STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Deborah Kimbrough,
Jennifer Dilorenzo
Appellants,

Case Nos. 09-LAY-06-0305
09-LAY-06-0308

v.

Hamilton County Board of Commissioners,

Appellee.

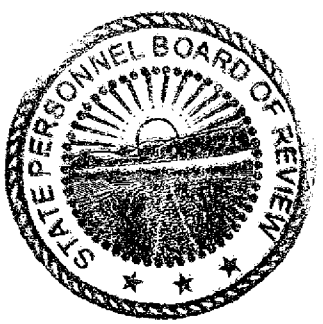
ORDER

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 the respective layoffs of Appellants be **AFFIRMED**, pursuant to O.R.C. §§ 124.03 and 124.328.

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, July 8, 2010.

Clerk

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

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

DEBORAH KIMBROUGH and JENNIFER DILORENZO	Case Nos. 09-LAY-06-0305 09-LAY-06-0308
Appellants	
v.	May 17, 2010
HAMILTON COUNTY BOARD OF COMMISSIONERS/HAMILTON COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES,	JAMES R. SPRAGUE Administrative Law Judge
Appellee.	

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

These causes came to be heard at pre-hearing and record hearing on April 27, 2010. Present at the pre-hearing and record hearing were Appellants, who appeared *pro se*. Appellee, Hamilton County Board of Commissioners/Hamilton County Department of Job and Family Services ("HCJFS"), was present through its designee, David Helm, Labor Relations Manager for HCJFS, and was represented by Kathleen Bailey, Assistant Prosecuting Attorney for Hamilton County.

These causes come on due to Appellant Kimbrough's July 6, 2009 and Appellant DiLorenzo's June 23, 2009 filing by postmark and hard copy of appeals from the layoff from their positions as JFS Manager–Children's Services, effective July, 2 2008, effectuated through the Hamilton County Human Resources Department. Appellants received actual notice of this action on or before June 18, 2009.

Jurisdiction over the subject matter of these appeals was established pursuant to R.C. 124.328 *et seq.*

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

At hearing, the following witnesses offered testimony: **David Helm**, Labor Relations Manager with HCJFS; **Joseph Gagliardo**, Human Resources Manager for HCJFS; **Aiesha Walker**, Human Services Section Chief with HCJFS; Appellant **Deborah Kimbrough**; and Appellant **Jennifer DiLorenzo**.

Prior to commencing the record hearing in these matters, a pre-hearing was conducted. At the pre-hearing, the undersigned and the parties initially reviewed the question of whether Appellee had substantially complied with the pertinent procedural prerequisites for abolishing a classified position and laying off the incumbent in that position. Further, at the pre-hearing, the parties set forth their respective order of presentation of witnesses and the parties sequentially numbered and finalized their exchange of documents for the hearing.

Appellants' concerns focused more on issues that could be described as substantive (*i.e.* challenging Appellee's rationale) and as "bad faith" as versus as challenging Appellee's substantial procedural compliance with the pertinent Revised Code and Ohio Administrative Code. Following an initial review of Appellee's activities regarding substantial procedural compliance, the undersigned initially determined that Appellee had established its *prima facie* case in this area and could proceed to hearing on same.

In regard to substantive compliance, Appellee's **asserted rationale of "lack of funds,"** which Appellee utilized to justify the layoff of Appellants from their positions, was reviewed. As is also reflected in Appellants' opening statements, the Appellants set forth several of their challenges to Appellee's stated rationale.

Appellant Kimbrough asserts that HCJFS failed to act in good faith by calculating the retention points of laid-off employees incorrectly and thereby making errors in the layoff process. Ms. Kimbrough states she alerted HCJFS to these errors months before the Appellee acknowledged such errors. According to Ms. Kimbrough, as of the date of hearing, the Appellee had not remedied its layoff list to account for the error in retention points. Ms. Kimbrough failed to demonstrate that Appellee's error in miscalculating retention points was intentional.

Appellee did not deny the error made in retention points. However, Appellee did correctly point out that, had the error not occurred, Ms. Kimbrough would still have been laid off from her Manager position. In other words, the error did not affect Ms. Kimbrough.

