O/A 8-28-86

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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DEPARTMENT OF ADMINISTRATION,

Appellants,
Cross-Appellees

vs.

CASE NO. 68,986

FLORIDA NURSES ASSOCIATION,

Appellee,
Cross-Appellant

_____/

Appeal taken from the Circuit Court
of the Second Judicial Circuit,
in and for Leon County, Florida

APPELLANTS'-CROSS-APPELLEES' AMENDED INITIAL BRIEF

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EXPLANATORY NOTE

Citations to the Record-on-Appeal are designated (R____, A____). The R____ portion of the designation refers to the page number which the Clerk of the Circuit Court has assigned to each page of the Record-on-Appeal. However, the exhibits introduced at the trial on January 8, 1986, have all been assigned the number 313.

The A____ portion of the designation is keyed to the listing of documents from the Record-on-Appeal contained in Appellants'-Cross-Appellees' Appendix. Exhibits referred to in the brief may be more esily referred to in the Appendix rather than under the single number 313 in the Record-on-Appeal.

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STATEMENT OF THE CASE

Appellants, State of Florida, Department of Corrections, Department of Health and Rehabilitative Services and Department of Administration implemented Chapter 85-318, Laws of Florida. (R-313, A-3). Chapter 85-318 was signed into law on June 20, 1985, and the sections applicable to this appeal became effective on October 1, 1985.

Chapter 85-318 requires lawyers and doctors employed by the Appellants to serve at the pleasure of their agency head. All personnel actions affecting them are exempt from the provisions of Chapter 120, Florida Statutes. Moreover, Chapter 85-318 requires that these professionals are to receive greater pay and benefits than are provided to employees in the Career Service.

Article III, Section 14 of the Florida Constitution provides that "there shall be a civil service system for state employees, except those expressly exempted." Chapter 85-318 expressly exempts attorney and physician classifications from the Career Service and creates the Selected Professional Service.[1] While attorneys and physicians were exempted from the Career Service, attorneys in hearing officer classifications were not

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[1] Chapter 86-149, Laws of Florida, changed the name of the Selected Professional Service to the Selected Exempt Service.

exempted from Career Service. On October 1, 1985, attorneys and physicians were transferred from the Career Service System to the Selected Professional System.

On September 26, 1985, the Florida Nurses Association (FNA), on behalf of physicians it represents in the Professional Health Care Bargaining Unit (Unit), filed the instant action seeking to temporarily and permanently enjoin Appellants from implementing Chapter 85-219[2] (R-313, A-2) and Chapter 85-318[3], Laws of Florida, as to those Unit members whether they were FNA members or not. (R-22, A-12) On September 26, 1985, the lower court temporarily enjoined Appellants (R-140, A-22):

> from taking any action under House Bill 1304 and Senate Bill 670 against those members of the Professional Health Care Unit and/or the Florida Nurses Association, so as to deprive these physicians of any protections afforded by Career Service.

The lower court allowed one (1) attorney and nine (9) management or supervisory physicians to intervene. The lower court orally extended the temporary injunction to apply to the physician intervenors during a hearing on December 10, 1985. The

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[2] Chapter 85-219 was also referred to by the lower court and parties as House Bill 1304. It would have applied solely to physicians employed by DOC and HRS. Appellants agreed to the injunction against its implementation. It appears in Chapter 110 as 110.205(2)(v), Florida Statutes.

[3] Chapter 85-318 was also referred to by the lower court and parties as Senate Bill 670 or committee substitute for Senate Bill 670.

physician intervenors were not members of the Unit nor of FNA.

On May 14, 1986, the lower court entered a final judgment which upheld the constitutionality of Chapter 85-318 (R-299, A-24). However, the Court ordered that:

> no state employed physician or attorney who achieved permanent status in the Career Service System prior to October 1, 1985, may be suspended or discharged except for cause nor may they or any of them be denied the protections afforded in Secs. 110.227 and 110.309, F.S., or any other statutory section designed to protect the rights of permanent state employees.

