

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

Thomas W. Mundy,

*Appellant,*

v.

Case No. 09-LAY-06-0311

Ohio University,

*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 Appellant's layoff be **AFFIRMED**, pursuant to sections 124.321 *et seq.* of the Ohio Revised Code.

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 12, 2010.

  
\_\_\_\_\_  
Michelle Hensley  
Clerk

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

11-12-10MH

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

Thomas W. Mundy

Case No. 09-LAY-06-0311

*Appellant*

v.

August 31, 2010

Ohio University

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 January 14 and May 11, 2010. Present at the hearing was the Appellant, Thomas Mundy, represented by Ray Critchett, Attorney at Law and Appellee Ohio University designee Carolyn Bailey Lewis, Director of WOUB, represented by Tim Lecklider, Assistant Attorney General.

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

Appellant Mundy's position of Broadcast Engineer was abolished, effective June 30, 2009, for a lack of funds and reorganization for efficiency or economy. Appellee determined Appellant Mundy had no displacement rights, so he was therefore laid off. Appellant Mundy filed a timely appeal of his job abolishment.

**STATEMENT OF THE CASE**

Appellee's first witness was Appellant Mundy, as if on cross examination. Appellant Mundy was a Broadcast Engineer since August, 2004, with WOUB, the radio station at Ohio University. As such, he oversaw the maintenance and repair of equipment and the installation of new equipment.

Appellant Mundy identified Appellee's Exhibit 7 as an organizational chart for WOUB employment positions. He stated the chart appeared accurate as of February 2009 when it was created. Appellant Mundy indicated that Appellee's Exhibit 9 was an email from the director and although he did not recall reading the

attached memorandum pertaining to the financial situation of the department, in all likelihood, he had received it. Despite the fact that he did not remember reading the memorandum, Appellant Mundy testified he was generally aware there were funding issues.

As the only witness for his case, Appellant Mundy indicated he applied for different positions within Ohio University before or around August 2008. One of the positions he applied for was filled by another person in September, 2008. Consequently Appellant Mundy filed a grievance in December, 2008 as to the alleged unfairness of the hiring process. He never received a final decision from Dr. Shepherd on the grievance. Appellant Mundy further stated his grievance was forwarded to budgeting in late December, 2008, and that he has no idea why his grievance would have gone to the budgeting department. In March, 2009 he was notified of his lay-off in a meeting.

Appellant Mundy testified he had a performance evaluation done in April, 2009. It contained some negative comments, which had never happened before. After filing a grievance related to his performance evaluation, Appellant Mundy was permitted to make comments with regard to his negative performance evaluation.

Appellant Mundy testified he received his layoff notice but was not given a copy of the layoff list nor was he told that he could access the list on-line. He stated there were approximately eighty employees affected by the layoffs, but he later heard that all but fourteen employees were able to be placed into other positions. Appellant Mundy stated he was put on paid administrative leave shortly after filing his grievance, for alleged inappropriate behavior, but he never received the outcome of the investigation as he was then laid off. He opined that his position was targeted for abolishment due to the fact that he filed the two grievances and that Mr. Warthman told him he felt there was malice involved in his layoff.

Appellee's next witness was Susan Cyran, the Director of Financial Operations for WOUB for approximately the last three and a half years. Ms. Cyran is a Certified Public Accountant and her job duties include the monitoring of the day to day financial operations, including paying invoices, preparing the budget, monitoring expenses and revenues and overseeing the supervisors' budgets.

Ms. Cyran testified that in June or July of 2008 she did a projection into the next fiscal year (FY) that put the department at a \$300,000- \$400,000 deficit for the following June. This was due to the fact that expenses were rising and revenues were decreasing. She indicated that WOUB was effectively cut from one of its main sources of funding, ETech Ohio and also that WOUB was subject to a 10-12% cut from the University. Furthermore, the fees that WOUB was required to pay to NPR and PBS to air their programs increased significantly over the previous four years. Similarly, the maintenance contract for equipment increased as well as expenses due to salary and benefits.

