



POLICY CLARIFICATION

STATUTORY/RULE REFERENCE NUMBER: <i>Subsection 110.227(8), Florida Statutes</i>	TRACKING NUMBER: <i>2009 -# 001</i>
SUBJECT: <i>Removing Career Service employees from promotional positions while serving probationary periods.</i>	
APPROVAL SIGNATURE: <i>Sharon D. Larson, Director</i> 	EFFECTIVE DATE: <i>June 18, 2009</i>

Issue:

How is subsection 110.227(8), F.S. to be applied? Subsection 110.227(8), F.S. states:

A career service employee who is serving a probationary period in a position to which he or she has been promoted may be removed from that promotional position at any time during the probationary period but must be returned to his or her former position, or a comparable position, if such a position is vacant. If such a position is not available, before dismissal, the agency shall make a reasonable effort to retain the employee in another vacant position. This subsection does not apply to terminations for cause as described in subsection (1), nor does it create a right to "bump" an employee from an occupied position as described in paragraph (2)(a).

Policy:

The plain language of the subsection provides that removal of a probationary employee from a position to which he or she was promoted within the Career Service requires an agency to return the employee to their former position, if vacant, or a comparable one that is similar in duties, responsibilities and pay band, if available. If such a position is not available, the subsection also requires an agency to make a reasonable effort to place the employee in another vacant position prior to termination. However, the provisions of the statute do not apply to removals "for cause" as described in subsection 110.227(1), F.S.

The following questions and answers have been developed as a means of providing guidance for agencies in administering the provisions of the statute.

1. Does the statute specify the reasons for removal of a probationary employee from a position to which he or she was promoted?

No. The statute only states that removal "for cause" does not require a return to the former or comparable position. However, there are several reasons for removal from the position for which the provisions of this statute would apply, including, but not limited to:

- When an agency determines that an employee is having difficulty adjusting to the requirements of the position and decides that removal is warranted, or
- When, in conjunction with a layoff, the agency removes the employee from the

position and returns him or her to their vacant former or comparable position. If the employee is not removed from the position, the employee must be assessed along with other employees in the affected work unit, consistent with the provisions of Rule 60L- 33.004, F.A.C., or

- When the appointment to the position may not be working out as the employee had envisioned or the position may not be what the employee expected, leading the employee to request removal from the position, or
- When there is a mutual recognition by the employee and the agency that a return to the former position would be in the best interests of both the employee and the agency, leading the agency to remove the employee from the position.

2. Whose decision is it to remove an employee from a position?

Only an agency can remove an employee from a position, regardless of the reason for removal. The agency may initiate the removal or approve an employee's request for removal.

3. What happens once the agency makes the decision to remove the employee from a position to which he or she was promoted for any reason other than "for cause"?

The agency must return the employee to his or her former position, if vacant, or a comparable one, if available. If neither of these exists, the employee may be terminated. However, prior to the termination, the agency must make a reasonable effort to find a vacant position for the employee. The agency must only search for other positions for which the employee meets the minimum qualifications at the time that the employee is being removed from the position to which he or she was promoted. There is no minimum time frame or standard required in the statute to return the employee to the former position or search for a vacant comparable position or another vacant position.

4. What type of action is used when the employee is removed from the position to which he or she was promoted?

Removal of an employee from the position and return to his or her former position or a comparable one will be considered a demotion as defined in subsection 110.107, F.S. If the agency finds another vacant position before termination, the action to place the employee in this position will be a demotion, reassignment, or promotion as defined in subsection 110.107, F.S., as applicable.

Note: If the employee is moved to an SES position, such appointment shall be original as provided in Rule 60L- 33.002(1), F.A.C.

5. Will the employee be returned to the previous salary when removed from the position to which he or she was promoted?

The statute does not have any provisions requiring the employee to be "made whole" or "held harmless." The agency does not necessarily have to reduce the employee's salary when the employee is removed from the position, but may do so based on agency needs and available funding. Rule 60L-32.001, F.A.C. provides that the agency can set the base rate of pay for an employee within the pay band for the broad band level. Any reduction in salary would be effective upon the employee's appointment to his or her former position or appointment to a new position.

6. If an employee is performing poorly or unable to perform duties of the job, is he or she entitled to return to their former position or a comparable position?