(R-306, A-31)

On May 28, 1986, Appellants appealed to the First District Court of Appeal (R-308, A-33) and on June 5, 1986, Appellee filed a cross-appeal (R-310, A-35). On June 4, 1986, Appellants requested that this case be certified to this Honorable Court as one involving a question of great public importance because it directly affects the Legislature's authority to create, define and terminate employment rights. This action was so certified on June 30, 1986 (A-1), and this Honorable Court accepted jurisdiction on July 8, 1986.

SUMMARY OF THE ARGUMENT

The legislative power of the state is vested in the Legislature pursuant to Article III, Section 1 of the Florida Constitution. Article III, Section 14 gives the Legislature the authority to enact laws for the constitutionally required civil service system; authority is expressly given to exempt employees. The Legislature has absolute power, except as it is restrained by the constitution, to create, abolish or modify all positions created by legislative action whenever it is deemed necessary, expedient or conducive to the public good.

The Legislature enacted Chapter 85-318, Laws of Florida, which expressly exempted doctors and lawyers from the Career Service, created the Selected Professional Service and included these employees in that category. The enactment impliedly abolished the legal and medical classifications. The Department of Administration, in enacting regulations, administratively abolished these positions in Career Service and placed them in the Selected Professional Service. Incumbents in the exempted positions may not complain that the Legislature lacked authority to exempt their positions.

Persons who attained permanent status in the Career Service acquired a property right in employment which may be protected against arbitrary adverse employment actions. Although the constitution requires such protection, state law determines the existence of the property right and the new state law terminated

the right when those persons became members of the exempt service. Employees may not carry Career Service protection with them into the Selected Professional Service.

Persons employed as attorneys and physicians in Career Service were afforded the opportunity to choose to remain in their positions after they became exempt or to secure other employment in the Career Service.[4] An attorney or physician who chose to remain in the Career Service could have "bumped" or replaced another employee with less seniority in a position for which the attorney or physician was qualified to perform.

Chapter 85-318 does not impact on a fundamental right or involve a suspect class and it bears a rational relationship to a legitimate purpose. The Legislature determined a legitimate purpose in allowing the state to attract and retain qualified legal and medical professionals while at the same time affording the state an opportunity to tailor a professional group responsive to state needs.

If the legislative had intended the selected professionals to continue to have the protections afforded to permanent state employees, it would have said so. Instead, it required the selected professionals to serve at the pleasure of their agency heads. The lower court erroneously ignored the legislative

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[4] Appellants are not aware of any incumbent who elicited not to join the Selected Professional Service and receive the greater benefits.

intent by requiring selected professionals to continue to be subject to statutes applicable to permanent state employees.

I

THE LEGISLATURE HAD THE AUTHORITY TO EXEMPT EMPLOYEES FROM THE CAREER SERVICE SYSTEM AFTER THEY HAD OBTAINED PERMANENT STATUS IN THE CAREER SERVICE SYSTEM.

Article III, Section 1 of the Florida Constitution vests all legislative power of the state in the Legislature. Section 14 of that article requires the state to have a civil service system with authority for some state employees to be exempted from the civil service law. The Legislature created Florida's civil service law, the present day Career Service System with the enactment of Chapter 110, Part II, Florida Statutes.

Since civil service laws are created by the Legislature, each office or position created by legislative action may be controlled, modified or abolished by the Legislature (unless specifically prohibited by the constitution) whenever such cause is deemed necessary, expedient or conducive to the public good. Higginbotham v. Baton Rouge, 306 U.S. 535, 59 S.Ct. 705, 83 L.Ed. 968 (1939); Dupont v. Kember, 501 F. Supp. 1081 (M.D. La. 1980) (the state legislature has absolute power except as it is restrained by its own constitution to create, abolish or modify all offices within its reach); Hall v. Strickland, 170 So.2d 827 (Fla. 1965) (positions legislatively created by the county are

wholly within the legislative control of the county and terms of office of the incumbents may be shortened); City of Jacksonville v. Smoot, 92 So. 617 (Fla. 1922) (legislatively created offices may be abolished by the Legislature even during the term of the incumbent, without violating any of his constitutional rights); Grobsmith v. Kempiners, 430 N.E. 2d 973 (Ill. 1981) ("Civil service status is not a vested right, that having been created by the [Legislature] it is wholly within its control and subject to change by legislative action.")