It is noteworthy that at the time the layoffs and this error occurred, Hamilton County was facing a huge budget crisis and laid off approximately 500 employees in a very short amount of time. In situations such as this, it is at least acceptable to commit a certain number of non-outcome determinative errors. The employees affected by the error have, to the knowledge of the parties in this case, not appealed their layoffs. Also, testimony at hearing by Appellee's Human Resources Manager attributed the error to an unintentional misinterpretation of provisions of the Ohio Revised Code. This testimony was, at the very least, a feasible counterargument to Kimbrough's allegation of bad faith and successfully rebutted Appellant's Kimbrough's production of evidence on the issue of bad faith regarding this error.

Ms. Kimbrough also argues bad faith on the part of the Appellee in that it failed to offer open positions to laid-off employees, including herself and Appellee DiLorenzo, prior to posting said positions. According to Human Resources Manager Gagliardo, it is not the policy of human resources to reach out to laid-off employees and offer positions to laid-off employees prior to posting the positions. Neither Appellant refuted this position. In addition, both are free to apply to the open positions. As such, the undersigned cannot agree with Appellant Kimbrough that failure to offer Appellants these positions constituted bad faith.

Appellant DiLorenzo argues the Appellee did not follow its own internal procedures and acted in bad faith by not only failing to post the layoff list ten days prior to the layoffs and but also by failing to calculate retention points 30 days in advance of the layoffs, as is the policy dictated by Appellee's internal procedures. These internal procedures are not mandated by and do not follow either the Ohio Revised Code or the Ohio Administrative Code. As such, this Board lacks jurisdiction to hold Appellee accountable failing to abide by its internal procedures. It is also noteworthy that, according to Human Resources Manager Gagliardo, the layoff decisions were made at the eleventh hour and it was not feasible, given the extreme circumstances, to calculate retention points in advance or provide employees with the notice provided for in the department's

internal procedures. This constituted an excusable failure to completely follow HCJFS's internal procedures and was not bad faith.

Appellant DiLorenzo also argues that, because she did not finish the probationary period in her prior position, she should be allowed to bump back two positions into a bargaining unit position. This Board can only place an employee into a bargaining unit position in very limited circumstances as set forth in O.R.C. 124.03(A)(1) and O.R.C.124.152 *(i.e.* this Board's reclassification of the relevant position and the concomitant placement of the incumbent into a bargaining unit position). Since the circumstances described in 124.03(A)(1) and 124.152 are not applicable to Ms. DiLorenzo's instant situation, it would be improper here for this Board to place her into any bargaining unit position.

In addition, the pertinent collective bargaining agreement (between Appellee and the collective bargaining agent representing this bargaining unit) supersedes the Ohio Revised Code in this situation. As such, it specifically deprives this Board of jurisdiction over all collective bargaining layoff subject matter for this unit, pursuant to O.R.C. 4117.10 (A).

Appellant DiLorenzo argues bad faith on the part of Appelle in that work she previously performed as a JFS Manager has been parceled out to JFS Supervisor 3's who remained with Appellee following Ms. DiLorenzo's layoff. The position descriptions for the JFS Manager and Supervisor 3 are similar, but not identical. The duties previously performed by Ms. DiLorenzo do, upon inspection, appear to fall within the purview of the Supervisor 3's.

The undersigned has determined that these Supervisor 3's do not appear to be working outside their classifications by supervising Eligibility Technicians, as was Ms. DiLorenzo's prior duty. In other words, the Supervisor 3's do not appear to be working outside their classifications and performing work previously assigned to Ms. DiLorenzo before her layoff.

CONCLUSIONS OF LAW

These cases present this Board with the question of whether Appellee met its burden of proof by demonstrating its substantial procedural compliance and its substantive compliance with all pertinent statutory requirements (including the good faith statutory requirement set forth in R.C. 124.321 (D))? These cases

also present this Board with the question of whether Appellee successfully rebutted any assertion by Appellant that Appellee acted in bad faith, as that term is defined by case law?

Based on the Findings above, we may answer both of these questions in the affirmative. I have found that Appellee met its burden of proof regarding both substantial procedural compliance and substantive compliance. I have also found and reiterate that Appellee successfully met its burden of production regarding any of Appellant's additional bad faith assertions. Accordingly, I find that Appellee has successfully defended the layoffs of both Appellants.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** the respective layoffs of Appellant Kimbrough and Appellant DiLorenzo, pursuant to R.C. 124.03 and R.C. 124.328.

JAMES R. SPRAGUE
Administrative Law Judge

JRS: