

**STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW**

Anthony G. Conn,

*Appellant,*

Case Nos. 08-ABL-06-0351  
08-LAY-06-0352  
08-RED-06-0353

v.

Department of Rehabilitation and Correction,  
Montgomery Education and Pre-Release Center,

*Appellee.*

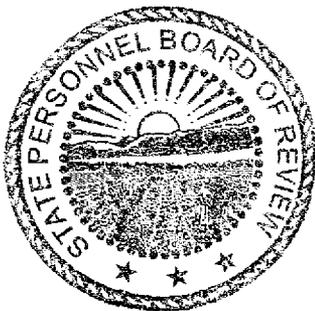
**ORDER**

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 Chapter 123:1-41 of the Ohio Revised Code. IT IS FURTHER **ORDERED** that Case number 08-RED-06-0353 be **DISMISSED** since there is no reduction action to appeal on its own, pursuant to O.R.C. § 124.03(A) and O.R.C. § 124.328.

Lumpe - Aye  
Sfalcin - Aye  
Tillery - Aye

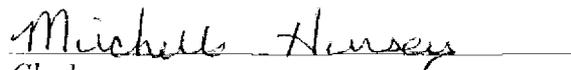


  
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J. Richard Lumpe, *Chairman*

**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 9, 2009.

  
\_\_\_\_\_  
Clerk

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

11-9-09

**STATE OF OHIO  
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Anthony G. Conn

*Appellant*

v.

Department of Rehabilitation and Correction,  
Montgomery Education & Pre-Release Center

*Appellee*

Case Nos. 08-ABL-06-0351  
08-LAY-06-0352  
08-RED-06-0353

October 8, 2009

Marcie M. Scholl  
Elaine K. Stevenson  
*Administrative Law Judges*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause came on for consideration upon Appellant Conn's timely filing of the above-referenced appeals. A record hearing in this matter was held on December 15, 16, and 17, 2008. Appellant Conn was present at record hearing and appeared *pro se*. 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 Pooja A. Bird and Joseph N. Rosenthal.

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.

On cross examination Mr. Stockdale testified there were other areas looked at besides payroll. Appellee made reductions in other areas, such as leases for the Adult Parole Authority offices, telephone lines were reduced, lab contracts in Cuyahoga County were cut as were other contracts. He stated the department also had a goal of reducing redundant religious service contracts and the money allocated to inmate education was also cut.

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 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 that an employee has had no more than a thirty-day break in service. She indicated 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 that 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 Mr. Pickens testified she uses the statutory provisions and the layoff manual published by DAS when verifying retention points. She stated she has not found any errors in the manual. When asked what fall back rights are, Ms. Pickens explained that when an unclassified employee, who previously held a classified position, has his or her unclassified status revoked, then the employee has a right to return to the formerly held classified position, even if the position was in a different classification series. When asked if it matters if the formerly held classified position was in a different layoff jurisdiction, Ms. Pickens stated she did not know.

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

Anthony G. Conn

Case Nos. 08-ABL-06-0351, 08-LAY-06-0352, and 08-RED-06-0353

Page 4

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 that 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 that 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 that 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.

On cross examination Mr. Forbes explained that some of the education programs for inmates are required by law. He stated he did not know have the dollar figures with him for those costs, although he explained that the advanced training provided to inmates is not a significant cost. Mr. Forbes testified a two year Early Retirement Incentive was considered but was not implemented due to the cost. He

also added that the two year buyout did not significantly increase the pool of eligible of employees.

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 that 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 that 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 that 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 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 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 that a separate rationale was prepared for each abolished position, showing how the position's duties would be absorbed.

On cross examination Mr. Burrus explained that Dayton Correctional and Montgomery Pre-Release went under one Warden and merged their deputy and custody supervisor ranks, but there remains two separate and distinct payrolls. He explained the two entities are operating under one table of organization but no position's funding source was transferred. Mr. Burrus also testified that an employee cannot go outside of his or her layoff jurisdiction when exercising fall back rights.

Appellee's next witness was Lawrence Mack, Warden at Dayton Correctional Institution (DCI) and Montgomery Educational Pre-Release for approximately seven to eight months. Prior to that, he was Warden at DCI and has been employed by Appellee for approximately twenty-five years. He explained that the two institutions are on the same campus and DCI is a level 2 facility and Montgomery is a level 1. There are 332 staff at both and 832 inmates.

Warden Mack testified he first learned about the abolishments in early 2008 from the Director. He was told to consolidate redundant services. In late February 2008, he testified he started on a plan of consolidation and the purpose was to reduce staff. Forty positions were combined or abolished and he looked at those positions collectively. Warden Mack testified he looked at every department, including personnel and the business office and consolidated as much as he could in every department. He eliminated Captains, as there were six Captains at DCI and six at Montgomery. Warden Mack testified he reduced that number to a total of seven, as it was unnecessary to have more. He stated safety has not been comprised or reduced and there has been a savings realized.

