

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

NICOLE PEDONE,

Appellant,

v.

Case No. 10-LAY-12-0338

CUYAHOGA COUNTY AUDITOR,

Appellee,

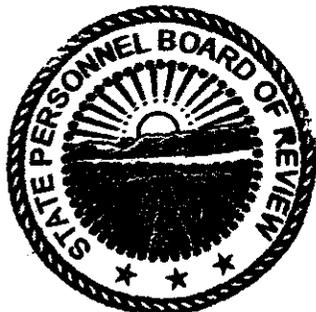
ORDER

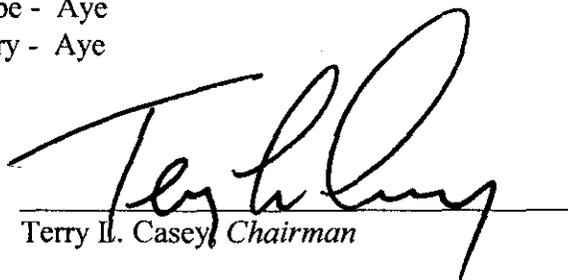
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including 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 job abolishment and resultant layoff of Appellant Pedone is **AFFIRMED** pursuant to R.C. 124.03 and R.C. 124.321 *et seq.*

Casey - Aye
Lumpe - Aye
Tillery - Aye




Terry L. Casey, 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 constitutes ~~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 09, 2011.




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**

Nicole Pedone

Case No. 10-LAY-12-0338

Appellant

v.

September 21, 2011

Cuyahoga County Auditor

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on May 26, 2011. Present at the hearing were the Appellant, Nicole Pedone, represented by Carl J. Rose, Attorney at Law and Appellee Cuyahoga County Auditor designee Albert Bouchahine, Personnel Manager for Human Resources, represented by Barbara R. Marburger, Assistant Prosecuting Attorney.

The subject matter jurisdiction of the Board was established pursuant to sections 124.03 and 124.328 of the Ohio Revised Code.

Prior to hearing evidence, Appellant Pedone stated she was stipulating to the Appellee's rationale for the layoff in that she was not questioning that the Appellee did have a budget deficit.

STATEMENT OF THE CASE

Appellee's first witness was Albert Bouchahine, presently employed by the County Executive's Office as a Personnel Manager. Mr. Bouchahine testified that in November and December of 2010, he was employed with the Board of County Commissioners (BOCC) as a Personnel Manager. At the request of Auditor David Reines, the BOCC directed him to assist the understaffed Cuyahoga County Auditor's Office by providing Human Resource services. He noted that he was specifically called upon to administer a planned layoff of nine (9) part-time employees, to account for an anticipated general fund deficit in the 2011 Fiscal Year of approximately \$387,000.

Mr. Bouchahine identified Appellee's Exhibit 1 (A-C) as the General Fund Budget for 2011 for the Auditor's office, the Budget Summary and the Performance Audit of the Auditor's Office, dated August 3, 2010. He testified those documents illustrated the projected deficit as reported by Appellee, which indicated that the full and part time salaries, adjusted for furlough, were to exceed the 2011 agency base budget, based largely in part on a 23.6% budget cut for agency base salaries. Mr. Bouchahine stated the Cuyahoga County Performance Audit recommended to reduce staffing costs in the Tax Administration and Property Service functions.

Mr. Bouchahine testified that Mr. Reines chose to eliminate the part-time Office Assistant position because he felt that the work could be distributed amongst other remaining employees. He noted that Appellee's Exhibit 3 and 4 listed the nine part-time employees affected by the layoff.

Mr. Bouchahine further explained that section 124.323 of the Ohio Revised Code establishes the order of layoff and that statute mandates that a person holding a part-time position is laid off prior to the lay off of a full-time employee. With regard to displacement rights, he testified that the layoff of all part-time Office Assistants ran no risk of a "domino effect" due to displacement. He explained that the retention point system utilized by the Department of Administrative Services allows employees within the same category to displace others with fewer retention points. However, he noted, a part-time employee can only displace another part-time employee in the same category. Mr. Bouchahine stated that a part-time employee can never displace a full-time employee, even if the part-time employee has more retention points. He testified that since all part-time Office Assistants were laid off at the same time, Appellant Pedone had no displacement rights since there were no part-time Office Assistants left to displace.

