

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

Stephen M. Popovich,

Appellant.

v.

Case No. 08-ABL-06-0299

Department of Rehabilitation and Correction,
Madison Correctional Institution,

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 the abolishment of Appellant's position be **DISAFFIRMED**, pursuant to O.R.C. §§ 124.03(A), 124.328 and 124.321(2)(a).

Lumpe - Aye

Sfalcin - Aye

Tillery - Aye



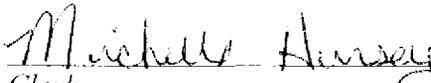


J. Richard Lumpe, *Chairman*

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 Hursey
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**

Stephen M. Popovich,

Case No. 08-ABL-06-0299

Appellant

v.

September 17, 2009

Department of Rehabilitation and Correction,
Madison Correctional Institution

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 Popovich's timely filing of a notice of appeal of the abolishment of his position. A record hearing in this matter was held on December 1 through December 3, 2008. Appellant Popovich 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 Pooja A. Bird 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 that 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 that 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 that 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 that 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 they discussed several alternatives.

The witness testified that 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 that the budget reduction plan 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 stated there was a reduction of GRF funds spent agency wide, as the object was to eliminate spending. He explained that positions can be paid for out of non-GRF funds but the revenues are GRF. Mr. Stockdale testified the commissary prices were increased by seven percent to cover the staff and that those are non-GRF funds.

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 that he prepares Appellee's biennial budget and prepares budget allocation plans for each year. Mr. Forbes explained that 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 that 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 that 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 that 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.

On cross examination Mr. Forbes explained that the salaries of the commissary personnel goes through OPI and at the present time, no GRF funds are used for commissary personnel.

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 that 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 that Wardens were repeatedly counseled to choose positions for abolishment, rather than people.

Mr. Burrus stated that 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 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 that 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 reiterated that the abolishments were done to reduce GRF spending.

Appellee's next witness, Chris Lambert, testified he is presently employed by Appellee as a Labor Relations Officer 3 and is responsible for working with labor unions regarding the grievance process, arbitration and mediation. He confirmed that he was assigned to write the general rationale for the June 2008 job abolishments and subsequent layoffs and indicated he reviewed examples of past abolishments and layoffs, and discussed specific issues with other staff members in preparing the rationale. The witness noted he reviewed materials from OBM and

met with Deputy Directors to learn how budget cuts would be made. Mr. Lambert stated that individual rationales for each position were created by the Warden of the institution at which the position was located.

Mr. Lambert recalled that Appellee did not have the option of closing institutions, due to an increase in inmate populations, and that the Director specified that no abolishments or layoffs should be made with regard to security and medical staff or parole officers. He observed that it was the Director's goal to preserve Appellee's core functions of security, medical services, parole services and education for rehabilitation.

The witness stated that the only basis for the job abolishments was the budget shortfall. He noted that the rationale addressed commissary staffing issues, the reduction of personal service contracts, and the increase in inmate population. Mr. Lambert testified that he was not involved in any determination as to which positions should be abolished.

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 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 that 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 that 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, Brian Cook, testified he is presently employed by Appellee as Warden of the Madison Correctional Institution (MCI) and has been with the Department of Rehabilitation and Correction for approximately twenty years. He stated that MCI employs approximately 500 staff, including five or six OPI employees who report to Central Office.

Warden Cook stated he was advised budget cuts needed to be made and he was instructed to select fifteen to eighteen positions to be abolished. He recalled he discussed the cuts to be made with his supervisor, Regional Director Ernie Moore, and that ultimately twenty positions at MCI were abolished. The witness confirmed he was given the discretion to select the positions to be abolished, but was advised that some areas, such as OPI staff, Corrections Officers and medical staff, were off-limits.

Warden Cook explained there are two commissaries at MCI, one for each compound, and that the commissaries operate eight hours a day, five days per week. He confirmed he abolished a Commissary Manager 1 position, which was occupied by Appellant Popovich, because he believed the duties could be absorbed by the remaining three Commissary Manager positions and because any security risk created by abolishing the position was minimal. Warden Cook observed that at the time he selected the position to be abolished, it was funded through GRF, but later the commissary positions were transferred so that their salaries were paid by OPI funding. He was not able to recall when that change took place.

Warden Cook acknowledged he would not have abolished the position of Commissary Manager 1 if he had known he would not save any money as a result of the position abolishment. He testified he was not aware at the time he drafted the rationales for the abolishment of positions at MCI that the commissary positions would be transferred to OPI; the witness confirmed he received a letter from Deputy Director Forbes in February 2008 stating that the commissaries were being transferred out of the institutions to OPI (Appellant's Exhibit A).

Appellant Popovich testified he is presently employed in a Commissary Manager 1 position at Franklin Pre-Release Center (FPRC). He noted his transfer has resulted in a much longer commute and that he now has additional job

responsibilities which require him to perform Quartermaster and Storeroom Supervisor duties for approximately ninety percent of his time and Commissary Manager duties for only ten percent of his time. Appellant Popovich stated he believes that the abolishment of his position at MCI did not result in a reduction in GRF expenditures.

FINDINGS OF FACT

Based on the testimony presented and evidence admitted at record hearing, and the entirety of the information contained in the record, I make the following findings of fact:

The parties 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 Appellant Popovich's position.

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 that it had to abolish positions in order to realize the necessary amounts of savings mandated by the Governor's order to reduce the budget.

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.

Appellant Popovich held a position classified as Correctional Commissary Manager 1 at Madison Correctional Institution. As of March 2008, Appellant Popovich's position was funded entirely by Ohio Penal Industries (OPI) operations.

On June 3, 2008, Appellant Popovich received notice that his position was to be abolished effective June 22, 2008.

Appellant Popovich exercised his displacement rights and, as a result, displaced into a Correctional Commissary Manager 1 position at Franklin Pre-Release Center 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 Popovich 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 Popovich's displacement rights were 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.

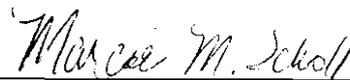
If an abolishment results in a reduction of the work force, the appointing authority shall follow the procedures for laying off employees, subject to the following modifications:

- (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.

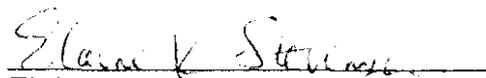
Appellee has not met its burden of proving by a preponderance of the evidence that Appellant Popovich's abolishment was due to reasons of economy. The evidence established that on January 31, 2008, the Governor issued an Executive Order requiring agencies, Appellee included, to reduce their GRF expenditures. 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. The evidence and the testimony of the witnesses established that the abolishments were done to reduce GRF expenditures. The evidence also established that as of March 2008, the institutions were invoiced for the commissaries salaries which resulted in Appellant Popovich's position not being GRF funded; therefore, there were no GRF savings realized by the abolishment of his Commissary Manager position. Warden Cook testified he would not have abolished Appellant Popovich's position if it would not have resulted in a monetary savings. It did not.

Therefore, since Appellee did not meet its burden of proof in that the abolishment of Appellant Popovich's position was not for reasons of economy, as it was not GRF funded, it is our **RECOMMENDATION** that the abolishment of Appellant Popovich's position be **DISAFFIRMED**.



Marcie M. Scholl
Administrative Law Judge



Elaine K. Stevenson
Hearing Officer