Next, Ms. Cyran identified the email and financial memorandum in Exhibit 9. She spoke about the specifics of the financial situation elaborated on by the document, dated December 2008, which included a total loss of revenue of \$182,750; an increase in expenses of \$279,500; and a projected deficit of \$426,000 for the 2009 fiscal year. Exhibit 11 was identified as the budget for 2008-2009 and the forecast for 2009-2010, which she prepared in March 2009. Ms. Cyran testified that in 2008-2009 there was a carryover of \$378,367, but no such surplus existed in her projections for 2009-2010. As of March 19, 2009, Ms. Cyran projected a \$381,509 deficit for that fiscal year. For the entire biennium of FY 09-10, she testified the projected deficit was \$1,025,873. Ms. Cyran noted that if a lease for WOUB's towers went through the deficit would still be \$423,553.

Ms. Cyran testified that she prepared Appellee's Exhibit 1 "Justification for a Reduction in Classified Staff Positions." This document provided a list of all abolished positions and projected a savings of \$157,267 after the abolishments. Ms. Cyran stated that during the months of January through March, 2009, the top administrators met frequently to discuss how to manage the deficit, but in the end the only place where they could cut were positions. She stated that these decisions were made with only the positions in mind, not the individuals who filled them. Ms. Cyran stated there were a total of six positions cut, three classified positions and three administrative positions. She testified two employees took an early retirement incentive. Ms. Cyran testified she and the administrators thought three employees would take the early retirement incentive and also believed that Appellee would allow the use of furloughs, but they did not. She stated they also did away with employee cell phones and no longer printed the TV Guide.

On cross examination, Ms. Cyran testified she only knew about Appellant Mundy's filing of a grievance from Ms. Lewis, but she does not know the particulars, as she has never researched the grievance procedure. She testified she does not remember receiving the memo of December 2008 from Mr. Skidmore regarding Appellant Mundy's grievance, even though she was copied on it. Ms. Cyran testified she never discussed Appellant Mundy's grievance with Mr. Skidmore.

Ms. Cyran testified the decision to abolish positions was made a week before the March 19, 2009 date and Appellee's Exhibit 1 was prepared sometime shortly after that date. She stated the actual deficit ended up being \$439,000 after the abolishments. Ms. Cyran testified in deciding what positions would be abolished, they looked at what duties could be absorbed by others. She stated she does not know anything about retention points and reiterated that the abolishments were due to a lack of funds, since they had a deficit.

Carolyn Bailey Lewis, Director and General Manager of WOUB for approximately twelve years, also testified on behalf of the Appellee. She is responsible for personnel, goal setting, and the 48 staff members. Ms. Lewis testified that when making the decision to abolish positions the administrative staff did not have knowledge of any employee's retention points. She testified they looked to see if there was anything else they could do other than abolish positions as a few years ago, they had to trim production and programming and they were still reeling from that. The object was to save money without destroying the service provided to the region. Ms. Lewis testified they looked at classified and administrative contract positions across the board as they did not want to wipe out an entire department. The decision was made that they could do with one less Broadcast Engineer position. She explained that the Broadcast IT position was unclassified, so there was no need to abolish that position.

On cross examination Ms. Lewis testified they had a deadline of March or April, 2009, to notify the affected employees as the Appellee wanted the employees to know of the abolishments prior to the beginning of the fiscal year. She stated Mr. Skidmore and she discussed how to respond to Appellant Mundy's grievance and Mr. Skidmore wrote the response. In looking at the table of organization, she explained that the open positions have no funding. Ms. Lewis testified that the remaining technicians and engineers have taken over Appellant Mundy's and Mr. Warthman's duties and the traffic and other departments have helped out. She stated no outside contractors have been hired to do the duties of Appellant Mundy.

Appellee's next witness was Mark Brewer, Chief Content Officer for WOUB for approximately ten years. He stated he was part of the executive staff that made the decisions on the abolishments. He testified it was a difficult process, as when he began his employment, there were approximately seventy-one employees and now they are at approximately forty. Mr. Brewer testified they looked at the functions that were essential to keep and determined which positions they could do without and still accomplish the mission. On cross examination he testified he learned of Appellant Mundy's grievance sometime in December 2008 but doesn't know anything further other than he was upset about some interviews.