Appellee's Exhibit 5 was identified by Mr. Bouchahine as the layoff notice which his staff authored and sent to Appellant Pedone, dated November 16, 2010, via certified mail. He recalled that the layoff letter sent to Appellant Pedone was directly based on the guidelines set forth in a Department of Administrative Services form letter, and included standard language regarding displacement rights. Mr. Bouchahine testified there were no accommodations in the mailing of the notice to Appellant Pedone. Mr. Bouchahine testified he did not know Appellant Pedone, the quality of her work, or that she was disabled. He stated he was not informed by the Auditor of Appellant Pedone's disability.

Mr. Bouchahine testified that Mr. Reines and someone from the payroll department met with Appellant Pedone on December 7, 2010 regarding her layoff, but they failed to inform her at that time that she had no displacement rights.

On cross-examination Mr. Bouchahine clarified that despite the fact that several paragraphs in Appellant Pedone's layoff letter referred to displacement rights, the Auditor's Office planned to mail additional letters to anyone requesting to exercise such rights informing them that they did not have displacement rights. He testified that it was the Appellee's opinion that this was in accordance with DAS guidelines. Mr. Bouchahine further noted that he would not be surprised if the Auditor was also unaware of the fact that Appellant Pedone had no displacement rights, which he surmised is the reason that he did not mention it at the meeting with her on December 7, 2010.

Appellant Pedone testified she began her employ with the Auditor's Office in April 2004, and worked continuously until her layoff, although she explained she was off on a medical leave of absence from April, 2010 until she received her notice of layoff. Appellant Pedone explained that based on her educational background and Bachelor's degree in Communications, she was placed in a role focusing on community service. The department she worked in administered the Homestead program, working to ensure that the elderly and disabled received credit on their taxes. In this capacity, she often volunteered her time participating and initiating outreach programs for other groups in the community that were not taking full advantage of state incentive programs, such as military veterans, representatives from the American Diabetes Association, and the Sight Center organization.

Appellant Pedone testified that while employed, she received accommodations for her disability through the State, as well as occasional assistance from her co-workers. She testified that although she never received any disciplinary actions in her tenure as an Office Assistant, she received only one raise in the six years of her employment. Further, Appellant Pedone stated she was the only part-time employee in her department, and had asked to be converted to a full-time employee at least two to three times. Though she was given more hours, she was never made a full-time employee, despite the conversion to full-time of several other part-time employees with fewer educational qualifications and shorter tenure.

Appellant Pedone testified she was first made aware of the certified mail slip for the layoff letter on November 22, 2010, when a neighbor noticed it on her table and offered her a ride to the post office. Once in receipt of the letter, she had to wait several days for a family member, someone she sufficiently trusted to read her private mail, to open and read the layoff letter. Appellant Pedone recalled that upon learning of the stipulated five day deadline to exercise her displacement rights, she immediately filed an appeal and contacted the Auditor's office after the Thanksgiving holiday, for fear her notice was late due to the extenuating circumstances surrounding the delivery of her initial letter.

As a result of these contacts, Appellant Pedone explained that she first scheduled a meeting with the Auditor, Mr. Reines, and a representative from the payroll department for December 3, 2010. It was later rescheduled to December 7, 2010. Ms. Pedone testified that at this meeting, she requested to exercise her displacement rights or to fulfill a vacant position. She stated that despite the letter indicating her ability to exercise these rights and her past commendations, she was dismissed from the meeting without her requests being fulfilled. Appellant Pedone acknowledged that she was informed at the meeting that she was barred from exercising displacement rights over any full-time employees, but she was not informed that she had no displacement rights whatsoever or that all the part-time employees were laid off.