No. The subsection specifically states that promoted employees may be terminated "for cause" which includes poor performance. In the event that performance related issues reach the stage of "poor performance," an agency may terminate the employee. Pursuant to Rule 60L-35.003(d), F.A.C., documentation "for cause" is any written notification, such as a counseling memo, that is provided in a timely manner that informs the employee in writing of performance expectation deficiencies that could result in a "Below Expectation" or "Unacceptable" rating. Such documentation may establish "cause" as described in subsection 110.227, F.S. and in such cases, the statute does not require the agency to return the employee to the former or comparable position. Effective personnel management requires continued communication and documentation of employee performance. As with any documented case of employee discipline, the employee may be terminated at the discretion of the agency.

7. What is the advantage to the agency of returning an employee to their former position as provided for in the statute?

The provisions of the statute allow the agency to return an employee to a level of work at which he or she previously had been successful. This action enables the agency to retain an employee who demonstrated performance that merited promotion and who possesses experience, skills and/or knowledge valuable to the agency. In that vein, agencies have the discretion to remove the employee who may not be performing as anticipated from the position to which he or she has been promoted and return the employee to his or her former position rather than losing a valuable employee.

Background:

This provision became effective on January 1, 2009, and applies only to an employee who has been promoted to a Career Service position with probationary status. Prior to the effective date of the statute, there was no statutory requirement for promoted employees who were serving the required probationary period to be returned to their former position for any reason.

Applicable Statute/Rule Citation:**Section 110.227(8), Florida Statutes**

(8) A career service employee who is serving a probationary period in a position to which he or she has been promoted may be removed from that promotional position at any time during the probationary period but must be returned to his or her former position, or a comparable position, if such a position is vacant. If such a position is not available, before dismissal, the agency shall make a reasonable effort to retain the employee in another vacant position. This subsection does not apply to terminations for cause as described in subsection 1), nor does it create a right to "bump" an employee from an occupied position as described in paragraph (2)(a).

Section 110.227(1), Florida Statutes

(1) 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 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. The agency head shall ensure that all employees of the agency have reasonable access to the agency's personnel manual.

Chapter 60L-33 Appointment and Status

(1) An employee appointed to fill a position not in the career service shall be given exempt status. If the employee is appointed to perform the duties of another employee in a filled position, the employee shall also be given overlap status.

(2) An employee appointed to fill a position in the career service shall be given status in accordance with the following:

(a) **Overlap Status** – An employee shall be given overlap status when appointed to perform the duties of another employee in a filled position. Time spent on overlap status shall count toward completion of a probationary period if, while on overlap status, the employee performed all of the duties of the position.

(b) **Temporary Status** – An employee shall be given temporary status when temporarily appointed to fill a vacant position. The appointment shall be for no more than 1040

hours during any twelve-month period, absent the Department's approval of a written request for extension. Time spent on temporary status shall not count toward completion of a probationary period.

(c) **Trainee Status** – An employee appointed to a position as a trainee shall be given trainee status in accordance with the trainee program developed by the agency. The program

shall include an outline of the proposed pay schedule for the training period, including justification for the proposed schedule. Upon successful completion of the trainee program, the employee may be appointed to a position in the same broadband level requiring the same licensure, certification or registration requirement and required knowledge, skills, and abilities. An agency may approve appointments with trainee status in the following programs: cooperative education program; vocational rehabilitation or blind services program; agency trainee program; or return to work program. Time spent on trainee status shall not count toward completion of a probationary period.

(d) Probationary or Permanent Status – An employee shall be given probationary status or permanent status in accordance with the following.

1. Upon original appointment, promotion or demotion to a different broadband level, or any time an employee moves between agencies, an employee shall be given probationary status unless a demotion is to a position in which the employee has previously held permanent status in the agency or unless the legislature has designated that an employee shall be moved but shall not have status as a new employee.

2. An employee appointed on probationary status shall attain permanent status in the career service upon successful completion of the designated probationary period.

3. Time spent on military leave shall count toward completion of the employee's probationary period, and an employee on military leave can attain permanent status while on such leave.

4. Part-time employees and employees filling shared employment positions shall attain permanent status in the same manner as full-time employees.

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