STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

John D. Moore,

Appellant,

v.

Case Nos. 08-ABL-06-0282
08-LAY-06-0283

Department of Rehabilitation and Correction,
Allen Correctional Institution,

Appellee.

ORDER

This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

After a thorough examination of the record and a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellee's abolishment of Appellant's position and his resultant layoff be **AFFIRMED**, pursuant to O.R.C. § 124.321 *et seq* and O.A.C. Chapter 123:1-41.

Lumpe - Aye
Sfalcin - Aye
Tillery - Aye

J. Richard Lumpe, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitute ~~(the original/a~~ true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, November 19, 2009.

Michelle Hursey
Clerk

NOTE: *Please see the reverse side of this Order* ***or*** *the attachment to this Order for information regarding your appeal rights.*

11-19-09

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

John D. Moore	Case Nos. 08-ABL-06-0282 08-LAY-06-0283
Appellant	
v.	October 8, 2009
Department of Rehabilitation and Correction, Allen Correctional Institution	
	Marcie M. Scholl Elaine K. Stevenson
Appellee	*Administrative Law Judges*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for consideration upon Appellant Moore's timely filing of a notice of appeal of his job abolishment and resultant layoff. A record hearing in this matter was held on December 15, 16, and 17, 2008. Appellant Moore was present at record hearing and was represented by Samuel N. Lillard, Attorney at Law. Appellee Department of Rehabilitation and Correction was present through its designee, Human Resources Legal Counsel Amy C. Parmi, and was represented by Assistant Attorneys General Mahjabeen F. Qadir and Joseph N. Rosenthal.

The record remained open until January 15, 2009 for the submission of closing briefs.

This Board's jurisdiction to hear these appeals was established pursuant to R.C. 124.03(A) and R.C. 124.328.

STATEMENT OF THE CASE

Appellee's first witness was Kevin Stockdale who testified he is presently employed by Appellee as Chief of Budget Planning and Analysis, and has held that position for approximately three months. He indicated that prior to accepting his present position, he was employed by the Office of Budget Management (OBM) as a Budget Management Analyst for approximately one year; in that position he was responsible for working with assigned agencies to prepare and monitor budgets. The witness noted he worked with Appellee, Department of Youth Services and the

Department of Public Safety to prepare budgets and budget requests for the 2008-2009 budget cycle.

The witness recalled that on January 31, 2008, Governor Ted Strickland issued an Executive Order (Appellee's Exhibit 1), requiring state agencies receiving general revenue funds (GRF) to reduce their expenditures in order to close a budget deficit. Mr. Stockdale indicated agencies were required to take a number of actions to reduce their budgets and that some agencies, such as Appellee, were required to reduce their payrolls, as payroll costs are generally the largest component of agency budgets. He explained payroll costs include employees' base pay, along with additional costs, such as fringe benefits and step increases.

Mr. Stockdale recalled that his role as a Budget Management Analyst was to provide Appellee with guidelines regarding budget reductions; he noted Appellee was required to cut its budget by six to ten percent. The witness stated he reviewed the plan submitted by Appellee to OBM for viability and impact, and submitted a report to his supervisor. He noted Appellee was somewhat restricted in what it could and could not cut from its budget stating, for instance, that Appellee could not cut food service, and indicated several alternatives were discussed.

The witness testified Appellee's initial budget reduction plan was rejected by OBM. Mr. Stockdale indicated he worked with Appellee and OBM's Director provided Appellee with guidelines for budget reduction (Appellee's Exhibit 11, Book 3) to prepare a revised plan that implemented OBM's agency budget directives. He stated the budget reduction plan ultimately submitted by Appellee and approved by OBM encompassed a total budget reduction of $71.7M, which included a reduction in payroll of $52M and affected institutional and administrative operations agency-wide.

Appellee's next witness, Rhonda Pickens, testified she is presently employed by the Department of Administrative Services as a Human Resources Analyst 2 and stated she is responsible for verifying retention points for agencies seeking to abolish positions. She indicated she works specifically with Appellee, the Department of Youth Services, the Rehabilitation Services Commission, the Department of Tax and other smaller agencies. The witness noted that the manner in which retention points are accrued and calculated is outlined by the Ohio Administrative Code. She observed that retention points are not accrued in certain situations, such as while an employee is on disability leave.

