

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

Brian C. Mattern,

*Appellant,*

Case Nos. 08-LAY-06-0357  
08-LAY-06-0398

v.

Department of Rehabilitation and Correction,  
Ohio State Penitentiary,

*Appellee.*

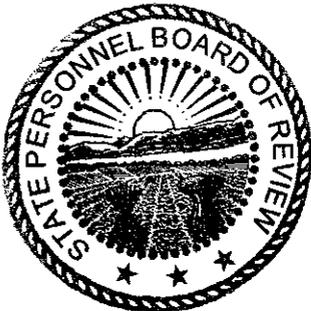
**ORDER**

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 findings of the Administrative Law Judge but rejects the recommendation. The Board's Opinion in this case is attached hereto.

Wherefore, it is hereby **ORDERED** that the effective date of Appellant Mattern's layoff be **MODIFIED** from June 21, 2008, to July 19, 2008. As a result of this modification, Appellant Mattern is entitled to all pay and emoluments due him for the time period of June 21, 2008 to July 19, 2008.

Lumpe - Aye  
Sfalcin - Aye  
Tillery - Aye

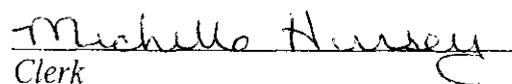


  
\_\_\_\_\_  
J. Richard Lumpe, *Chairman*

**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, December 31, 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.*

12-31-09  
M.H.

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

Brian C. Mattern

*Appellant*

Case Nos. 08-LAY-06-0357

08-LAY-06-0398

v.

Department of Rehabilitation & Correction,  
Ohio State Penitentiary

*Appellee*

**OPINION**

After thoroughly considering the objections filed by both the Appellant and the Appellee and the Appellant's Motion for Consideration, the Board hereby adopts the findings of the Administrative Law Judge but rejects the recommendation.

This Board has previously addressed the issue of what happens when an employee has a certain status, i.e., provisional, at the time the retention points are calculated and then a different status, due to the passage of time, at the time of the effective date of an abolishment or layoff. See *Sassi v. ODRC*, 04-RED-03-0133 and 04-LAY-03-0134. In the previous case, this Board held that a status change that occurs by operation of law is not affected by the restriction of movement after the retention point list is submitted, as per OAC 123:1-41-08(F). The law is actually silent on the issue and since the *Sassi* case was not appealed beyond this Board, no court has addressed this issue. Although the *Sassi* case concerned a provisional employee versus a probationary employee, both are similar in that it is the passage of time in a position which changes the status of both. Since this Board has previously addressed this issue and there has been no new persuasive arguments put forth, this Board is standing by its previous decision on the issue. Therefore, since Ms. Drummond was no longer a probationary employee at the time of the effective date of the layoff, Appellee was correct in allowing her to participate in the displacement process as it did.

Further, upon review of Appellee's objections, wherein additional facts that were not clear at the hearing were addressed, it appears there was disparate treatment with respect to Appellant Mattern and Lieutenant Kowach. From the Report and Recommendation, it is clear that the Administrative Law Judge was under the impression that Appellant Mattern could have displaced Lt. Kowach but chose not to do so. After reading Appellant Mattern's objections and those of Appellee, it is clear that was not the case. Both Appellant Mattern and Lt. Kowach were being displaced by other employees who had more retention points, so the only option for both was to displace into the bargaining unit or accept the layoff. Appellant Mattern could not displace Lt. Kowach. Appellant Mattern chose to accept the layoff and Lt. Kowach decided to displace into the bargaining unit. Appellant Mattern was laid off effective June 21, 2008, but the Appellee extended Lt. Kowach's layoff date until July 19, 2008. There was no reason given by Appellee as to why Lt. Kowach was able to work approximately one month longer than Appellant Mattern, while the only difference

between the two employees is that one chose to exercise his displacement rights and the other did not.

Appellee stated in its objections that Lt. Kowach was allowed to remain in his Lt. position for an extra month because he decided to displace; however, if that reasoning were to apply equally to all employees, then every other employee who chose to exercise their displacement rights should have been permitted to remain in the position they were displaced from for an extra month. Obviously, that was not the case. Treating differently two employees who were in the same circumstance, by allowing one to benefit from an extra month in his position while the other was not given the same option, amounts to bad faith on the part of the Appellee. The civil service system was subverted when the Appellee stated an effective date for the layoff of both Appellant Mattern and Lt. Kowach and then unilaterally extended the effective date for Lt. Kowach. Therefore, Appellant Mattern is entitled to the same consideration that was given to Lt. Kowach and is due all pay and emoluments for the time period of June 21, 2008 through July 19, 2008.