It was not feasible nor beneficial for the state to make absolute the placement of all classifications of employees into the Career System. See, Attorney General Opinion 68-43, March, 1968. The Legislature has for decades exempted state employees from the Career Service, indeed, during the last thirty (30) years it has fashioned some type of exemption from Career Service at least twenty seven (27) times.[5] As a result, the State has hundreds of job classifications in which thousands of employees are exempt under §110.205, Florida Statutes.

The lower court did not hold, and Appellees can not seriously argue, that Legislature may not create positions which

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[5] See, Chapter 29933, 1955; Chapter 61-258; Chapter 67-437; Chapter 69-343; Chapter 69-106; Chapter 71-354; Chapter 72-156; Chapter 73-227; Chapter 73-247; Chapter 74-151; Chapter 75-48; Chapter 75-109; Chapter 75-299; Chapter 76-268; Chapter 77-104; Chapter 79-190; Chapter 80-404; Chapter 81-213; Chapter 82-187; Chapter 82-221; Chapter 83-72; Chapter 83-174; Chapter 83-177; Chapter 83-280; Chapter 83-332; Chapter 84-207; and Chapter 85-318, Laws of Florida.

are exempt from Career Service or later reclassify existing positions as exempt. Article III, Section 14, Florida Constitution; §110.205, Florida Statutes (1985); Burgess v. Florida Department of Commerce, 436 So.2d 356, 357-58 (Fla. App 1 DCA 1983). However, the lower court held and Appellees contend that once a state employee attains permanent status in the Career Service System then the Legislature cannot exempt the employee from the Career Service.

The leading decision regarding the Legislature's authority over legislatively created positions is City of Jacksonville v. Smoot, 92 So. 617 (Fla. 1922). In that case, the Legislature enacted an amendment to the city charter which abolished a number of municipal offices prior to the expiration of the terms of the office holders. Smoot, one of the officeholders whose position had been abolished, prevailed against the City of Jacksonville receiving a judgment for his salary to the end of his otherwise unabridged term of office. This Court reversed that judgment and held that:

> [i]t was within the power of the Legislature, therefore, to alter or amend the government of the City of Jacksonville, and if in doing so an office which existed under the old government was expressly or impliedly abolished, the incumbent cannot complain; because the power of removal from office is incident to the power of appointment, and an office created by the Legislature may be abolished by the Legislature, even during the term for which the incumbent was elected or appointed, without violating any of his

> constitutional rights, in the absence of any constitutional limitation on the subject. Even when an officer, by reason of having been appointed for a definite term or by special statutory provision, cannot be lawfully removed except for cause after a full hearing, his office may be summarily abolished when the proper municipal authorities deem it advisable.

92 So. at 620.

Although Smoot concerns the specific issue of abolishment of positions held by municipal officeholders, it is applicable here regarding the amount of authority this Court has allowed the Legislature to exercise over the continued existence of positions created as a result of legislative action. See also, State v. Swank, 12 So.2d 605 (Fla. 1943) (Legislature repealed civil service law and created a new civil service system which abolished all positions and terminated whatever rights the former employees had held).

The Legislature abolished the attorney and physician classifications from the Career Service with enactment of Chapter 85-318, and it was within its authority to do so. Smoot, supra at 620. In carrying out the intention of the Legislature, the Department of Administration completed, by promulgating rules, the administrative abolishment of the attorney and physician classifications from the Career Service which had existed under the Career Service Class Specifications. (R-313, A-37, 55). The Department then recreated them in the Selected Professional

Service under Selected Professional Service Class Specifications. (R-313, A-55, 61-66). Consequently, only attorney hearing officers remain in Career Service and there are no Career Service physician classifications remaining.[6]

The generally accepted principle of legislative authority over legislatively created office and positions is that they may be controlled, modified or abolished by the Legislature (unless prohibited by the constitution), whenever such course may seem necessary, expedient or conclusive to the public good. Higginbotham v. Baton Rouge, supra, Dupont v. Kember, supra Grobsmith v. Kempiners, supra.

