provides that an administrative tribunal's order is final agency action.

This bill substantially amends sections 110.227 and 447.207 of the Florida Statutes.

II. Present Situation:

The Florida Civil Service System and Career Service

Since 1956, the Florida Constitution has required a civil service system for state employees. Section 14 of Article 3, Florida Constitution, provides that "[b]y 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.”

Florida’s constitutional civil service system requirement is implemented in ch.110, F.S., which 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 establish and maintain a classification and compensation program addressing Career Service, Selected Exempt Service, and Senior Management Service; to maintain a plan for shared employment; 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 and status; and to establish rules and procedures for the suspension, reduction in pay, transfer, layoff, demotion, and dismissal of career service employees.[1] The terms “career service” and “career service employee” are not defined in the statutes.

Part II of ch. 110, F.S., establishes the Career Service System,[2] which was changed significantly by the “People First” initiative as passed in ch. 2001-43, L.O.F. All existing rules related to ch.110, F.S., were repealed January 1, 2002,[3] and the DMS subsequently enacted rules to effectuate the provisions of the new law.[4]

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.[5] 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.[6] “That hearing is not a mini-trial and need not definitely resolve the propriety of the discharge.”[7] The final resolution regarding the discipline may occur at the post-termination hearing.[8]

Florida’s statutes provide procedural due process by requiring that career service employees receive 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.[9] Moreover, the Florida statutes provide for

[1]Sections 110.201, 110.2035, 110.21, 110.217, and 110.224, F.S.
[2]In 2004, the State Personnel System consisted of 113,030 employee positions, 92,354 of which were career service employee positions (44 percent male, average salary $33,578; 56 percent female, average salary $30,174). Annual Workforce Report, the Department of Management Services, at 16 (2004).
[3] Rules 60K, 60M, and 60N, F.A.C.
[4] Rules 60L 29-39, F.A.C.
[5]*Mckinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).
[6]*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).
[7]*McKinney*, 20 F.3d at 1561.
[8]*Loudermill*, 470 U.S. at 546.
[9]Section 110.227, F.S.

post-termination review of the employer's decision by the Public Employees Relations Commission (PERC) and the appellate courts.[10]

Career Service Job Actions

Any employee who has satisfactorily completed at least a 1-year probationary period in his or her current position may be suspended or dismissed only for cause. Cause includes poor performance, 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.[11] A career service employee who has satisfactorily completed at least a 1-year probationary period in his or her current position and who is subject to a suspension, reduction in pay, demotion, or dismissal must receive written notice of such action at least 10 days prior to the date such action is to be taken. After the notice and prior to the date the action is to be taken, the employee must be given an opportunity to appear before the agency taking the action and answer the charges against him or her. Actions are appealable to the Public Employee Relations Commission (PERC), upon written notice of the appeal by the employee filed with the PERC within 14 calendar days after the date on which the notice of suspension, reduction in pay, demotion, or dismissal is received by the employee.[12]

In extraordinary situations such as when the retention of a career service employee who has satisfactorily completed at least a 1-year probationary period in his or her current position 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, a fellow employee, or some other person, such employee may be suspended or dismissed without 10 days' prior notice, provided that notice of such action, evidence of the reasons therefor, and an opportunity to rebut the charges are furnished to the employee prior to the dismissal or suspension. Agency compliance with the procedure requiring notice, evidence, and an opportunity for rebuttal must be substantiated. Any employee who is suspended or dismissed pursuant to the provisions of s. 110.227(5)(b), F.S., may appeal to the Public Employees Relations Commission as provided in s. 110.227(6), F.S. Written notice of any such appeal shall be filed with the PERC by the employee within 14 days after the date on which the notice of suspension, reduction in pay, demotion, or dismissal is received by the employee.

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). The PERC is composed of a chair and two full-time commissioners appointed by the Governor and confirmed by the Senate; it is housed within the DMS for administrative purposes, but is not subject to control, supervision, or direction by the DMS.[13] For fiscal year 2005-2006, the Legislature appropriated $3.29 million ($1.78 million in general revenue and $1.51 million in trust fund monies) and 35 FTEs to the PERC.