Warden Mack testified he knows Appellant Conn through the consolidation process. He does not know how long Appellant Conn was a Captain or how long he was at Montgomery. He stated it was Appellant Conn's seniority that determined what happened and it is his understanding Appellant Conn is now a Corrections Officer. Warden Mack identified his rationale for the abolishment of Appellant Conn's position and stated the reasons for the abolishment are contained in the rationale.

On cross examination Warden Mack testified there are eleven Lieutenant positions and one vacancy currently. Initially he thought there would be thirteen Lieutenant positions remaining.

Appellant Conn testified he was a Captain and was then placed in a holding position of a Sergeant, although he still received the pay of a Captain. He stayed approximately thirty days in the holding position and then displaced into the bargaining unit as a Corrections Officer. Appellant Conn testified he did not object to the rationale and stated he had prior bargaining unit time. He stated he realizes the abolishments were done due to the economy and he does not object nor disagree with the reason. Appellant Conn opined, however, that the education money for inmates could have been looked at closer, as that figure is close to \$41

million. The minority contracts could have been cut, as sometimes those are more expensive and he stated there was a list of fifty other things that could have been cut. Those along with natural attrition could possibly have saved payroll from being cut and he stated he believes it is bad faith that those other areas were not looked at.

Appellant Conn testified he was promoted to Captain less than three years ago from a Lieutenant position at Lebanon Correctional. He stated there was a vacant Lieutenant position but he was told that it was not going to be filled.

On cross examination, Appellant Conn testified he was given wrong information as he was told by Mr. Burrus that he could fall back to his position at Lebanon then Mr. Lambert told him that was not correct and he could not do so. He was also told he could displace into a sergeant position then was told his retention points would allow him to displace into a lieutenant position. Appellant Conn stated Captain Mackabee gave him a lot of wrong information.

### **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 position encumbered by Appellant Conn and in the exercise of Appellant Conn's displacement rights.

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.

Anthony G. Conn

Case Nos. 08-ABL-06-0351, 08-LAY-06-0352, and 08-RED-06-0353

Page 9

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 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 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 Conn held a position at Montgomery Education & Pre-Release Center classified as Correction Captain. On or about June 3, 2008, Appellant Conn was notified the Correction Captain position was slated for abolishment.

Appellant Conn was placed in a holding position number as a Captain for approximately 30 days and continued to receive pay as a Correction Captain. Appellant Conn displaced into a Correction Officer position in the bargaining unit.

## CONCLUSIONS OF LAW

In the present appeals the Board must consider: (1) Whether Appellee has proven by a preponderance of the evidence that the abolishment of the position encumbered by Appellant Conn was for reasons of economy and was effectuated in accordance with sections 124.321 to 124.327 of the Ohio Revised Code and the rules of the Ohio Administrative Code Chapter 123:1-41 *et seq.*, and (2) whether Appellant Conn's displacement rights were 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.*

Section 124.321 of the Ohio Revised Code governs the abolishment of positions. It states, in pertinent part:

(D)(1) Employees may be laid off as a result of abolishment of positions. As used in this division, "abolishment" means the deletion of a position or positions from the organization or structure of an appointing authority.

For purposes of this division, an appointing authority may abolish positions for any one or any combination of the following reasons: as a result of a reorganization for the efficient operation of the appointing authority, for reasons of economy, or for lack of work.

(2)(a) Reasons of economy permitting an appointing authority to abolish a position and to lay off the holder of that position under this division shall be determined at the time the appointing authority proposes to abolish the position. The reasons of economy shall be based on the appointing authority's estimated amount of savings with respect to salary, benefits, and other matters associated with the abolishment of the positions only, if:

- (i) Either the appointing authority's operating appropriation has been reduced by an executive or legislative action, or the appoint authority has a current or projected deficiency in

funding to maintain current or projected levels of staffing and operations; and

- (ii) In the case of a position in the service of the state, it files a notice of the position's abolishment with the director of administrative services within one year of the occurrence of the applicable circumstance described in division (D)(2)(a)(i) of this section.

(b) The following principles apply when circumstance described in division (D)(2)(a)(i) of this section would serve to authorize an appointing authority to abolish a position and to lay off the holder of the position under this division based on the appointing authority's estimated amount of savings with respect to salary and benefits only:

- (i) The position's abolishment shall be done in good faith and not as a subterfuge for discipline.
- (ii) If a circumstance affects a specific program only, the appointing authority only may abolish a position within that program.
- (iii) If a circumstance does not affect a specific program only, the appointing authority may identify a position that it considers appropriate for abolishment based on the reasons of economy.

(3) Each appointing authority shall determine itself whether any position should be abolished. An appointing authority abolishing any position in the service of the state shall file a statement of rationale and supporting documentation with the director of administrative services prior to sending the notice of abolishment.