Ms. Pickens explained that continuous service means an employee has had no more than a thirty-day break in service. She indicated that accrual of retention points starts over if an employee has a break in service. The witness noted it is the agency's obligation to provide information regarding an employee's prior service to DAS, although agencies argue that it is onerous for employees to provide information regarding their prior service. She observed prior service also affects the calculation of employees' vacation and sick leave.

The witness stated DAS has to have a cut-off date for the submission of information regarding prior service credit in order to keep the abolishment and layoff process on track and that information must be submitted prior to the submission of the rationale. She indicated an employee can only challenge his or her own retention point calculation.

On cross examination Ms. Pickens testified the only thing she does is retention points. She only looks at the rationale to determine what date it is filed with DAS. She testified the rationale from Appellee was sent to DAS on April 8, 2008. Ms. Pickens testified that after a position has been identified for abolishment, no employee can move into or out of the classification series of the identified position. She identified Appellant's Exhibit 19 as a letter consenting to a transfer from the unclassified service to the classified service, dated March 7, 2008, for Edwin Dunn.

Appellee's next witness was Douglas Forbes. He has been employed by Appellee as Deputy Director of Administration for approximately three years and supervises approximately two hundred employees in that position. He indicated he is responsible for Appellee's budget and supervises approximately seven employees who work on that budget. The witness confirmed he prepares Appellee's biennial budget and prepares budget allocation plans for each year. Mr. Forbes explained Appellee has three funding sources: General Revenue Funds (GRF), which comprise approximately eighty-five percent of Appellee's funding; Prisoner Program Funds; and OPI Funds.

Mr. Forbes explained that OPI (Ohio Penal Industries) makes items such as license plates, furniture, and clothing, and has its own budget; OPI is funded through customer sales to state agencies and local government agencies. He noted

OPI funds pay entirely for commissary staff salaries and no GRF funds are used. The witness observed that OPI sales decreased from $3M to $1M, and explained that Appellee purchases approximately eighty-five percent of the products OPI manufactures.

Mr. Forbes confirmed he participated with the other Deputy Directors in the overall budget reduction planning process, but did not determine which positions should be cut at each institution. He recalled Appellee saved approximately $39M in payroll expenses and was able to save more than $9M in areas other than payroll, such as reductions in ancillary services, lease agreements, and travel expenses, but still fell short of its $71M goal. The witness observed Appellee had also begun offering an Early Retirement Incentive in May of 2007 for approximately 1,400 eligible positions but, to date, only two hundred sixty employees had taken advantage of the incentive.

Mr. Forbes confirmed payroll expenditures are Appellee's largest expense. He indicated seven hundred and one positions were abolished, which included one hundred sixty-two positions that were vacant at the time of abolishment. Mr. Forbes stated that, in his opinion, Appellee had to cut positions in order to realize the necessary amount of savings mandated by the Governor's order to reduce the budget. He noted Appellee looked to positions other than security and medical staffing when determining which positions should be abolished but, to his knowledge, no guidelines were provided to wardens.

Appellee's next witness was David Burrus. He was employed by Appellee for approximately twenty-seven years and retired from the position of Labor Relations Administrator in September 2008. In that position he administered three collective bargaining agreements and oversaw the disciplinary process for union employees. The witness confirmed he was familiar with and participated in the abolishment process; he oversaw the abolishment process for both union and exempt employees that resulted in the June 2008 layoffs.

Mr. Burrus stated the directors and assistant directors made the decision that job abolishments were necessary, and observed that the abolishments affected all of Appellee's institutions. He explained that in Central Office and the Division of Parole and Community Services, the Deputy Director with oversight for each specific area made the determination as to which positions would be abolished. The witness recalled that Director Terry Collins notified each Warden or Regional

Director of the number of positions to be eliminated at their facilities, and the Wardens and Regional Directors used their discretion to select specific positions, based upon their facilities' operational needs. He confirmed Wardens were repeatedly counseled to choose positions for abolishment, rather than people.