Florida law has been consistent with the above-stated generally accepted principle for the past several decades. Swank, supra; Smoot, supra; Hall v. Strickland, 170 So. 2d 827 Fla. 1965); City of Miami Beach v. Smith, 251 So. 2d 290 (Fla. 3rd DCA 1971); City of Miami v. Rodriguez-Quesada, 388 So. 2d 258 (Fla. 3rd DCA 1980).

Indeed, in Florida the Legislature may provide for the exemption of positions from the Career Service System which will require employees to lose all of their Career Service entitlements. Burgess v. Department of Commerce, 400 So.2d 1258 (Fla. 1st DCA 1983). Moreover, the Legislature may provide for

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[6] To comply with the lower court's order, physicians in this action continue to be treated as though they remain in the Career Service. (R-313, A-56).

exemption of positions from Career Service which will require the loss of some but not all Career Service entitlements. Nute v. Florida Department of Law Enforcement, 397 So. 2d 1222 (Fla. 1st DCA 1980).

In sum, the Legislature has the absolute authority to exempt attorney and physician classifications from the Career Service System. Such exemption may occur even if the person in the covered positions has attained permanent status with entitlement to certain advantages only available in the Career Service System. A contrary decision would provide an unwarranted intervention by the judiciary into the Legislature's lawmaking function and attendant executive branch's administrative responsibilities in violation of the separation of powers doctrine. Therefore, that part of the judgment below requiring that attorneys and physicians be afforded all the protections afforded to Career Service employees must be reversed.

II

DOCTORS AND LAWYERS MAY BE EXEMPTED FROM PROPERTY RIGHTS IN EMPLOYMENT

Section 110.227(1), Florida Statutes, requires that employees who have attained permanent status in the Career Service may only be suspended or dimissed from employment for cause. As a result, doctors and lawyers who had attained permanent status in the Career Service prior to October 1, 1985, acquired a property right in their positions. See, Headley v.

Baron, 228 So.2d 391 (Fla. 1969). It is undenied that once permanent status is obtained, Career Service employees have a property right in their employment which entitles them to protections against arbitrary adverse employment actions. Blanton v. Griel Memorial Psychiatric Hospital, 758 F.2d 1540 (5th Cir. 1980); Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976), vacated on other grounds, 438 U.S. 901, 98 S.Ct. 3118, 57 L.Ed.2d 1144 (1978).

Any property right in employment possessed by Career Service employees is based upon state law and includes Chapter 110, 447 and 120, Florida Statutes. Cleveland Board of Education v. Laudermill ____U.S.____, 105 S.Ct. 1487 (1985); Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2071, 33 L.Ed.2d 548 (1972). Although the employees on whose behalf FNA contested the implementation of Chapter 85-318, Laws of Florida, have an interest in retaining their Career Service status; Section 110.205(2), Florida Statutes determines that the legislature may replace it. Burgess v. Department of Commerce, 400 So.2d 1258 (Fla. 1st DCA 1981).

The Legislature has the authority to create and define property rights in employment through the enactment of laws. Article III, Section 14, Florida Constitution. But the constitutional authority to give property rights in employment also allows the Legislature to take them away. State v. Swank 12

So.2d 605 (Fla. 1943). Legislative take-backs of property rights given to former Career Service employees is not without recent precedent. When senior positions in the Career Service were exempted from Career Service and included in the Senior Management Service, it required those employees going into the senior service to lose the entitlements afforded to permanent state employees. See Chapter 80-404, Laws of Florida. Moreover, a continuing example of the take-back of Career Service protections is §110.205(1), Florida Statutes, which allows exemptions from Career Service of positions designated as policy-making positions.

