

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Walter E. Vogel,

Appellant,

v.

Case No. 08-ABL-06-0358

Department of Rehabilitation and Correction,
Hocking Correctional Facility,

Appellee.

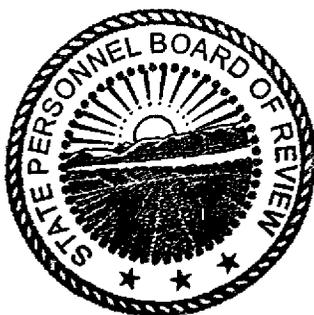
ORDER

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

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 be **AFFIRMED**, pursuant to O.R.C. § 124.321 *et seq* and Chapter 123:1-41 of the Ohio Revised Code.

Lumpe - Aye
Sfalcin - Aye
Tillery - Aye



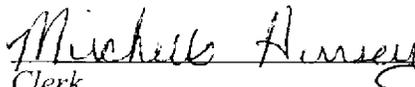


J. Richard Lumpe, *Chairman*

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 9, 2009.



Michelle Amey
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
STATE PERSONNEL BOARD OF REVIEW**

Walter E. Vogel

Case No. 08-ABL-06-0358

Appellant

v.

October 8, 2009

Department of Rehabilitation and Correction,
Hocking Correctional Facility

Marcie M. Scholl
Elaine K. Stevenson
Administrative Law Judges

Appellee

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for consideration upon Appellant Vogel's timely filing of a notice of appeal of the abolishment of his position. A record hearing in this matter was held on December 15, 16, and 17, 2008. Appellant Vogel 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 Timothy M. Miller and Nicole S. Moss.

This Board's jurisdiction to hear the instant appeal 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 that 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 explained that OBM reviewed plans and made recommendations but the Governor's office made the decision as to what programmatic areas would be cut. The institutions did not make that decision. He stated the front line staff was to be preserved, such as the Correction Officers, Parole Officers and nurses.

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 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.

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.

based upon their facilities' operational needs. He confirmed Warden's 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 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 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 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 retention points are calculated based on years of continuous service, with no break in service. He confirmed 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 explained that the duties of a position are determined by the classification specification for the position. If a duty is contained in the classification specification, then anyone in that particular classification can perform that duty.

Appellee's next witness was Samuel A. Tambi, currently working at Franklin Pre-Release, but prior to that, was Warden at Hocking Correctional Institution (HCI) from 2001 until November 2008. He has been employed by Appellee for approximately twenty-nine years. Warden Tambi testified he was told to abolish five positions at HCI and that he could look at any positions. He had to look at the need for every position and he looked at areas where there were more than one staff person.

Warden Tambi stated HCI has approximately five hundred inmates and is a small institution with 162 staff. He testified he could not abolish positions in the medical and education areas and he could not abolish any correction officers. Warden Tambi testified it was very difficult for him to do abolishments. He stated he knows Appellant Vogel as a Food Service Manager. Warden Tambi testified he selected the Food Service Manager position for abolishment because it was a duplicative position. He identified the rationale he wrote for the abolishment of that position and stated some of the duties were reassigned to the Correctional Food Service Manager 2, as that position already performed some of the duties of the abolished position.

On cross examination Warden Tambi testified he took the Food Service handbook and its guidelines into consideration when he made his decision. He

stated food service is a seven day-a-week operation serving approximately five hundred people at three meals a day. Warden Tambi testified there is not currently a Food Service Manager 1 or 2 in attendance daily as one person cannot work seven days a week. The Food Service Coordinators have to assume some of those duties and the Food Service Manager 2 is on call twenty-four hours a day. The shift supervisor also assumes some of the duties.

On redirect examination Warden Tambi stated Appellant Vogel and the Food Service Manager 2 were both gone on occasion prior to the abolishment and the food service area functioned well during their absences.

Appellant Vogel's first witness was Robin Gee, Personnel Director for eighteen years at HCI. She testified she and a group of her colleagues took an active part in the selection of positions for abolishment. Ms. Gee testified she is not familiar with the Food Service handbook. She stated Warden Tambi asked her, the Deputy Warden and Administrative Assistant to provide him with feedback on the abolishments but Ms. Gee testified Warden Tambi made the final decision. With respect to Appellant Vogel's position, Ms. Gee testified they had to look at both exempt and bargaining unit positions. There were two supervisory positions in food service and the Warden decided to abolish the lower level position.

Appellant Vogel testified he did not feel his position should have been abolished as food service is a seven day-a-week operation. He stated his position was a direct line position and was an integral part of the facility.

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 Vogel.

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 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 which 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 Vogel held a position at Hocking Correctional Facility classified as Correctional Food Service Manager 1. On or about June 3, 2008, Appellant Vogel received notice that his position was slated for abolishment effective June 21, 2008.

Appellant Vogel exercised his displacement rights and as a result, he displaced into a Correctional Food Service Manager 1 position at Noble Correctional Institution effective June 22, 2008.

CONCLUSIONS OF LAW

In the present appeal the Board must consider: (1) Whether Appellee has proven by a preponderance of the evidence that the abolishment of the position encumbered by Appellant Vogel 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.*

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 Vogel's abolishment was due to reasons of economy and that all procedural requirements of effectuating such abolishment were satisfied. Prior to the record hearing, Appellant Vogel stipulated that Appellee complied with the relevant procedural and notice requirements of the Ohio Revised Code and Ohio Administrative Code in implementing the abolishment of his position.

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 Vogel 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 Vogel's position took place in June 2008. The appointing authority has the discretion to decide, based on operational needs, which positions to abolish. There is no statute nor regulation which mandates that higher paying positions must be abolished in place of lower paying positions. As Warden Tambi testified, he based the decision on need and the fact that there were two supervisors in food service.

Appellant Vogel's primary argument at record hearing was that he did not agree with then-Warden Tambi's analysis and determination to abolish the Correctional Food Service Manager 1 position occupied by Appellant Vogel at Hocking Correctional Facility. He offered as an exhibit the Food Service manual which states that "A Food Service Manager ii or Manger I shall be on duty daily."

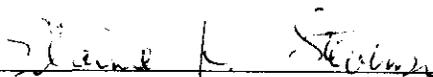
While the manual does state such a requirement, it does not have any relevance to the abolishment of Appellant Vogel's position. The manual is not law but more importantly, the abolishment of Appellant Vogel's position was due to reasons of economy. Therefore, the only relevant facts that this Board is looking at is if Appellee proved that the abolishments were done in order to save money and because Appellee had a projected or realized deficit. As discussed above, Appellee has met its burden. There was a cost savings realized by the abolishment of Appellant Vogel's position. If his position had been abolished for reasons of efficiency or for a lack of work, then the issues he raised may be relevant; however, that is not the case. Warden Tambi had the discretion to decide which positions to abolish and barring any bad faith, this Board cannot substitute its judgment for that of the appointing authority. Appellant Vogel did not provide any evidence of bad faith on the part of Appellee in abolishing his position.

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Inasmuch as Appellee has proved by a preponderance of the evidence that Appellant Vogel's position was abolished for reasons of economy pursuant to section 124.321 *et seq.* of the Ohio Revised and Chapter 123:1-41 of the Ohio Revised Code, and the fact that no bad faith was shown with regard to the abolishment of Appellant Vogel's position, it is our **RECOMMENDATION** that Appellant Vogel's abolishment be **AFFIRMED**.



Marcie M. Scholl
Administrative Law Judge



Elaine K. Stevenson
Hearing Officer

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