Mr. Burrus stated Appellee took additional efforts to reduce the agency's budget, including offering an Early Retirement Incentive program, consolidating some programs, and reviewing contractual obligations. He testified one unclassified Deputy Warden position at each institution was eliminated, as well as other unclassified positions within Central Office and the Division of Parole & Community Services. The witness noted some affected unclassified employees exercised their fallback rights to classified positions.

Mr. Burrus confirmed that unclassified position eliminations were implemented prior to the job abolishment of exempt positions because of the issue of fallback rights. He explained that when an unclassified employee exercises his or her fallback rights it is sometimes necessary to create a position for them to "fall back" into; the witness noted this can lead to duplicative positions in some institutions, and when a job abolishment is undertaken, typically the most recently created duplicative position is the position eliminated. Mr. Burrus acknowledged that this practice sometimes resulted in a formerly unclassified employee being placed into a classified position and then laid off from that position shortly thereafter, but indicated Appellee was legally required to proceed in that manner.

Mr. Burrus indicated that once the positions to be abolished had been identified, it was necessary for Appellee to identify the layoff jurisdiction for each position and calculate retention points for each of the incumbent employees. He noted that retention point lists were posted in several locations and any alleged errors were checked by referring to information contained on the OAKS system; DAS also certified Appellee's calculations. The witness explained that retention points are calculated based on years of continuous service, with no break in service. He confirmed that prior service was also considered in the calculation of retention points, but that DAS would not consider the issue of an error in awarding prior service credit unless it was raised prior to or at the same time that the layoff rationale was submitted. Mr. Burrus testified an employee may only challenge the calculation of his or her own retention points.

Mr. Burrus stated that once DAS had certified Appellee's retention point calculations, the next step was to determine how each of the affected employees would be impacted by the displacement process; a notification letter was sent to employees (Appellee's Exhibit 4B). He noted an exempt employee could displace into a vacant bargaining unit position in their classification, but that employees already in the bargaining unit whose positions were abolished would take priority in filling those vacancies. The witness recalled that employees were also notified of some vacancies that would be filled, and were given the option of applying for those positions or for Corrections Officers openings.

The general rationale for the job abolishments and subsequent layoffs was for reasons of economy, which resulted from the projected budget shortfall. Mr. Burrus noted a separate rationale was prepared for each abolished position, showing how the position's duties would be absorbed.

On cross examination Mr. Burrus testified DAS was provided with a general notification sometime prior to April 8, 2008 that job abolishments would be forthcoming. He stated Mr. Dunn did not fall back into the institution where he previously held a classified position as there was a need for the position at Allen Correctional Institution (ACI). Mr. Burrus explained that to create a position, a personnel action form and possibly some other document must go through DAS. He stated his office was not involved in that process, as the labor relations officer did that. Mr. Burrus testified that since the personnel department would have put Mr. Dunn in the classified position, he did not know if the position was created or if it already existed.

In looking at Appellant's Exhibit 25, attachment 2, dated March 2008, Mr. Burrus stated he believes that it reflects the date his office received lists from some Deputy Directors who compiled the information from the Wardens. He stated the date printed at the bottom of page two shows the date the document was printed. Mr. Burrus testified he did not calculate retention points and stated he did not know who calculated Appellant Moore's retention points.

Mr. Burrus identified Appellant's Exhibit 16 as a letter, dated February 26, 2008, which he wrote to Mr. Dunn telling him his fallback position is a Correction Grievance Officer 2 and would be located at ACI. Mr. Burrus stated that is where he was told to put Mr. Dunn.

On redirect examination Mr. Burrus testified Mr. Dunn had been a Deputy Warden at ACI and he remained there when his unclassified position was revoked. He stated Mr. Dunn had more retention points than Appellant Moore and Appellant Moore was displaced. Mr. Burrus testified he had to submit to DAS a list of people who had fallback rights and what classifications the fallback rights were in. DAS then created a position and a position number would given to the newly created position.