If an abolishment results in a reduction of the work force, the appointing authority shall follow the procedures for laying off employees, subject to the following modifications:

- (a) The employee whose position has been abolished shall have the right to fill an available vacancy within the employee's classification.

- (b) If the employee whose position has been abolished has more retention points than any other employee serving in the same classification, the employee with the fewest retention points shall be displaced.
- (c) If the employee whose position has been abolished has the fewest retention points in the classification, the employee shall have the right to fill an available vacancy in a lower classification in the classification series.
- (d) If the employee whose position has been abolished has the fewest retention points in the classification, the employee shall displace the employee with the fewest retention points in the next or successively lower classification in the classification series.

\* \* \* \* \*

Appellee has met its burden of proving by a preponderance of the evidence that Appellant Conn's abolishment was due to reasons of economy and that all procedural requirements of effectuating such abolishment were satisfied. The evidence established that on January 31, 2008, the Governor issued an Executive Order requiring agencies, Appellee included, to reduce their GRF expenditures. Specifically, Appellee was ordered by OBM to cut their expenditures by six to ten percent. The evidence also established that approximately eighty-five percent of Appellee's budget is made up of GRF funding.

Section 124.321(2)(a) of the Ohio Revised Code allows an appointing authority to abolish positions based on the estimated savings of an employee's salary and benefits if the appointing authority's operating appropriation has a projected deficiency or if the appropriation has been reduced by executive action. Appellee proved that both of those are true. Appellant Conn offered no evidence to dispute either of those facts. Appellee had a budget deficit and was ordered by executive action to reduce their expenditures. Appellee abolished 701 positions in order to reduce its expenditures. The statute provides that the savings in salary and benefits can be the basis for an abolishment due to economy if the abolishment takes place within one year of such executive action and projected deficit. In the instant case, the Executive Order was issued in January 2008 and the abolishment

of Appellant Conn's position took place in June 2008. The appointing authority has the discretion to decide, based on operational needs, which positions to abolish.

In the case of Appellant Conn, the appointing authority decided to consolidate staff at two institutions sharing the same location. Obviously there was a cost savings realized from the consolidation and Appellant Conn testified he was not disputing the reasons for the abolishments. Appellant Conn questioned the accuracy of the layoff manual and whether Appellee properly afforded him his displacement rights. Appellant Conn also disagreed with the decisions Appellee made to reduce its expenditures.

It is unfortunate Appellant Conn was given wrong information several times; however, after reviewing his layoff and displacement, it appears everything was done correctly. With respect to going back into a position he held within the last three years, Appellant Conn testified he was first told he could do so within a different layoff jurisdiction. That is not true. Since the right to displace into a previously held classification (within the last three years) is governed by Chapter 123:1-41 of the Ohio Administrative Code, those rules provide that displacement by means of returning to a previously held position must be within the same layoff jurisdiction. The evidence established there were no displacement rights to his previously held classification in his layoff jurisdiction.

As far as being put into a holding position of Captain, it appears that was done until all the displacement occurred. Had Appellant Conn displaced into a Lieutenant position, he would have been displaced again and would have ended up in the same place he is currently. Rather than do the paperwork to have him displace, then be displaced, Appellee put him into a holding position. While there technically are no provisions within the Revised or Administrative Codes to do so, there was no negative affect on Appellant Conn, as he ended up in the same place no matter which way the displacement was done. Due to his retention points, he had no other positions to displace into.

Appellant Conn argued that Appellee could have looked at other areas to cut. The evidence established other areas were cut, such as contracts, lease agreements, ancillary services, etc. The bottom line is that Appellee still faced a budget deficit and decided on job abolishments. The law provides that Appellee has the discretion to chose the positions to abolish in such a case and this Board cannot substitute its judgment for that of the Appellee.

Anthony G. Conn

Case Nos. 08-ABL-06-0351, 08-LAY-06-0352, and 08-RED-06-0353

Page 14

Appellant Conn also filed a reduction appeal. He was not reduced except through the action of his position being abolished, which he has also appealed. There is no reduction action to appeal on its own and therefore it is our **RECOMMENDATION** that case number 2008-RED-06-0353 be **DISMISSED**.

Inasmuch as Appellee has proved by a preponderance of the evidence that Appellant Conn's abolishment and resultant layoff was effectuated in accordance with sections 124.321 *et seq.* of the Ohio Revised Code and Chapter 123:1-41 of the Ohio Administrative Code, and since Appellant Conn did not prove the existence of any bad faith on the part of Appellee, it is our **RECOMMENDATION** that Appellee's abolishment of Appellant Conn's position and his resultant layoff be **AFFIRMED**.



Marcie M. Scholl  
*Administrative Law Judge*



Elaine K. Stevenson  
*Hearing Officer*

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