[10]Sections 447.208 and 447.504, F.S.
[11] Section 110.227(1), F.S.
[12] Section 110.227(5)(a), F.S.
[13]Section 447.205, F.S.

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; conduct secret ballot elections to determine whether public employees desire to be represented by a union; process charges of unfair labor practices as well as charges relating to a public employee or employee organization participating in a strike and provide appropriate remedies; assign mediators to assist parties in negotiations when collective bargaining impasse occurs; and administer the impasse resolution process.[16]

Section 110.227(7), F.S., provides that, other than for law enforcement or correctional officers, firefighters, and professional health care providers, each suspension, dismissal, demotion, or reduction in pay must be reviewed without consideration of any other case or set of facts.

For Fiscal Year 2003-04, the DMS reports 1,378 dismissals, and 1,055 demotions of Career Service personnel.[17] The PERC reports 286 appeals of dismissals, and 6 appeals of demotions. OPPAGA reports that 100 percent of PERC's labor and employment decisions were affirmed on appeal in FY 2003-04.[18]

The Division of Administrative Hearings

Pursuant to s. 120.65, F.S., the Division of Administrative Hearings within the Department of Management Services (DMS) is headed by a director appointed by the Administration Commission and confirmed by the Senate. The DOAH is a separate budget entity, and its director is an agency head for all purposes. The DMS must provide administrative support to the DOAH to the extent requested by the director, but the DOAH is not subject to control, supervision, or direction by the DMS in any manner. The division hears administrative appeals of agency action or inaction which adversely impacts a party's interests, pursuant to ch. 120, F.S.

III. Effect of Proposed Changes:

Section 1 changes the standard in s. 110.227(1), F.S., under which any employee who has satisfactorily completed a 1-year probationary period may be suspended or dismissed from "cause" to "*just* cause." The bill adds the phrase "in appropriate circumstances" before the list of actions which may constitute "cause" in the current statute.[19] The bill does not define what constitutes "just cause."

Currently, a career service employee who has completed a one year probationary period and is subject to a suspension, reduction in pay, demotion, or dismissal, must receive notice of such action, and must be given an opportunity to answer the charges against him or her. The employee

[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]Section 447.207, F.S.
[17] Annual Workforce Report – 2004, Department of Management Services, at 36.
[18] OPPAGA's Florida Government Accountability Report on the Public Employees Relations Commission
[19] Section 110.227(1), F.S., provides that cause shall include, 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.

may appeal the action to the Public Employees Relations Commission (commission or PERC). The bill amends s. 110.227(5)(a), F.S., to provide that a certified law enforcement officer, correctional officer, or correctional probation officer may seek review by an administrative law judge assigned by the Division of Administrative Hearings (division or DOAH), as an alternative to seeking review by the commission.

The bill changes the term "appeal" to "application for review," in this paragraph and other paragraphs affected by this bill, in describing what will be filed by the employee with the commission or the division. The bill also requires the division to develop a standard form to facilitate applications for review by certified law enforcement officers, correctional officers, and correctional probation officers. Agencies would be required to provide a copy of the appropriate application with each notice required in actions under this section. The bill does not provide that other types of employees who seek review under extraordinary situations[20] may use the form.

The bill amends s. 110.227(5)(a), F.S., which provides that in extraordinary situations, an employee may be suspended or dismissed without 10 days prior notice, provided that some notice, evidence for the action, and an opportunity to rebut are provided to the employee. Current law provides that an employee suspended or dismissed pursuant to this paragraph may appeal to the commission; the bill provides that such an employee may apply for review to the commission *or* the division, pursuant to s. 110.227(6), F.S.

Section 110.227(6)(a), F.S., which provides procedures for handling applications for review of agency job actions, is amended to add the division. Current law provides that no extension of time for the hearing may exceed 30 days, absent exceptional circumstances, nor may an extension of time be granted without the consent of all parties. The bill amends the above provision by adding the phrase "unless the administrative tribunal determines that the due process rights of any party would be adversely affected" to the beginning of the sentence. The bill does not provide a standard by which any such determination would be made.

