

Hillsborough County Civil Service Board

Number: INFORMAL

Date: July 24, 1996

The Honorable Victor Crist
Representative, District 60
Chairman, Hillsborough County Legislative Delegation
Post Office Box 1110
Tampa, Florida 33601

RE: HILLSBOROUGH COUNTY CIVIL SERVICE BOARD--HILLSBOROUGH COUNTY LEGISLATIVE DELEGATION--PUBLIC OFFICERS AND EMPLOYEES--CIVIL SERVICE BOARDS--clarification of previous informal opinion relating to county civil service board. Ch. 85-424, Laws of Florida.

Dear Representative Crist:

On behalf of the Hillsborough County Legislative Delegation, you ask for a clarification of several points made in a recently issued informal opinion discussing the powers and duties of the Hillsborough County Civil Service Board. The following informal comments are provided in an effort to assist you and the Hillsborough Delegation in studying the current system.

You ask for this office's comments on the existence of two separate pay plans for identical classes of positions in light of the concept of "uniform administration of the classified service" on merit principles as provided in the civil service act.

Chapter 85-424, Laws of Florida, created the Civil Service Act of 1985 applicable in Hillsborough County.[1] The purpose of the act, as set forth in the statement of policy is "to establish a system for the formulation and implementation of procedures to ensure the uniform administration of the classified service on [certain] merit principles."[2] Among these is the principle that:

"[r]ecruitment, selection, compensation, benefits and advancement of employees [will be] on the basis of their relative job-related ability, knowledge, skills and personal capabilities, including open consideration of qualified applicants for initial appointment[.]"[3]

Section 4, of the act provides, in part, that:

"The provisions of this act shall apply to all classified personnel employed by the following agencies or authorities within Hillsborough County: the board of county commissioners, the county administrator, clerk of the circuit court, supervisor of elections, property appraiser, tax collector, sheriff, department of criminal justice information within the thirteenth judicial circuit, environmental protection commission, aviation authority, port authority, planning commission, school board, circuit court commissioner, public transportation commission, court administrator, expressway authority, law library, legal aid, legislative delegation, soil conservation, civil service board and any other agency or authority not expressly exempt from this act."

The civil service board is authorized to "adopt classification, benefits and pay plans for classified positions as provided herein." [4] Employees of all agencies which are subject to the civil service act are divided into two classes: the classified service and those employees in classes which are exempt from the classified service. [5] A class of positions or a classification is defined to mean "all positions which are sufficiently similar as to kind or subject matter of work, level of difficulty or responsibilities, and qualification requirements of the work to warrant the same treatment as to title, pay range, and other personnel transactions." [6]

According to your letter, there is one pay range for each classification of employees for all covered authorities in the Hillsborough County Civil Service System except the Tampa Port Authority and the Hillsborough County Aviation Authority. You have asked that this office comment on the existence of two separate pay plans for identical classes of positions.

As discussed in this office's earlier opinion, nothing in Chapter 85-424, Laws of Florida, would preclude the civil service board from establishing different personnel classes based on the responsibilities and functions of a particular group of employees provided such classification is reasonable and all persons under the same conditions and in the same circumstances are treated alike. Thus, if positions are substantially similar as to difficulty, responsibility and qualification, the act contemplates that these positions will be in one class. Whether two positions are substantially similar and should be included in the same class is a mixed question of law and fact, the ultimate resolution of which is a judicial question rather than a strictly legal one.

In addition, the civil service act specifically recognizes that payment of employees should be based on ability, knowledge, skills, and personal capabilities. Thus, a range of compensation could be made available within a particular class based on these factors. However, as the earlier opinion makes clear, nothing in the act appears to authorize the payment of salaries outside the pay range designated for a particular class.

You also ask for a clarification of the statement in our earlier letter to you that "Florida courts have recognized that an administrative agency possesses the implied authority to deviate from its rule provided such deviation is adequately explained and is necessary to carry out its expressly granted powers[.]"

Several courts have held that the provisions of section 120.68(12), Florida Statutes, impliedly recognized an agency's deviation, in proper cases, from its own rules. Reference was made to these cases in the earlier informal opinion regarding the Hillsborough County Civil Service Board. [7] However, these cases construed the language of the statute prior to its amendment in 1984. At that time, section 120.65(12)(b) provided for remand if the agency action was "[i]nconsistent with an agency rule, an officially stated agency policy, or prior agency practice, if deviation therefrom is not explained by the agency"

As amended in 1984, paragraph (b) of the statute was divided into two separate paragraphs: (b) and (c). [8] The current version of section 120.68(12)(b), which reflects this change, provides for remand if an agency fails to follow its rule, but does not contain the language "if deviation therefrom is not explained by the agency." Section 120.68(12)(c) now provides for remand if an agency does not follow its officially stated agency policy or prior agency practice if the deviation

is not explained by the agency.

Thus, this office's position, as stated in Attorney General's Opinion 94-44 (1994) is that while the rationale of these cases may still be valid in relation to stated agency policies, it would not, in light of the current language of section 120.68(12)(b), Florida Statutes, appear to apply to agency rules.

I would note that the memorandum from the Joint Administrative Procedures Committee summarizes the committee's position regarding the authority of agencies to deviate from their own administrative rules and concludes that the Hillsborough County Civil Service Board has limited authority to waive procedural rules and may waive substantive rules only to the extent that the board has adopted criteria to govern the exercise of that discretion.

Finally, you ask whether an agency may pass a procedural rule relating to the amendment or abrogation of a substantive rule without a legislative change to the enabling legislation of the agency. Such a determination would appear to be dependant upon a number of factors specific to the case and it would be inappropriate for this office to draw such a conclusion in the absence of such information.

However, I would note that, public bodies, like public officers, may not do something indirectly which they are prohibited from doing directly.[9] Whether in a particular case the actions of an agency conform to the requirements of the Administrative Procedures Act, the enabling legislation, and the administrative rules which the agency has adopted to govern its conduct, is a mixed question of law and fact which must be answered in a judicial forum.

I trust that these informal comments will clarify my earlier responses to you.

Sincerely,

Gerry Hammond
Assistant Attorney General

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[1] See Title, Ch. 85-424, Laws of Florida, and s. 3, Ch. 85-424, Laws of Florida, providing the short title.

[2] Section 1, Ch. 85-424, Laws of Florida.

[3] *Id.* at s. 1(1).

[4] Section 7(3)(g), Ch. 85-424, Laws of Florida.

[5] Section 6(1) and (2), Ch. 85-424, Laws of Florida.

[6] Section 5(7), Ch. 85-424, Laws of Florida.

[7] The cases, which are also cited in Op. Att'y Gen. Fla. 94-44 (1994), are: *Hall v. Career Service Commission*, 478 So. 2d 1111 (Fla. 1st DCA 1985); *E.M. Watkins & Company, Inc. v. Board of Regents*, 414 So. 2d 583 (Fla. 1st DCA 1982).

[8] See s. 4, Ch. 84-173, Laws of Florida.

[9] *Cf. Green v. Galvin*, 114 So. 2d 187 (Fla. 1st DCA 1959), *cert. denied*, 116 So. 2d 775 (Fla. 1959), *appeal dismissed*, 117 So. 2d 844 (Fla. 1960).