Appellant Moore testified he was a Correction Grievance Officer 2 at ACI and was displaced by Mr. Dunn. He has worked at ACI since March 1987 and has been with the state since September 1984. He identified Appellant's Exhibits 7-10 and 12 as personnel action forms pertaining to his positions, showing a continuous service date of September 1984. His direct supervisor was Warden Williams. Appellant Moore stated ACI and Oakwood are on the same grounds and in the same layoff jurisdiction. He testified Warden Williams told Mr. Dunn in February 2008 that his unclassified position was going to be revoked and that he would be placed into a classified position at Oakwood. Appellant Moore testified he was the only Correction Grievance Officer 2 at ACI and identified Appellant's Exhibits 14, 21, 22, and 23 as table of organizations on different dates. He also identified Appellant's Exhibits 5, 24, 19, 1, 2, 3, 4, 5 and 6.

On cross examination Appellant Moore testified he is currently on disability leave, so he is still in his Correction Grievance Officer 2 position.

Appellant's next witness was Warden Jesse J. Williams, an employee of Appellee for approximately twenty years. Warden Williams testified Appellant Moore's working title was Institution Inspector and Mr. Dunn was the Deputy Warden of Administration, an unclassified position. He testified there were no vacant Correction Grievance Officer positions at ACI, so Central Office created a position to place Mr. Dunn in. Warden Williams testified there was only money to fund on Correction Grievance Officer position and Mr. Dunn had more retention points than Appellant Moore.

Warden Williams denied ever telling Mr. Dunn he would be transferred to Oakwood. He stated he and Appellant Moore talked about seeing if there was a vacant position at Oakwood as he wanted to try to help Appellant Moore so that he would not be displaced. Warden Williams identified Appellant's Exhibits 21,22,19,14,23, 24, 19, and 6.

On cross examination Warden Williams testified he did not know when Appellant's Exhibit 23, a table of organization, was created. He stated he was at a Warden's meeting where he was told that one Deputy Warden was going to have his unclassified status revoked. He was told where Mr. Dunn's fallbacks rights were, as he did not know what they were at the time of the revocation. Warden Williams testified he had no authority to place Mr. Dunn into any other institution other than his own.

Appellee's rebuttal witness was Clarrisa Harris, a Human Capital Management Senior Analyst with Appellee in Central Office. As part of her duties, she was responsible for creating classified positions for the unclassified revocations. In looking at Appellee's Exhibit 6, she explained that a position description is first created for a new position. Since Appellee is decentralized there is no need to receive approval from DAS. She stated the decentralization occurred approximately ten or twelve years ago. Ms. Harris testified she notified personnel staff at ACI to create a position description and another authorization form and then she created the personnel action form and the position.

In looking at Appellant's Exhibit 19, Ms. Harris testified it was her signature on the personnel action form for Mr. Dunn as she created it. She testified Appellee uses its own forms and does not use the position description authorization form from DAS.

FINDINGS OF FACT

Based on the testimony presented and evidence admitted at record hearing, and the entirety of the information contained in the record, we make the following findings of fact:

> The parties stipulated Appellee complied with the relevant procedural and notice requirements of the Ohio Revised Code and Ohio Administrative Code in implementing the abolishment of the Correctional Grievance Officer 2 position and Appellant Moore's resultant displacement.

On January 31, 2008, The Governor of Ohio issued Executive Order 2008-10S, which instructed state agencies to implement General Revenue Fund (GRF) spending reductions within their agencies due to an impending state budget shortfall. The Governor also instructed the Office of Budget and Management (OBM) to issue directives to guide agencies in implementing GRF spending reductions.

Appellee took steps to reduce the agency's budget, including offering an Early Retirement Incentive program, consolidating some programs, and reviewing contractual obligations.

Payroll expenditures are Appellee's largest expense and Appellee determined that it had to abolish positions in order to realize the necessary amounts of savings mandated by the Governor's order to reduce the budget. Appellee estimated that the average total payroll cost of each position is approximately $70,000. Appellee initially identified 701 positions for abolishment, which would result in 37M in cost savings.

