

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

William Middlestead,

Appellant,

Case Nos. 08-LAY-06-0303

08-INV-06-0304

08-RED-07-0451

v.

Department of Rehabilitation and Correction,
Ohio State Penitentiary,

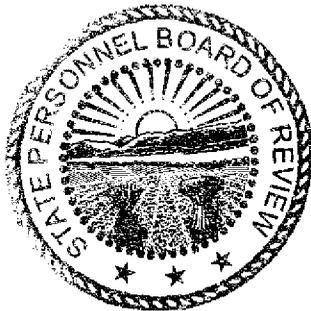
Appellee.

ORDER

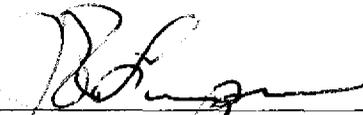
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

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 Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellant's reduction appeal (Case No. 08-RED-07-0451) be **DISMISSED** as moot and that Appellant's investigation appeal (Case No. 08-INV-06-0304) be **CONSOLIDATED** with his layoff appeal (Case No. 08-LAY-06-0303) and it be **DISAFFIRMED** due to the fact that Appellant's displacement rights were violated in contravention of sections 124.321 *et seq.* of the Ohio Revised Code and Chapter 123:1-41 of the Ohio Administrative Code and further that Appellant exercise his displacement rights as he was entitled to if it were not for the pre-positioning of Mr. Savric. Opinion Attached.



Lumpe - Aye
Sfalcin - Aye
Tillery - Aye



J. Richard Lumpe, *Chairman*

2-11-10

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, February 11, 2010.

Michelle Hursey
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**

William Middlestead

Appellant

v.

Department of Rehabilitation & Correction,
Ohio State Penitentiary

Appellee.

Case Nos. 08-LAY-06-0303
08-LAY-06-0304
08-RED-07-0451

OPINION

After thoroughly considering the Objections filed by the Appellee and Appellant's Response to the Objections, the Board hereby adopts the findings of the Administrative Law Judge but rejects the finding of bad faith, finding instead that the Appellee abused its discretion by denying displacement rights to Appellant Middlestead.

The evidence established that positions were identified for abolishment in either the first or second week of February 2008. Therefore, at the time of the promotion of Mr. Savric to a Building Maintenance Superintendent 2, with an effective date of February 17, 2008, Appellee had already identified Appellant Middlestead's Building Maintenance Superintendent 1 position for abolishment. Both positions were in the same layoff jurisdiction. Appellee argues in its Objections that Appellee did not violate the terms of the hiring controls by promoting Mr. Savric. That may very well be true; however, Appellee did abuse its discretion in filling the Building Maintenance Superintendent 2 position knowing that Appellant Middlestead's Building Maintenance Superintendent 1 position was going to be abolished, thus taking away his displacement rights. Even though the hiring process started prior to February 17, 2008, Appellee did not have to fill the position through the promotion of Mr. Savric. They chose to do so and by doing so, abused their discretion. Warden Bobby testified he knew of the designation of Appellant Middlestead's position to be abolished and he knew of the promotion of Mr. Savric. Therefore, contrary to Appellee's argument, Appellee knew that those two actions were taking place and would ultimately effect each other. Appellee cannot argue that it, as an entity, should not be imputed with that knowledge.

Appellee has not disputed that Appellant Middlestead had more retention points than Mr. Savric and would have been able to displace him if he would have remained a Building Maintenance Superintendent 1. Appellant Middlestead raised the issue at hearing and Appellee did not dispute his assertion then nor have they disputed it in their objections.

Therefore, upon finding an abuse of discretion on the part of Appellee, it is our determination that Appellant Middlestead's layoff be **DISAFFIRMED** and he is entitled to exercise his displacement rights as they would have been except for the pre-positioning of Mr. Savric into the Building Maintenance Superintendent 2 position within the same layoff jurisdiction as Appellant Middlestead. Appellant Middlestead's investigation appeal (case number 08-INV-06-0304) is hereby consolidated with his layoff appeal and his reduction appeal (case number 08-RED-07-0451) is hereby **DISMISSED** as moot.



J. Richard Lumpe, *Chairman*

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

William Middlestead

Case Nos.: 08-LAY-06-0303
08-INV-06-0304
08-RED-07-0451

Appellant

v.

September 29, 2009

Department of Rehabilitation and Correction,
Ohio State Penitentiary

Marcie M. Scholl
Elaine K. Stevenson
Administrative Law Judges

Appellee

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for consideration upon Appellant Middlestead's timely filing of the above-captioned appeals. A record hearing in this matter was held on December 8, 9, 11, and 12, 2008. Appellant Middlestead 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), R.C. 124.328, and R.C. 124.56.

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.

On cross examination Mr. Stockdale testified he did not know if anyone ever asked the employees in an institution for their ideas on how to save money.

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.