Currently, a party requesting discovery in an appeal before the commission must demonstrate a substantial need for the information requested and an inability to obtain relevant information by other means. The bill adds a provision that failure of the agency to timely share with the employee all of the information it has collected in making and supporting its decisions constitutes substantial need. The bill does not provide a standard by which timeliness is to be judged.

Current law provides that the provisions of s. 447.503(4) and (5), F.S., and ch. 120, F.S., apply to appeals before the commission. The bill deletes the reference to s. 447.503(4) and (5), F.S., which provide specific procedures for appeals before the commission, including prehearing orders, provision for an evidentiary hearing when a proceeding involves a disputed issue of material fact, and provision for issuing a recommended or final order. By deleting the reference to ch. 447, F.S., and keeping only the reference to ch. 120, F.S., the bill has the effect of subjecting commission proceedings to some of the procedural requirements applicable to

[20] Such as when the retention of a career service employee who has satisfactorily completed at least a 1-year probationary period in his or her current position 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, a fellow employee, or some other person. Section 110.227(5)(b), F.S.

commission proceedings in chapter 447, Part II, F.S., but also some of the procedural requirements of applicable to division proceedings under ch. 120. F.S.

The bill changes the standard by which the "administrative tribunal" (changed from "commission" to reflect the addition of the division) shall evaluate agency discipline actions. The current standard provides that if the commission finds that cause did not exist for the agency action, the commission must reverse the decision of the agency head, and the employee must be reinstated. The new standard provides that if the administrative tribunal finds that "sufficient" cause did not exist to justify the discipline imposed by the agency action, it must reverse the decision of the agency head, and the employee must be reinstated. It is unclear whether the "sufficient" cause standard in this section is the same as the "just" cause standard added by the bill in s. 110.227(1), F.S.

The bill changes the standard by which the administrative tribunal reviews the agency penalty imposed. The current standard provides that the commission may not reduce the penalty imposed by the agency head, except in the case of law enforcement or correctional officers, firefighters, and professional health care providers, if the commission makes specific written findings of mitigation. The new standard provides that if sufficient cause exists to justify the penalty, the administrative tribunal may not reduce the penalty imposed by the agency head, except in the case of law enforcement or correctional officers, firefighters, and professional health care providers, if the administrative law judge makes specific written findings of mitigation. It is unclear whether the "sufficient" cause standard in this section is the same as the "just" cause standard added by the bill in s. 110.227(1), F.S., and it is unclear whether the use of "administrative law judge" changes the standard for the commission. Additionally, the language seems to imply that if an administrative tribunal does *not* find sufficient cause for the penalty, that the tribunal may reduce the penalty imposed, even for those employees that are not law enforcement or correctional officers, firefighters, and professional health care providers.

The bill adds a new section that requires that every award of back pay must be reduced by any mitigating interim earnings of the employee which exceed legal expenses in seeking review, and requires an administrative law judge to be otherwise bound by the common law of the state in determining the amount of back pay. It is unclear whether the use of "administrative law judge" makes this standard applicable to the commission.

The bill amends s. 110.227(6)(d), F.S., by deleting a provision that exceptions to the recommended order by the hearing officer must be filed within 5 business days after the recommended order is issued, and that the final order must be filed by the commission no later than 30 calendar days after the hearing or after the filing of exceptions or oral arguments if granted. The bill provides that the administrative tribunal's order is final agency action, and must be issued within 30 days following the hearing. It is unclear whether a final order by the Division of Administrative Hearings is appropriately called "final agency action."

Section 2 amends s. 447.207, F.S., to provide that the commission or its designated agent shall, *in appropriate circumstances*, hear appeals arising out of any suspension, reduction in pay, demotion, or dismissal of any permanent employee in the Career Service System, to reflect the fact that the bill provides employees the opportunity to seek review with the Division of Administrative Hearings.