The Director of the Department of Rehabilitation and Correction, Terry Collins, notified each Warden or Regional Director of the number of positions to be eliminated at their respective facilities. The Wardens and Regional Directors used their discretion to select specific positions, based upon their facilities' operational needs.

On April 8, 2008, Appellee submitted its rationale for job abolishments to the Ohio Department of Administrative Services (ODAS). Appellee's rationale contained the agency's budget information, general cost savings measures, and the proposed abolishment of several hundred positions to save salary and benefits. Appellee's rationale contained several tables that outlined projected GRF savings based upon staff reductions and other cost savings measures.

Appellee calculated retention points for those employees affected by the abolishment and resultant layoffs. ODAS verified Appellee's calculation of retention points for all affected employees and authorized Appellee to proceed with the layoffs that resulted from the abolishment of positions.

In June 2008, Appellant Moore held a position at Allen Correctional Institution classified as Correctional Grievance Officer 2. In a letter dated May 8, 2008, Appellant Moore was notified that he may be displaced or laid off. On June 4, 2008, Appellant Moore received notice that he had no displacement rights and would be laid off effective June 21, 2008.

Appellant Moore was receiving disability benefits at the time he was displaced and laid off.

The parties stipulated that on March 16, 2008, Mr. Dunn's unclassified position was revoked and he was placed into a classified Correction Grievance Officer 2 position at ACI. Mr. Dunn had more retention points than Appellant Moore.

The parties also stipulated that the layoff rationale for Appellant Moore was signed on March 13, 2008, and that his retention points were calculated correctly.

CONCLUSIONS OF LAW

During the record hearing, Appellee made a motion to dismiss based on the argument that because Appellant Moore's position was not abolished and he was displaced from his position, he could not appeal the abolishment, nor the rationale and he could not raise the affirmative defense of bad faith. The parties were ordered to brief the subject of if an affirmative defense of bad faith can be raised when an employee has been displaced from his position and laid off. Appellee relied on its Motion to Quash and Exclude, filed on December 11, 2008 and Appellant Moore filed his Hearing Brief on December 17, 2008.

After reviewing the documents and the statutes, Appellee's Motion to Exclude is hereby **DENIED.** Contrary to Appellee's arguments, there is nothing in the statutes or administrative rules which would prohibit an employee from arguing bad faith on the part of an Appellee when an employee has been displaced from his or her position. Appellee did not present any case law standing for such a proposition. Appellant Moore did present evidence of case law where the courts have not distinguished between an abolishment and a layoff for purposes of presenting a bad faith argument. As pointed out in Appellant Moore's brief, this Board's administrative rule 124-7-01 of the Ohio Administrative Code specifically states that

a layoff will be disaffirmed if it is proven that such action was taken in bad faith. Therefore, Appellant Moore's argument of bad faith in his displacement is properly before this Board. With that being said, since it is clear that Appellant Moore's position was not abolished, it is our **RECOMMENDATION** that case number 2008-ABL-06-0282 be **DISMISSED**.

In the remaining layoff appeal, Appellee must prove by a preponderance of the evidence that Appellant Moore's displacement and layoff was effectuated in accordance with sections 124.321 to 124.327 of the Ohio Revised Code and the rules of Ohio Administrative Code Chapter 123:1-41 *et seq*. Appellee has met its burden.

Section 124.324 of the Ohio Revised Code governs the layoff and displacement procedures. That statute states as follows:

> (A) A laid-off employee has the right to displace the employee with the fewest retention points in the following order:
>
> (1) Within the classification from which the employee was laid off;
>
> (2) Within the classification series from which the employee was laid off;
>
> (3) Within the classification the employee held immediately prior to holding the classification from which the employee was laid off, except that the employee may not displace employees in a classification if the employee does not meet the minimum qualifications of the classification or if the employee last held the classification more than three years prior to the date on which the employee was laid off.
>
> If, after exercising displacement rights, an employee is subject to further layoff action, the employee's displacement rights shall be in accordance with the classification from which the employee was first laid off.
>
> The director of administrative services shall verify the calculation of the retention points of all employees in an affected classification in accordance with section 124.325 of the Revised Code.

