

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

Melissa L. Curry,

Case Nos. 08-ABL-06-0380
08-LAY-06-0381

Appellant.

v.

Department of Rehabilitation and Correction,
Lebanon 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 her resultant layoff be **AFFIRMED**, pursuant to O.R.C. § 124.321 *et seq* and O.A.C. § 123:1-41.

Lumpe - Aye
Sfalcin - Aye
Tillery - Aye

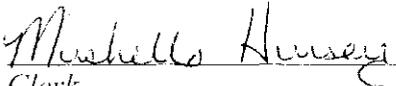


J. Richard Lumpe, *Chairman*

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 9, 2009.



Michelle Hunsley
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

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Melissa L. Curry

Appellant

v.

Department of Rehabilitation and Correction
Lebanon Correctional Institution,

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Case Nos. 08-ABL-06-0380
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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 Curry's timely filing of a notice of appeal of her job abolishment and resultant layoff. A record hearing in this matter was held on December 15, 16, and 17, 2008. Appellant Curry was present at record hearing and was represented by J.C. Shew, 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 Timothy M. Miller and Nicole S. Moss.

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 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.

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 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.

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 that 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 he 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 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 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 stated he was fairly certain the working title of Inspector, whose duties are mandated by law, has the classification of Correctional Warden Assistant and/or Correction Grievance Officer. He stated the positions of Inspector, or those positions which fulfilled that role, were not abolished.

Appellee's next witness was Tim Brunzman, currently Warden of Lebanon Correctional Institution (LCI) for approximately one year. He stated he has two Deputy Wardens, an Administrative Assistant, a Secretary, a Labor Relations Officer and an Inspector reporting directly to him. He explained LCI has approximately 2,693 inmate and is an institution built like a telephone pole, with a long corridor and other corridors branching off the main corridor. There is also a camp at LCI, which was built to house minimum security inmates, as the remainder of LCI is close security institution. The camp is approximately three to four hundred yards from LCI's front door.

Warden Brunzman testified there were twenty-seven or twenty-eight positions eliminated at LCI. He stated he was first directed to reduce twelve positions but when the decision was made to change from a unit management model to a social services model, he was provided with a new set of numbers to reduce. Warden Brunzman testified he decided on the first twelve abolishments, but for the social service model, Central Office told him how many positions to cut in the Unit Manager series.

Warden Brunzman testified he knows Appellant Curry as when he returned to LCI from a previous position at Chillicothe, she was his Administrative Assistant. He testified he selected her position for abolishment as when he received a list of position numbers and titles, he looked to see which positions were redundant, then asked himself if he needed two positions doing the same duties. Warden Brunzman stated he decided the institution could still function well with just one person doing the duties of Appellant Curry's position. He stated another employee, Ellen Myers, did the same duties as Appellant Curry. In looking at the rationale for the abolishment of Appellant Curry's position, Warden Brunzman testified the duties were reassigned in accordance with the rationale, as he discovered the employees

he distributed the duties were already doing some of those duties. He testified no one instructed him to abolish Appellant Curry's position and he did not do so because for a disciplinary reason.

On cross examination Warden Brunsman stated the prior warden at LCI was Ernie Moore and he is the one who created Appellant Curry's position. Her classification is Correction Warden Assistant 1 and he stated Inspectors are also in that classification. Warden Brunsman testified he chose not to abolish any Inspector positions. He stated he does not have the authority to create a vacant position, as all he can do is ask Central Office to create one for him. Warden Brunsman testified he tried to come up duties for Appellant Curry to do and have ample work to keep her busy. He divided the duties between she and Ms. Myers. Appellant Curry did special projects, court reimbursement paperwork and he assigned a person to her to meet the supervision requirement. He testified he was not planning on abolishing Appellant Curry's position when he assigned her duties and stated he did not have a problem with her performance.

Appellant Curry testified she has been employed by Appellee for approximately ten and one-half years. She stated she returned to work at LCI the week before Thanksgiving in 2007. She testified she received a call from the former warden, Mr. Moore, who told her they were coming up with duties for her.

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 Appellant Curry's position and her resultant layoff.

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 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 Curry held a position at Lebanon Correctional Institution classified as Correction Warden Assistant 1. On June 3, 2008, Appellant Curry received notice that her position would be abolished effective June 21, 2008. There were no available positions for Appellant Curry to displace into, and as a result, she was laid off effective June 21, 2008.

Appellant was hired as a new employee and currently holds 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 Curry 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 Curry's 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.*

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 Curry'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 Curry stipulated Appellee complied with the relevant procedural and notice requirements of the Ohio Revised Code and Ohio Administrative Code in implementing the abolishment of her position and her layoff.

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

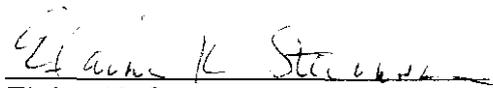
At hearing, Appellant Curry argued her position was targeted for abolishment due to her settlement of an appeal she filed in 2005. As a result of her settlement, she was placed into the Correction Warden Assistant 1 position at LCI. She had previously been employed at Montgomery Education & Pre-Release Center as a Correction Warden Assistant 1. Her settlement agreement was signed in September 2007 and the evidence established she began working at LCI in November 2007.

Warden Brunsman testified when he became Warden of LCI, Appellant Curry was already in her position of Correction Warden Assistant 1. He did not place her in that position. There was no evidence to establish that he had any part in her appeal nor in the settlement of her case. There was no evidence to establish Warden Brunsman had any involvement in placing Appellant Curry in the Correction Warden Assistant 1 position at LCI. The only involvement he had was in making the decision to abolish her position and he explained that he did so due to the economy and the fact that her position was redundant. Appellant Curry did not offer one scintilla of evidence of any bad faith on the part of the Appellee. She signed the settlement agreement, agreeing to be placed at LIC in the same position she held prior to her removal. She cannot argue Appellee knew they were going to abolish her position seven months later and pre-positioned her to be abolished. She provided no evidence whatsoever of being pre-positioned and her argument is wholly without merit.

Inasmuch as Appellee has met its burden of proving by a preponderance of the evidence that Appellant Curry's position abolishment and resultant layoff was in accordance with sections 124.321 et seq. of the Ohio Revised Code and Chapter 123:1-41 of the Ohio Administrative Code and there has been no showing of bad faith on the part of the Appellee, it is our **RECOMMENDATION** that Appellee's abolishment of Appellant Curry's position and her resultant layoff be **AFFIRMED**.



Marcie M. Scholl
Administrative Law Judge



Elaine K. Stevenson
Hearing Officer

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