Upon cross-examination Appellant Pedone testified that despite media coverage of the layoffs, she was unaware that any other part-time Office Assistants were also laid off.

FINDINGS OF FACT

After a thorough review of the testimony of the witnesses and the documents admitted into evidence, I find the following facts:

1. Appellant Pedone had been employed with Appellee for approximately six and one-half years at the time of the abolishment of her part-time position of Office Assistant, effective December 4, 2010.

2. The rationale for the abolishment of positions, including Appellant Pedone's, was a lack of funds. Appellant Pedone stipulated that the Appellee had a lack of funds and thus, she did not contest the rationale of the Appellee.
3. Appellee abolished the jobs of all part-time Office Assistants; therefore Appellant Pedone did not have any displacement rights.
4. Appellee complied with all procedural requirements of effectuating the abolishment of Appellant Pedone's position.

CONCLUSIONS OF LAW

In order for Appellee's abolishment of Appellant Pedone's position to be affirmed, Appellee had the burden of proving by a preponderance of the evidence that it complied with all of the statutory requirements in effectuating the abolishment and resultant layoff. Appellee has met its burden.

Appellant Pedone stipulated to Appellee's rationale in that she agreed there was a lack of funds within the Appellee's budget. As for the procedural aspects of effectuating the abolishment, Appellee has complied with all of the procedural requirements of calculating retention points, posting a layoff list and mailing the notice of abolishment timely to Appellant Pedone. Appellant Pedone argued that due to her disability of blindness, even though she received notice that she had a certified letter waiting for her at the post office, she had to wait for someone to read the notice to her and then pick up the certified letter. Appellant Pedone argued that this Board should provide an equitable remedy to her, but unfortunately, this Board does not possess equitable powers. Unlike a court of general jurisdiction, this Board has only the jurisdiction and authority granted to it by statute. In the case of an abolishment of a position, this Board has only the authority to ensure that the abolishment was effectuated in accordance with the laws and administrative rules governing job abolishments.

Appellee complied with the statutes and administrative rules, in that the notice letter was mailed to Appellant Pedone by certified mail at least seventeen days in advance of the effective date and it contained all of the required information. While it is unfortunate that Appellant Pedone did not have anyone available to notify her immediately that she had a certified letter waiting on her, the Appellee is not required by statute to do anymore than mail the letter in a timely fashion. It perhaps would have been a nice gesture on the part of the Appellee to call Appellant Pedone and notify her that a certified letter had been mailed to her so she could have made arrangements for someone to be on the lookout for it, but once again, the law does not impose such duty on the Appellee.

Since Appellant Pedone was employed as a part-time employee and since all of the part-time Office Assistant positions were abolished, there was no one left for Appellant Pedone to displace. Appellee stated that the notice letter did not notify Appellant Pedone that she had no displacement rights, as a second letter with that information was going to be sent to employees upon an employee's notification to Appellee that the employee wanted to exercise his or her displacement rights. While Appellee followed the statutory requirements, there would have been nothing preventing them from stating in the letter that Appellant Pedone had no displacement rights nor would it have been wrong for either the Auditor or the representative from payroll to have told Appellant Pedone that at the meeting in December 2010.

It appeared that Appellant Pedone was a valued employee who performed her job well; however, an employee's performance does not enter into the rationale for abolishment nor is it something that this Board considers in reviewing an appointing authority's abolishment of positions. It is unfortunate that Appellant Pedone did not learn that she did not have any displacement rights earlier, but there has been no evidence brought forth to show that Appellee did not comply with all of the requisite statutes and rules governing job abolishments.

Nicole Pedone
Case No. 10-LAY-12-0338
Page 7

Therefore, it is my **RECOMMENDATION** that Appellee's job abolishment and resultant layoff of Appellant Pedone be **AFFIRMED** pursuant to sections 124.03 and 124.321 *et seq.* of the Ohio Revised Code.



Marcie M. Scholl
Administrative Law Judge

:mms