(B) Following the order of layoff, an employee laid off in the classified civil service shall displace another employee within the same appointing authority or independent institution and layoff jurisdiction in the following manner:

(1) Each laid-off employee possessing more retention points shall displace the employee with the fewest retention points in the next lower classification or successively lower classification in the same classification series.

(2) Any employee displaced by an employee possessing more retention points shall displace the employee with the fewest retention points in the next lower classification or successively lower classification in the same classification series. This process shall continue, if necessary, until the employee with the fewest retention points in the lowest classification of the classification series of the same appointing authority or independent institution has been reached and, if necessary, laid off.

(C) Employees shall notify the appointing authority of their intention to exercise their displacement rights, within five days after receiving notice of layoff. This division does not apply if the director of administrative services has established a paper lay-off process pursuant to division (E) of section 124.321 of the Revised Code that includes a different notification requirement for employees exercising their displacement rights under that process.

(D) No employee shall displace an employee for whose position or classification there are certain position-specific minimum qualifications, as established by the appointing authority and reviewed for validity by the department of administrative services, or as established by bona fide occupational qualification, unless the employee desiring to displace another employee possesses the requisite position-specific minimum qualifications for the position or classification.

(E) If an employee exercising displacement rights must displace an employee in another county within the same layoff district, the displacement shall not be construed to be a transfer.

> (F) The director of administrative services shall adopt rules under Chapter 119. of the Revised Code for the implementation of this section.

* * * * *

Prior to the record hearing, Appellant Moore stipulated Appellee complied with the relevant procedural and notice requirements of the Ohio Revised Code and Ohio Administrative Code in implementing his layoff. Appellant Moore's primary argument at record hearing was that the abolishment of the position which resulted in his displacement was illegal and in bad faith. Appellee correctly argued that this Board does not have jurisdiction to review the revocation of an employee's unclassified status nor that employee's fallback rights. Appellee is correct in its assertion; however, in the instant case, it is necessary to look to the situation that created the displacement of Appellant Moore in context of this Board's jurisdiction with regard to abolishments and displacements. Section 124.328 of the Ohio Revised Code specifically provides, in part:

> A classified employee may appeal a layoff, or a displacement that is the result of a layoff, to the state personnel board of review.

Since it has already been established that a displaced employee can assert bad faith in his or her displacement, then it follows that this Board has the jurisdiction to look at an employee's bad faith argument. While this Board is not reviewing the propriety of the revocation of the unclassified status of an employee to determine if the revocation should or should not have taken place, this Board can review that revocation in terms of a bad faith argument.

The testimony and evidence established that on March 7, 2008, Edwin Dunn consented to transfer from the unclassified position of Deputy Superintendent to the classified position of Correction Grievance Officer 2, effective March 16, 2008. That was done pursuant to section 5120.382 of the Ohio Revised Code, which states as follows:

> Except as otherwise provided in this chapter for appointments by division chiefs and managing officers, the director of rehabilitation and correction shall appoint employees who are necessary for the efficient conduct of the department of rehabilitation and correction and prescribe their titles and duties. **A person who is appointed to an**

> **unclassified position from a position in the classified service shall serve at the pleasure of the director and retain the right to resume the position and status that the person held in the classified service immediately prior to the appointment. If the person is relieved of the person's duties for the unclassified position, the director shall reinstate the person to the position in the classified service that the person held immediately prior to the appointment or to another position that is certified by the director, with approval of the department of administrative services, as being substantially equal to that prior classified position.** Service in the unclassified service pursuant to the appointment shall be counted as service in the position in the classified service that the person held immediately preceding the appointment. A person who is reinstated to a position in the classified service as provided in this section is entitled to all rights and emoluments accruing to the position during the time of the person's unclassified service. (Emphasis added).

As can be seen from reading the above statute, Appellee had the authority to revoke Mr. Dunn's unclassified status and the law mandated Appellee to allow Mr. Dunn to "resume the position and status" he held immediately prior to serving in the unclassified position. The law further provides that Mr. Dunn had to be reinstated to the position he held immediately prior to becoming unclassified or to another substantially equal position. The choice is that of the Appellee's and this Board has no jurisdiction to substitute its judgment for that of Appellee.