David Wiseman was Appellee's next witness. He has been with WOUB since approximately 1981 and currently only works part-time, two days a week as the Chief Technology Officer. He testified they cut everything possible before cutting positions. Mr. Wiseman testified he was not present for the final decision on the abolishments and he reiterated that they were already short-handed so he did not want to abolish any positions. On cross examination, Mr. Wiseman testified he did not have any complaints about Appellant Mundy's work. He was concerned about his area taking a hit as with a retirement, he has lost four employees.

Gwen Brooks was Appellee's last witness. She is the Director of Employment and Recruitment for the last three years and has worked for Appellee for approximately thirteen and one-half years. She identified Appellee's Exhibit 2 as Appellant Mundy's employment history and Appellee's Exhibit 3 as the retention point calculations for the affected classifications. She explained retention points are based on one's years of service and the person with the lowest retention points is displaced by an employee with higher retention points. Ms. Brooks testified Appellant Mundy could not displace anyone as he didn't have enough retention points to do so. Ms. Brooks testified she hand delivered Appellant Mundy's notice letter to him and stated that the layoff list was posted on-line and also in the WOUB's offices.

## FINDINGS OF FACT

After thoroughly reviewing the testimony of the witnesses and the documents entered into evidence, I find the following facts:

1. Appellee properly notified Appellant Mundy of his job abolishment and resultant layoff. His notice letter contained the statutory and administrative requirements and his retention points were properly calculated.
2. As of the date of his job abolishment, June 3, 2009, Appellant Mundy had been employed by Appellee for approximately five years, beginning his employ in August 2004. He was one of two Broadcast Engineers and of the two, he had the least retention points.
3. Appellee's projected deficit for the WOUB department as of March 19, 2009 was \$381,509 for that fiscal year and an additional deficit of \$1,025,873 for FY 2009-2010. Even under the most favorable conditions the deficit was \$423,553.
4. Appellee looked at all avenues for cutting expenses, including eliminating employees' cell phones and the printing of the TV Guide. The decision was made to cut positions due to a projected deficit in WOUB's budget for the 2009-2010 fiscal years.
5. After the abolishments, Appellee still ended up with a deficit of \$439,000.
6. Appellant Mundy's job duties were absorbed by remaining staff and there has been no one hired on a contract basis to perform the duties of Appellant Mundy.
7. Appellant Mundy filed a grievance in December 2008 regarding a position that he had applied for but was not hired into. He did not receive a final decision on this grievance.

8. In April 2009, Appellant Mundy received what he perceived to a negative performance evaluation. He filed a grievance on the performance evaluation and as a result, he was permitted to comment on his evaluation.

### CONCLUSIONS OF LAW

In order for Appellee's layoff of Appellant Mundy to be affirmed, Appellee must prove by a preponderance of the evidence that the abolishment and layoff were effectuated in compliance with sections 124.321 *et seq.* of the Ohio Revised Code, Ohio Administrative Code Chapter 123:1-41, and the Administrative Regulations of the Ohio University. Appellee has met its burden.

Appellant Mundy did not raise any issues with regard to the procedural aspects of the abolishment of his position other than stating he did not receive the layoff list and alleged that it was not posted. The evidence established that Appellant Mundy received timely notice of his position abolishment and the notice letter contained the statutory and administrative requirements. His retention points were calculated properly and he did not raise an issue with regard to his retention points. Case law has held that an appointing authority must substantially comply with all procedural requirements (see *State, ex rel. Potten v. Kuth* (1980), 61 Ohio St.2d 328). Ms. Brooks testified that she personally handed Appellant Mundy's notice letter to him and that the layoff list was posted at WOUB and on the internet. There was no evidence that Appellant Mundy asked for a copy of the layoff list and was denied and there no evidence presented by Appellant Mundy to rebut Appellee's witness testimony that the layoff list was posted on-line and at WOUB. Assuming *arguendo* that the layoff list was not posted, there has been no harm shown to Appellant Mundy. Therefore, Appellee has substantially complied with all of the procedural requirements of effectuating Appellant Mundy's job abolishment.