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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 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 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 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 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 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 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

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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 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 testified the hiring freeze went into effect when the Governor's Executive Order was issued, sometime in January 2008. When asked why Appellant Middlestead had a one day break in service, Mr. Burrus explained that Appellee had to wait for the layoff and displacement processes to finish before anyone could be hired back and that resulted in a one day break in service.

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 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 that sometime in February 2008, he met with Warden Houck, the then Warden of OSP, to discuss Warden Houck's list of positions to be abolished. Appellant Middlestead's position of Building Maintenance Superintendent 1 was on the list. Warden Bobby testified he has known Appellant Middlestead since 1993. He stated there was a promotion that took place from a Building Maintenance Superintendent 1 to a 2. Warden Bobby also testified there was a vacant Building Maintenance Superintendent 2 position at Trumbull, but he could not recall exactly when that vacancy existed.

On cross examination Warden Bobby testified that the process to begin to fill the vacancy at Trumbull started sometime in December 2007 or January 2008. He stated the position was posted sometime prior to February 2008.

Appellant Middlestead testified that after he received his layoff packet, he was told he could be a Corrections Officer at step 7 with no probation and no break in service. He had applied for a voluntary demotion to the position of Corrections Officer in April 2008. When he received his pay stub of July 2, 2008, he became aware that all of his leave balances had been cashed out. He testified that with the hiring controls in place, he was frozen out and could not transfer. He stated he was restrained from going to other state agencies to try to find another job, as he had applied for several positions in other state agencies. Appellant Middlestead testified he was of the understanding that he took a voluntary demotion to a Corrections Officer and is of the opinion that he should serve only a minimal probationary period.

Appellant Middlestead testified that on February 17, 2008, an employee was promoted to a Building Maintenance Supervisor 2 position at Trumbull. He stated that because of that promotion, he had no place to bump. Appellant Middlestead testified he reported to training for his Corrections Officer position on June 23, 2008. The effective date of his layoff was June 21, 2008. On his pay stub of July 2, 2008, he saw that he was at step 1 and when he questioned why, he was told he was separated and re-hired. As a Building Maintenance Superintendent 1, he was at step 5. He received a letter from the Ohio Corrections Assessment Center on June 26, 2008, stating he was rehired as a Corrections Officer. He is serving a one year probation period and has no state seniority carry over, as he began with a new hire date of June 23, 2008.

On cross examination Appellant Middlestead testified he is accruing his vacation and sick leave at the same rate that he did when he was a Building Maintenance Superintendent 1.

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 Appellant Middlestead's layoff.

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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.

Appellee provided information to its employees that the hiring controls implemented by the Office of Budget and Management affect the hiring, transfer, and promotion of all agency positions with the exception of those

positions that are essential for Security/Safety, Direct Care, and Revenue Generation.

On February 17, 2008, Appellee selected Mr. Louis Savric for a promotion to the vacant Building Maintenance Superintendent 2 position at Trumbull Correctional Institution.

In 2008, Appellant Middlestead held a position classified as Building Maintenance Superintendent 1 at Ohio State Penitentiary (OSP). In February 2008, the Building Maintenance Superintendent 1 position encumbered by Appellant Middlestead was selected for abolishment.

On or about April 29, 2008, Appellant Middlestead applied for a voluntary demotion from Building Maintenance Superintendent 1 to a Correction Officer. Appellant Middlestead received information that if he took a voluntary demotion to a Correction Officer position, he would start at step 7 in the pay range for Correction Officer, he would have no break in service, and he would not have to serve a probationary period.

On June 2, 2008, Appellee issued a letter to Appellant Middlestead notifying him that there were no positions which he could displace into, therefore, he was to be laid off from his position of Building Maintenance Superintendent 1 at OSP effective June 21, 2008, as indicated in the May 8, 2008 notice of layoff. On June 19, 2008, Appellee issued a letter to Appellant Middlestead notifying Appellant Middlestead that he was being "rehired" to the position of Correction Officer at OSP effective June 23, 2008.

CONCLUSIONS OF LAW

In the present appeals the Board must consider whether Appellee has proven by a preponderance of the evidence that Appellant Middlestead's layoff and displacement rights were 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.* Additionally, Appellant Middlestead has filed a request for an investigation regarding the filling of a vacant Building Maintenance

Superintendent 2 position by promotion and an appeal of an alleged reduction in pay and/or position stemming from his voluntary demotion.

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.

* * * * *

Prior to the record hearing, Appellant Middlestead stipulated that Appellee complied with the relevant procedural and notice requirements of the Ohio Revised Code and Ohio Administrative Code in implementing his layoff. Appellee has proved by a preponderance of the evidence that Appellant Middlestead's abolishment was done for 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. Appellee proved that both of those are true. Appellant Middlestead 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 Middlestead's position took place in June 2008. The appointing authority has the discretion to decide, based on operational needs, which positions to abolish. There is no statute nor regulation which mandates that higher paying positions must be abolished in place of lower paying positions. Therefore, Appellee has met its burden with respect to its rationale of economy as to the reason for the abolishment of Appellant Middlestead's position.