In the instant case, Appellee chose to reinstate Mr. Dunn to his last held position of Correction Grievance Officer 2, effective March 16, 2008. The evidence established that Appellee submitted its rationale and list of retention points for all employees on April 8, 2008. Administrative rule 123:1-41-08(F) of the Ohio Administrative Code provides:

> (F) Movement into and out of affected classifications. Once an appointing authority has submitted the list of retention points and employees to the director the appointing authority may not hire into or move employees into or out of affected classifications by means of promotions, intra-transfers, voluntary demotions, position control number change, lateral or classification changes, or reassignments,

> except that inter-transfers out of an agency or implementation of the findings of a position audit commenced prior to the date of the submission of the list for verification of retention points shall be implemented.

Therefore, the date that no movement could take place into or out of affected classifications was April 8, 2008, per the above rule. Mr. Dunn encumbered the position of Correction Grievance Officer 2 effective March 16, 2008, so there is no violation of the statute. Appellant Moore repeatedly argued at hearing that the pivotal date for no more movement was the date a position was identified for abolishment by the Warden. No where is that stated in any statute or administrative rule and Appellant Moore could not point to anywhere in the Ohio Revised or Administrative Code where that is stated. Therefore, Appellant Moore's argument is completely without merit. Even though the Wardens selected positions for abolishment, the rationale and retention point submission was done by the Director of Appellee and until the time the Director submitted the rationales, they were subject to change at his discretion as appointing authority.

Therefore, there was no evidence proven of bad faith in the revocation of Mr. Dunn's position and placing him in the classified position of Correction Grievance Officer 2. Appellant Moore argued Appellee could have chosen another employee to revoke his or her unclassified status and that Mr. Dunn was chosen due to performance problems. As discussed above, this Board has no jurisdiction to review the choosing by the Appellee of the positions slated for revocation of unclassified service and this Board cannot substitute its judgment on the matter for that of Appellee. Even if Appellant Moore's assumption is true, it would seem to be a good business practice to revoke an employee's unclassified status if the employee had performance problems. By following the law and placing the employee into a classified position, the employee would then be subject to disciplinary procedures for performance problems.

Appellant Moore also seemed to confuse Mr. Dunn's fallback rights pursuant to the revocation of his unclassified status with the displacement rights given to an employee for a classification held within the last three years. Those are two separate and distinct rights. Mr. Dunn assumed the Correction Grievance Officer 2 position by virtue of section 5120.328 of the Ohio Revised Code and not because of any displacement rights. The three year rule as found in administrative rule 123:1-

41-12(C) of the Ohio Administrative Code would only come into play after Mr. Dunn had assumed the classified position of Correction Grievance Officer 2.

While it is true that if one simply looks at the timing of the unclassified revocation, it could appear that bad faith was present. However, the evidence established that the revocation was actually part of the abolishment plan as the Wardens were told to abolish one unclassified deputy position. Given the fact that the one position the Warden chose was Mr. Dunn's, the timing argument is negated. Appellee strictly followed the law and the rules in revoking Mr. Dunn's position. Since Mr. Dunn's created classified position was the last created, it was the first to go when the Warden decided that two Correction Grievance Officer 2 positions were not needed since the institution had historically only had one position. Had Mr. Dunn not had more retention points than Appellant Moore, then Appellant Moore could not have been displaced by Mr. Dunn. The law provides that it is retention points that decide displacement and there is nothing Appellant Moore can argue to change that fact.

Appellant Moore has not met his burden of proving by a preponderance of the evidence that bad faith was present in his displacement and layoff. Therefore, it is our **RECOMMENDATION** that since Appellee has met its burden of proof, Appellee's layoff of Appellant Moore be **AFFIRMED** pursuant to sections 124.321 et seq. of the Ohio Revised Code and Chapter 123:1-41 of the Ohio Administrative Code.

Marcie M. Scholl
Administrative Law Judge

Elaine K. Stevenson
Hearing Officer

:mms