The authority to exempt positions exists not only in Florida but in the federal sector as well. See 5 USC §§ 3301, 3302 in which Congress has authorized necessary exception from the competitive service[7] "as will best promote the efficiency of that service." By executive order, the President may exempt or except certain positions from the competitive service and place

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[7] Employees in the competitive service enjoy the type of protection against adverse employment actions which Florida's Career Service employees enjoy. Employees in the excepted service, other than those eligible for preference, e.g., military veterans, are not entitled to the entitlements afforded to competitive service employees. Chollar v. United States, 126 F. Supp. 448, 130 Ct.Cl. 338 (1954); However, military veterans in the excepted service have appeal rights. Vitarelli v. Seaton, 359 U.S. 535, 539, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959).

them in confidential, policy making positions in the excepted service[8].

The lower court said it was of the view that persons in the attorney and physician classifications who had obtained permanent status in the Career Service prior to October, 1985, the effective date of Chapter 85-318, Laws of Florida, were entitled to continued employment. It held that these persons could not be suspended or discharged, except for cause, or denied any of the statutory protections "designed to protect the rights of permanent state employees."

This view is consistent with that expressed by this Court that no one has a constitutional right to be hired by the

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[8] There are three types of positions excepted from the competitive service and they are set forth in 5 CFR §6.2 as follows:

> Schedule A. Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.
>
> Schedule B. Positions other than those of confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such noncompetitive examination as may be prescribed by OPM.
>
> Schedule C. Positions of a confidential or policy-determining character shall be listed in Schedule C.

government but once hired and having earned permanent status, an employee is entitled to protection from unjust or unlawful deprivation. Headley v. Baron, 228 So. 2d 28 (Fla. 1969). Although an employee with permanent status in the Career Service may have earned such status while in the position of an attorney or physician, it does not bestow any right to the person to be continually employed in the position of attorney or physician. See, Jones v. Board of Control, 131 So. 2d 713 (Fla. 1961) (any right to government employment or to continued government is subject to all reasonable governmental rules and regulations).

Persons in the legal and medical positions which became exempt positions on October 1, 1985, were afforded the opportunity to choose to remain in the exempt positions subject to the rules of Selected Professional Service or to exercise their right to secure other employment in and to continue to be subject to the rules of the Career Service. (R-313, A-56, 73). Chapter 22 A-7.11(4), Fla.Admin.Code.

The lower court's ruling would allow those persons in the attorney and physician classifications to remain in the Career Service as doctors and lawyers. Defendants admit that persons who remain in the Career Service and did not affirmatively choose to go into the Selected Professional Service continue to enjoy all of the protections afforded to permanent employees in the Career Service. However, as the Legislature exempted the attorney and physician classifications from the Career Service,

persons who held those positions before they became exempt were required to seek other employment in the Career Service in other positions for which they were qualified. See, §110.227, Florida Statutes.

The lower court also held that the persons who agreed to be included in the Selected Professional Service on October 1, 1985, did not do so voluntarily. However, except for those physicians represented in this cause by FNA, all of the attorneys and all the other physicians affirmatively elected to take a position in the Selected Professional Service. All were provided with information regarding the advantages and disadvantages of choosing or not choosing to join the Selected Professional Service. (R-313, A-73).

Once the Legislature exercised its constitutional authority to exempt positions from the Career Service and to include them in the Selected Professional Service, the incumbents could not carry their Career Service entitlements with them into the new service. To the extent that the lower court's ruling would allow this to occur would simply thwart the Legislature's intent. Moreover, it would be an impermissible interference by the judiciary into the legislative branch's exercise of its lawful authority.

III

CHAPTER 85-318, LAWS OF FLORIDA, HAS A RATIONALLY STATED PURPOSE RELATED TO THE STATUTE

In enacting Chapter 85-318, Laws of Florida, the Legislature stated that the policy supporting the creation of the Selected Service is to:

> create a system of personnel management which ensures to the state the delivery of high quality performance in select exempt classifications by facilitating the state's ability to attract and retain qualified personnel in these positions, while also providing sufficient management flexibility to ensure that the work force is responsive to agency needs. The Legislature recognizes that the public interest is best served by developing and refining the technical and managerial skills of its selected professional service employees.