J. Richard Lumpe, *Chairman*

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

Brian C. Mattern

Case Nos. 08-LAY-06-0357  
08-LAY-06-0398

*Appellant*

v.

September 29, 2009

Department of Rehabilitation and Correction,  
Ohio State Penitentiary

*Appellee*

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 Mattern's timely filing of a notice of appeal of his layoff. A record hearing in this matter was held on December 8, 9, 11, and 12, 2008. Appellant Mattern 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 Brooke E. Leslie 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 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 that 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 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 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 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 that 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 that 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 that 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 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 that 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 that 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 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 if someone chose not to exercised his or her displacement rights, that does not change the order of layoff. He also stated that he did a lot of question and answer sessions on the internet with regard to the budget impact statement.

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 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 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 that an employee can only challenge his or her own retention point calculation.

Appellee's next witness was David Bobby, currently the Warden at the Ohio State Penitentiary (OSP) since March 1, 2008. Prior to that he held the position of Warden at Trumbull Correctional Institution from 2003 to March 2008. He testified he was at Trumbull when the abolishment process began. Warden Bobby stated sometime in January 2008, he became aware that abolishments were needed. He testified he made the decisions on the abolishments that were to take place at Trumbull and since he left for OSP prior to the implementation of the abolishments, he met with the other two wardens and the Regional Director. They went through the abolishment list position by position and discussed why an abolishment would be necessary.

Warden Bobby testified he knows an employee named Deborah Drummond as she is a Lieutenant at OSP. He stated that according to the personnel director at OSP, Lieutenant Drummond was not in a probationary period on the effective date of the abolishments. Warden Bobby testified the personnel action form for Lieutenant Drummond's promotion is dated December 23, 2007 and she served a 180 day probationary period. He also stated all employees received a cost of living raise in July 2008.

Appellant Mattern testified his position of Lieutenant was not abolished but he was displaced. He received notification on June 3, 2008 that he was going to be laid off effective June 21, 2008. Appellant Mattern testified that Appellee did not follow the statutory procedures governing layoffs, as Ms. Drummond was still in her probationary period until June 19, 2008. He testified he emailed personnel, as evidenced by Appellant's Exhibit C, and asked about probationary periods. Personnel answered that the probationary status is determined as of the date of the paper layoff, which was May 27, 2008.

Appellant Mattern testified that on June 18, 2008, he was informed that another employee, Kowach, was having his employment extended. Because of that, Appellant Mattern testified he chose not to exercise his displacement rights.

On cross examination Appellant Mattern testified Mr. Kowach did exercise his displacement rights and he displaced into the bargaining unit. He explained that he "was out the door" on June 20, 2008 but in looking at Appellant's Exhibit D, Mr. Kowach stayed in his position until July 20, 2008, at which time he displaced into a Corrections Officer position. Appellant Mattern testified he had more retention points than Mr. Kowach.

### **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 Appellant Mattern's 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 Mattern held a position classified as Correction Lieutenant at Ohio State Penitentiary. On June 3, 2008, Appellant Mattern received notice that another employee was displacing into his position. Appellant Mattern chose not to exercise his displacement rights. Appellant Mattern was laid off effective June 21, 2008 and placed on a recall list.

In June 2008, Christopher M. Kowach was employed by Appellee and held a full-time position classified as Correction Lieutenant at Ohio State Penitentiary. On June 3, 2008, Mr. Kowach received notice he would be displaced as a result of the abolishment and layoff process. Mr. Kowach chose to exercise his displacement rights. Mr. Kowach's employment in his Lieutenant position was extended to July 20, 2008, at which time Mr. Kowach bumped into a bargaining unit position of Correction Officer.

Deborah L. Drummond is an employee of Appellee. On December 23, 2007, Ms. Drummond was promoted to a Correction Lieutenant position and began serving a 180 day probationary period. Her probationary period expired June 20, 2008.

### CONCLUSIONS OF LAW

In the present appeal the Board must consider: (1) Whether Appellee has proven by a preponderance of the evidence that Appellant Mattern's layoff 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.* Since Appellant Mattern's position was not abolished, he does not have the right to appeal Appellee's stated reasons of economy to effectuate the abolishments. What Appellant Mattern can appeal is whether or not Appellee complied with the pertinent statutes and rules in effectuating his layoff. Appellant Mattern had the burden of proving, by a preponderance of the evidence, non-compliance and/or bad faith on the part of the Appellee in effectuating his layoff. Appellant Mattern has met his burden of proof.

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

(2) (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.