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At record hearing, Appellant Middlestead requested a review of his layoff and displacement to determine whether it 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.* Additionally, Appellant Middlestead filed a request for an investigation regarding the filling of a vacant Building Maintenance Superintendent 2 position by promotion. He also filed an appeal of an alleged reduction in pay and/or position stemming from his voluntary demotion to a Corrections Officer.

Appellant Middlestead testified that a Building Maintenance Superintendent 1 at Trumbull Correctional Institution was promoted to a Building Maintenance Superintendent 2 position in violation of the hiring freeze and argued that such promotion was bad faith in that it was pre-positioning on the part of the Appellee. Appellant Middlestead testified that had the promotion not occurred, he could have exercised his displacement rights and would have displaced the Building Maintenance Superintendent 1 at Trumbull who was promoted to the Building Maintenance Superintendent 2 position. Appellant Middlestead was employed at OSP, which is in the same layoff jurisdiction as Trumbull Correctional Institution. Appellee offered no evidence to rebut Appellant Middlestead's testimony.

Appellant's Exhibit 6 in Appellant Middlestead's investigation appeal is a letter dated June 11, 2008 from Linda Woods. It is written on Appellee letterhead, Trumbull Correctional Institution, and is addressed to Appellant Middlestead. It states as follows:

As you have requested, Trumbull Correctional Institution selected Mr. Louis Savric to the Building Maintenance Superintendent 2 with an effective date of February 17, 2008.

Warden Bobby confirmed Mr. Savric was promoted, although he could not recall the dates. He testified he met with his supervisor sometime in the first or second week regarding the abolishments. Mr. Burrus testified the hiring freeze went into effect at the end of January 2008, when the Governor's Executive Order was released. Appellant's Exhibit 3 of Appellant Middlestead's investigation appeal is the Executive Order 2008-01S, issued January 31, 2008, and it states in paragraph 8:

. . . I order all Executive Agencies to immediately implement the following spending control strategies, . . .

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b. A hiring control policy limiting state payroll expenditures and identifying all potential human resource cost savings measures.

Appellant's Exhibit 4 is the DRC Budget Impact Website Q's and A's, dated 2/6/08. Question and answer number four state as follows:

Which positions have been marked with a hiring freeze? Does the affect lateral moves?

The hiring controls implemented by the Office of Budget and Management affect the hiring, transfer, and **promotion of all positions** with the exception (sic) those positions that are essential for Security/Safety, Direct Care, and Revenue Generation. (Emphasis added).

Appellant's Exhibit 5 is a list of Job Codes that are Exempt from the Hiring Controls and the Building Maintenance Superintendent 2 is not on the list as being exempt. Therefore, Appellant Middlestead has proved bad faith on the part of the Appellee in promoting Mr. Savric to a Building Maintenance Superintendent 2 position in violation of the hiring freeze that was in effect. By doing so, Appellee pre-positioned Mr. Savric so that he could not be displaced as a Building Maintenance Superintendent 1 by Appellant Middlestead. The evidence established that the promotion was effective February 17, 2008 and Warden Bobby testified he was looking at positions to abolish in the first two weeks of February, 2008. Appellee offered no testimony or documentary evidence to rebut Appellant Middlestead's evidence.

Appellant Middlestead also argued he was not placed in the proper step when he became a Corrections Officer and filed a reduction appeal. That issue and appeal now become moot since Appellant Middlestead has proved bad faith. In light of the bad faith and the finding that Appellant Middlestead's displacement rights were violated, he should have been able to displace Mr. Savric to occupy the Building Maintenance Superintendent 1 position at Trumbull Correctional Institution, thereby negating his new hire into the Corrections Officer position.

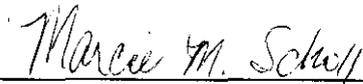
William Middlestead

Case Nos. 08-LAY-06-0303, 08-INV-06-0304, and 08-RED-07-0451

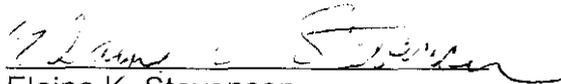
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Since Appellee offered no evidence to rebut Appellant Middlestead's testimony and evidence proving bad faith on the part of Appellee in pre-positioning Mr. Savric so that Appellant Middlestead would not be able to displace him, it is our **RECOMMENDATION** that Appellant Middlestead's layoff be **DISAFFIRMED** due to the fact that his displacement rights were violated in contravention of sections 124.321 et seq. of the Ohio Revised Code and Chapter 123:1-41 of the Ohio Administrative and further **RECOMMENDED** that Appellant Middlestead exercise his displacement rights as he was entitled to if it were not for the pre-positioning of Mr. Savric.

It is further **RECOMMENDED** that Appellant Middlestead's reduction appeal, case number 08-RED-07-0451 be **DISMISSED** as moot and that his investigation appeal, case number 08-INV-06-0304 be **CONSOLIDATED** with his layoff appeal, case number 08-LAY-06-0303.



Marcie M. Scholl
Administrative Law Judge



Elaine K. Stevenson
Hearing Officer

:mms