Chapter 85-318 does not impact upon any fundamental right or involve any suspect class and as long as it bears a rational relationship to a legitimate purpose it must be upheld. Markham v. Fogg, 458 So.2d 1127 (Fla. 1984); Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981); In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980). The Legislature perceived a lack of ability of the State to attract and retain qualified legal and medical personnel capable of delivering high quality performance deemed necessary, and an

inability upon the part of state management efforts to tailor the professional work force to be responsive to each agency's need to develop the required high quality performance.

The Legislature intended the Selected Professional Service to permit each state agency to attract and retain qualified professionals capable of delivering higher quality performance by mandating that the Selected Professional Service professionals receive increased annual and sick leave, paid life and medical insurance, and the opportunity to receive performance-based compensation under a merit pay plan. (R-313, A-53, 54, 69, 80, 83). To accomplish the attraction and retention of qualified professionals, the Legislature in Chapter 85-318, required that they receive "greater pay and benefits overall than are provided for the Career Service and less pay and benefits overall than are provided for the Senior Management Service." (R-313, A-8). Providing such benefits to members of the Selected Professional Service while at the same time providing management the increased flexibility to maintain a professional work force that is responsive to the needs of the state's agencies were determined by the Legislature to be both desirable and necessary.

Additionally, the flexibility afforded to management over doctors and lawyers is entirely consistent with the flexibility generally existing in their employment outside of government. Performance determines the compensation and longevity of relationships between professionals and their client employers.

The Legislature determined to give the state a similar opportunity to create such a performance-based merit relationship with its doctors and lawyers.

Further, the creation of the Selected Professional Service is but a continuation of the Legislature's efforts to increase the effectiveness, efficiency and productivity in the upper eschelon of the state's work force. In 1980, the Legislature created the Senior Management Service with the intent "to create a system for attracting, retaining, and developing highly competent senior-level managers." Included in Senior Management were persons in positions which had been exempted from Career Service. See Chapter 80-404, Laws of Florida.

It is well established that the intent of the Legislature is determined by the plain meaning of statutory language. Department of Legal Affairs v. Sandford - Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983); St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1981). Legislative intent is the polestar by which a court must be guided in determining what a statute requires. Parker v. State, 406 So.2d 1089 (Fla. 1981). The statutory provision at issue here is found in Section 2 of Chapter 85-318, Laws of Florida, which exempted:

> All positions which are not otherwise exempt under this subsection and which require as a prerequisite licensure as a physician pursuant to chapter 458, as an osteopathic physician pursuant to chapter 459, or as a chiropractic physician pursuant to chapter 460, including those positions which are

> occupied by employees who are exempted from licensure pursuant to s. 409.352; and all positions which are not otherwise exempt under this subsection and which require as a prerequisite that the employee be a member of the Florida Bar, except for any attorney who serves as a hearing officer pursuant to s. 120.65 or for hearings conducted pursuant to s. 120.57(1)(a).

In enacting Chapter 85-318, Laws of Florida, the Legislature could have chosen to limit it to those employees hired after October 1, 1985, or those hired prior to October 1, 1985, who had not attained permanent status in the Career Service System. However, the Legislature made no such limitation as to the holders of attorney and physician classifications . The Legislature was well aware of the impact that exempting such classifications would have upon the incumbents of the positions. If the Legislature had intended that all incumbents in those positions would continue to have protections of Career Service employees it would have said so. Further, this silence did not authorize the lower court to create such an exception.

To determine legislative intent in enacting a statute, courts will look to legislative history. The legislative history as to Chapter 85-318, Laws of Florida, reveals that the Legislature intended to resolve any perceived barriers to fashioning a professional work force that would be responsive to agency needs. It is axiomatic that a court has no authority to add to or to qualify statutory language in order to accomplish

that which the Legislature did not intend. See, Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 1976). However, that is exactly what the lower court has done in determining that the Legislature could not exempt all attorneys and physicians from the protections afforded to permanent state employees in the Career Service.