\* \* \* \* \*

Section 124.323 of the Ohio Revised Code establishes the order of layoff and states as follows:

Employees shall be laid off in the order set forth in this section within the primary appointment categories of part-time probationary, part-time permanent, full-time probationary, and full-time permanent. Whenever a reduction in force is necessary within each of the primary

appointment categories, first part-time probationary, then part-time permanent, then full-time probationary, and then full-time permanent employees shall be laid off.

Appellant Mattern's primary argument at record hearing was that Appellee acted improperly when it allowed a Correction Lieutenant who was still serving in her promotional probationary period to remain untouched by the layoff and displacement process. He argued that doing so, he ended up one slot lower on the recall list than he should have.

Appellant Mattern's argument has merit. The undisputed evidence established, through Warden Bobby's testimony, that Ms. Drummond was promoted to a Correction Lieutenant position at OSP effective December 23, 2007. She had to serve a 180 day probationary period, which would put the ending date of the probation at June 20, 2008. The effective date of Appellant Mattern's layoff was June 21, 2008 and his notice of layoff letter was dated May 8, 2008. Mr. Burrus testified he did a lot of question and answer sessions on the internet with regard to the budge impact statement. Appellant Mattern's Exhibit C is an email of a question and answer session sent to him by Collette Brandon. It states as follows:

How will a lieutenant coming off probation between the dates of the paper layoff and the effective layoff dates be affected? Once off probation the lieutenant has enough retention points as where they would not be affected?

The employee's probationary status on the date of the paper layoff will determine the order in which he will be displaced. **If he is still on probation, he will be displaced before an employee who is not.** (Emphasis added).

The ending date of the pay period prior to the submission of the retention points to DAS was March 29, 2008. Administrative rule 123:1-41-08(F) of the Ohio Administrative Code states as follows:

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, by reading the above statutes and rules, Appellant Mattern has shown bad faith on the part of the Appellee when Ms. Drummond was considered to be off her probationary period prior to June 20, 2008. Since she was still in her probationary period at the time the retention points were submitted to DAS for verification, she could not have been voluntarily reduced and her status at that time would have been probationary, meaning that she would have been in the first category for the order of layoff. By not doing so, Appellant Mattern's layoff rights were negatively affected and his place on the recall list is in error.

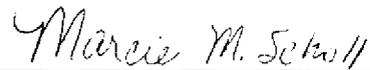
The fact that Appellant Mattern chose not to exercise his displacement rights does not affect that above facts. It may be that if Ms. Drummond had been laid off, Appellant Mattern may not have been displaced. The actions that Appellee failed to take with Ms. Drummond certainly affects Appellant Mattern's layoff, notwithstanding his right to displace others. Appellee offered no rebuttal with regard to Appellant Mattern's testimony and documents.

Appellant Mattern's other argument was that Appellee acted improperly when it extended for one month the tenure of another Correction Lieutenant who chose to exercise his displacement rights before placing that employee in a Correction Officer position in the bargaining unit. He argued that Mr. Kowach was able to work for a full month longer than Appellant Mattern. Appellee offered no evidence to rebut or explain why Mr. Kowach was able to do so. Appellant Mattern's Exhibit D shows that Mr. Kowach did not displace until July 20, 2008, while Appellant Mattern was laid off effective June 21, 2008.

The problem with Appellant Mattern's argument in this instance is that he could have exercised his displacement rights to displace Mr. Kowach. When he did not do so, Mr. Kowach was no longer subject to being displaced. There was not enough evidence presented to know if the above assumed facts are true or not, but since Appellant Mattern did not exercise his displacement rights, he cannot now

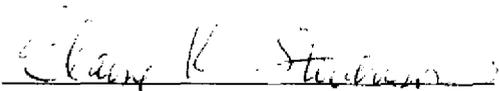
argue that his rights were violated by something that Mr. Kowach did or did not do as Appellant Mattern no longer had any effect on the position held by Mr. Kowach.

Since Appellant Mattern has met his burden of proving by a preponderance of the evidence that Appellee acted in bad faith and to the detriment of Appellant Mattern by failing to recognize that Ms. Drummond was still a probationary employee at the time of Appellant Mattern's layoff, pursuant to sections 124.321 *et seq.* of the Ohio Revised Code and Chapter 123:1-41 of the Ohio Administrative Code, it is our **RECOMMENDATION** that Appellant Mattern's layoff be **DISAFFIRMED** and Appellee re-do the layoff with Ms. Drummond's status being recognized as a probationary employee.



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Marcie M. Scholl  
*Administrative Law Judge*



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Elaine K. Stevenson  
*Hearing Officer*