Section 124.321 of the Ohio Revised Code provides the reasons an appointing authority can implement a job abolishment. That statute provides in paragraphs (D)(1) and (2) the following:

(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 position, except that **the reasons of economy associated with the position's abolishment instead may be based on the appointing authority's estimated amount of savings with respect to salary and benefits only, if:**

(i) Either the appointing authority's operating appropriation has been reduced by an executive or legislative action, or **the appointing 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 a 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. (Emphasis added).

In an abolishment case, the appointing authority has to show by a preponderance of the evidence that: 1) the abolishment was due to an allowable statutory reason; and 2) the proper procedures regarding the layoff or displacement were followed. The latter has already been proven.

The Appellee has proven beyond a preponderance of the evidence that a valid reason of economy existed to justify the abolishment of Appellant Mundy's position. For the 2008-2009 fiscal year, the University operated at a \$381,509 deficit. The projected deficit for the 2010 FY was \$423,553, which had the potential of being \$1,025,873 if certain leases did not materialize. The Appellee's witnesses and Appellant Mundy himself all corroborated the dire financial situation of WOUB. Therefore, the Appellee proved beyond a preponderance of the evidence that a lack of funds existed such to justify the abolishment of the Appellant's position. In fact, Appellant Mundy did not present any evidence to rebut the Appellee's figures nor did he argue that there was not a lack of funding. Appellant Mundy's argument was one of alleged bad faith on the part of the Appellee.

Appellant Mundy did not establish beyond a preponderance of the evidence that the abolishment of his position was done in bad faith. Although it is unfortunate that the grievance procedure may not have been followed adequately on the part of the University, the fact that Appellant Mundy filed a grievance prior to his position being abolished does not in and of itself establish bad faith. The University's witnesses testified that the abolishment of positions was done without taking into account the individuals that filled them. Ms. Cyran testified she was aware of the grievance being filed but did not know anything about it other than that. Mr. Brewer testified he knew about the December, 2008 grievance but only that it involved some allegations regarding an interview. Ms. Lewis testified she talked about the grievance with Mr. Skidmore and let him answer the grievance. There was no

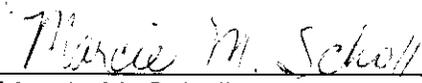
evidence presented by Appellant Mundy that any of the people involved in the decision making regarding the abolishment of his position did so because of the fact that he filed a grievance in December 2008.

The mere fact that Appellant Mundy filed a grievance in December 2008 and it was announced in March 2009, that his job was going to be abolished, does not prove bad faith. The evidence established that in early December, 2008, there were discussions taking place about the budget and the projected deficit. The evidence clearly established there was a deficit. The only evidence presented by Appellant Mundy that Appellee allegedly wanted to remove him was hearsay evidence, as there was no direct witness testimony on the alleged statement that Appellant Mundy was on his way out. While Appellee should have answered Appellant Mundy's grievance, that part of Appellant Mundy's claim is beyond the jurisdiction of this Board. The fact is that Appellant Mundy presented no evidence beyond the fact that he filed a grievance and was then laid off. He would like this Board to infer that the one action caused the other, but there is no proof of that.

With regard to the grievance he filed in April, 2009, that was after he had been notified of his job abolishment and layoff, so that could not be argued as a basis of bad faith.

Appellee has proved by a preponderance of the evidence that there was a deficit in funding, that Appellant Mundy had the least retention points in his classification series and that his job duties were re-distributed amongst existing staff. There was no proof of an abuse of discretion on the part of the appointing authority which would amount to bad faith.

Therefore, it is my **RECOMMENDATION** that Appellant Mundy's layoff be **AFFIRMED** pursuant to sections 124.321 *et seq.* of the Ohio Revised Code.

  
\_\_\_\_\_  
Marcie M. Scholl  
Administrative Law Judge