The general employment policy for the Career Service is "to recruit, select, train, develop, and maintain an effective and responsible work force." Section 110.104 (1), Florida Statutes. However, the Legislature's creation of the Selected Professional Service specifically was aimed at increasing the effectiveness, efficiency and productivity of the state's attorneys and physicians and provided a rational basis for Chapter 85-318. The lower court erred when it found no rational basis for exempting all attorneys and physicians from Career Service because it ignored or misinterpreted the legislative intent that all Selected Professional Service employees were to be exempt.

IV

LOWER COURT MAY NOT EXERCISE EQUITABLE JURISDICTION TO GRANT RELIEF WHICH CONTRAVENES LEGISLATIVE ENACTMENTS REGARDING STATE GIVEN EMPLOYMENT BENEFITS

The lower court may exercise its equitable powers to fashion relief so as to do equity. However, that maxim is subject to several counterprevailing principles in this appeal.

First, courts acting in equity do not have the right or power to issue orders they consider to be in the best interest of "social justice" at the particular moment without regard to established law. Flagler v. Flagler, 94 So.2d 592 (Fla. 1957). The "established law" in the context of this case has been rejected, ignored or misinterpreted in two respects by the lower court's search for an equitable remedy for relief. The final judgment rejects the constitutionally inherent power of the Legislature to expressly exempt certain employees from the Career Service. Moreover, the lower court ignored the requirements of Chapter 85-318, which in Section 8 provides in pertinent part that:

> Employees in the Selected Professional Service shall serve at the pleasure of the agency head and shall be subject to suspension, dismissal, reductions in pay, demotion, transfer, or other personnel action at the discretion of the agency head. Such personnel actions are exempt from the provision of Chapter 120.

To allow persons in the Selected Professional Service with permanent status in the Career Service prior to October 1, 1985, to be afforded protection under §§ 110.227 and 110.309, Florida Statutes, or any other statutory section designed to protect the

rights of permanent state employees, totally disregards this provision. Legislative direction as to how the selected professionals should be treated is, in effect, a prohibition against their being treated another way. See, Alsop v. Pierce, 19 So.2d 799 (Fla. 1944). The lower court's decision requires that some employees in the Selected Professional Service be treated in a way other than the Legislature intended.

Second, courts of equity are not authorized to adjudicate questions of public policy. See, Miami Laundry Co. v. Florida Dry Cleaning and Laundry Board, 134 Fla. 1, 183 So. 759 (Fla. 1983), which holds that the equitable power to grant injunctions is subject to the paramount power of the Legislature to set public policy through the enactment of laws. See also, Martin v. Dade Muck Land Co., 95 Fla. 530, 116 So. 449 (Fla. 1928), app. dismissed, 278 U.S. 560, 49 S.Ct. 25, 73 L.Ed. 505 (1928).

In Chapter 85-318, Laws of Florida, the Legislature mandated that the public policy of the state requires its doctor and lawyer employees to maintain a base of performance at a level higher than is required of Career Service employees. The lower court erred when it substituted its view of what the public policy should be and required that certain employees be treated other than how the Legislature intended.

CONCLUSION

For all of the foregoing reasons and by virtue of the statutes and authorities cited herein, Appellants urge this Honorable Court to hold that the judgment of the lower court as to the employees with permanent status in Career Service prior to October 1, 1985, was erroneous as a matter of law and must be reversed. Appellants further urge this Court to enter judgment for Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing as been furnished by U.S. Mail to RHEA P. GROSSMAN, P.A., 2710 Douglas Road, Miami, Florida 33133 and DONALD D. SLESNICK, II, ESQUIRE, 2285 S.W. 17 Avenue, Miami, Florida 33146 on this 29th of July, 1986.

George Drumming, Jr.
GEORGE DRUMMING, JR.