Section 3 provides that the act will take effect July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

For fiscal year 2005-2006, the Legislature appropriated $3.29 million ($1.78 million in general revenue and $1.51 million in trust fund monies[21]) and 35 FTEs to the Public Employee Relations Commission, which subsequently handles the career service appeals at issue at no further cost to the parties. For fiscal year 2005-2006, the Legislature appropriated 71 positions and $8.4 million for the Adjudication of Disputes Program in the Division of Administrative Hearings, which would presumably hear the career service reviews provided for in this bill. The primary source of funding comes from a fee assessment to state agencies and other entities as specified in budgetary proviso language. The division provides reports to agencies, the Governor, and legislative committees and the amount of time administrative law judges spend on cases. The costs of the Adjudication of Disputes Program are then pro-rated among the agencies according to their use. If career service employees could seek reviews through the division, presumably the agencies affected by the increased time spent in front of the division would see their pro-rata share of the costs go up. Those costs are indeterminate.

[21] The Public Employees Relations Commission Trust Fund is funded by a distribution from the Local Government Half-cent Sales Tax Clearing Trust Fund of s. 212.20(5)(d)3., F.S.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill purports to give the authority to the division to issue final orders in these review proceedings, but by definition in s. 120.52(7), F.S., a "final order" is a written final decision which results from a proceeding under ss. 120.56, 120.565, 120.569, 120.57, 120.573, or s. 120.574, F.S., which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive, or declaratory in form. Career service review proceedings arise under s. 110.227, F.S., not under any of the enumerated statutes in ch. 120, F.S.

It is unclear whether deeming the division's order as "final agency action" is consistent with current law. One appellate case has suggested that a DOAH "hearing officer is not an agency head, and the Division of Administrative Hearings is not an agency responsible for final agency action in Section 120.57 proceedings."[22] Customarily, the underlying agency action that the division reviews is considered the agency action, not the recommended or final order issued by the division.

A recent report by the Office of Program Policy Analysis and Government Accountability (OPPAGA) found that the state would not necessarily benefit by merging the various quasi-judicial entities housed within the DMS.[23] OPPAGA found that a potential merger of the commission with the division "would likely result in a temporary loss of efficiency as current DOAH administrative law judges do not have the expertise of current PERC staff in labor and employment law."[24] To the extent that both the commission and the division would be handling career service appeals, there would potentially be an inefficient overlap in duties, and the administrative law judges of the division would initially lack the expertise of the commission in handling these appeals.

Generally, the bill sets up a system wherein career service employees have access to different forums for review, based solely on their job titles, which differs from the current system, in which all employees seek review in the same forum. By giving certified law enforcement officers, correctional officers, and correctional probation officers the alternative to seek review of an agency action against them in the division, and all career service employees the alternative to seek review of agency actions against them in extraordinary circumstances in the division, confusion may arise among employees as to where to seek review.

Section 110.227(7), F.S., permits the commission to consider other cases or set of facts when reviewing each suspension, dismissal, demotion, or reduction in pay of law enforcement or correctional officers, firefighters, and professional health care providers. The bill would create a situation in which the commission could look to similar cases or sets of facts generated during

[22] *Department of Professional Regulation v. LeBaron*, 443 So.2d 225,226, (Fla 1st DCA 1984), overturned by statute on other grounds.
[23] OPPAGA Report No. 04-37
[24] Id. at 8.

reviews in the division, and vice versa. It is uncertain how this would affect the consistency of decisions generated in the two forums.

The bill does not address whether an employee may seek review in one forum after he or she initially sought review in the other forum. Without specifically prohibiting the practice, the bill leaves open the possibility that an employee could begin the review process in one forum, and subsequently elect to obtain review in the other forum. This could negatively impact the ability of the commission, the division, and agencies to efficiently and effectively handle career service reviews. Additionally, it is uncertain whether there would be consistency of decisions between the two entities.

VIII. Summary of Amendments:

None.