

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

DIANE ROLLER,

Appellant,

v.

Case Nos.: 11-ABL-05-0185
11-LAY-05-0186

DEPARTMENT OF HEALTH,

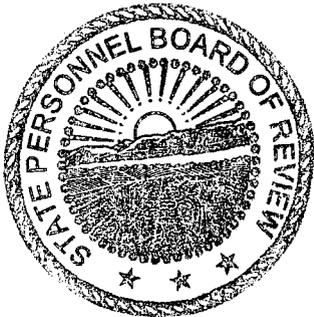
Appellee

ORDER

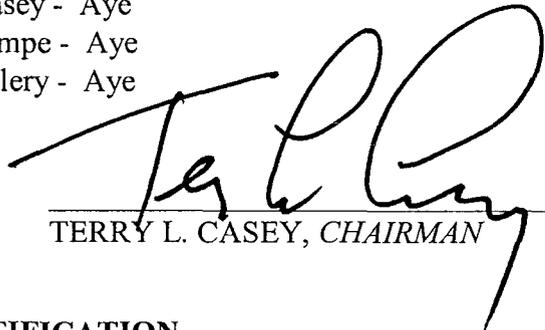
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

After a thorough examination of the record and a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that the abolishment of Appellant's position and her subsequent layoff from employment with Appellee be **AFFIRMED**, pursuant to O.R.C. § 124.321(D)(1).



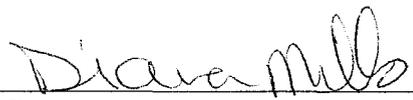
Casey - Aye
Lumpe - Aye
Tillery - Aye


TERRY L. CASEY, CHAIRMAN

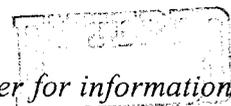
CERTIFICATION

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, December 5, 2012.


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**

Diane Roller,

Appellant

v.

Department of Health,

Appellee

Case Nos. 11-ABL-05-0185
11-LAY-05-0186

September 6, 2012

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

The above-referenced matters came on to be heard on March 9, 2011, due to Appellant's timely appeal from an abolishment of her position as Environmental Engineer 5 and subsequent layoff from employment. Appellant was present at record hearing and appeared *pro se*. Appellee was present at record hearing through its designee, Division Chief William McHugh, and was represented by Assistant Attorneys General Joseph N. Rosenthal and Robert E. Fekete.

Appellant stipulated to Appellee's procedural compliance with the provisions of Ohio Administrative Code Section 123:1-41-10. Upon Appellee's motion, Appellant's witnesses and documents were excluded from the record, based upon her failure to comply with Appellee's Request for Witness and Document Lists filed with this Board on June 10, 2011, however, Appellant was permitted to proffer the excluded documents.

STATEMENT OF THE CASE

Chris Keppler testified that he is presently employed by Appellee (ODH) as a Labor Relations Officer 3 and has held that position for approximately ten years. The witness recalled that in January 2011 he was involved in discussions with department heads and representatives of Appellee's Office of Financial Affairs regarding potential general revenue fund (GRF) reductions in the upcoming biennial budget. He noted that as a result of the impending budget cuts, ODH determined that it was necessary to implement job abolishments and layoffs.

Mr. Keppler confirmed that Appellant's Environmental Engineer 5 position was one of those abolished. He stated that a total of eleven encumbered positions in the Division of Prevention, both exempt and non-exempt, were part of the layoff. The witness noted that Appellant was not able to exercise displacement rights into another position.

Mr. Keppler indicated that he was responsible for processing the paperwork associated with the abolishments and layoffs and prepared the rationale and other documentation provided to the Department of Administrative Services (DAS) to support ODH's request to abolish positions and layoff employees. He noted that he was not involved in the decisions to eliminate specific positions.

The witness recalled that Appellee introduced proposed language in the upcoming budget to eliminate ODH's statutory oversight of the marina, manufactured home park, and agricultural labor camp programs; elimination of these programs impacted three staff positions -- the Environmental Engineer 5 position encumbered by Appellant, a Sanitarian Program Specialist 2 position, and a Design Engineer 2 position. Mr. Keppler stated that ODH estimated that twenty percent of the job duties performed by Appellant would remain following the elimination of the three programs identified, and that those remaining job duties were to be performed by an employee encumbering a Design Engineer 2 position.

Mr. Keppler indicated that ODH received approval from DAS to proceed with the layoff in May 2011 and proceeded to notify the affected employees, including Appellant. He noted that Appellant's last day of work was June 3, 2011, and her layoff was effective June 4, 2011.

The witness observed that although ODH had believed at the time it structured and implemented the job abolishments and layoff that the proposed programs would be eliminated, it was later notified that only the marina program would be removed from its oversight. He indicated that no laid-off employees were recalled as a result of the continuation of the other two programs and Appellant's remaining job duties were assigned to the Design Engineer 2 position, as planned.

William McHugh testified that he has been employed by ODH for approximately seventeen years and presently serves as Chief of the Division of Prevention and Health Promotion. He confirmed that he has been Division Chief since January 2011. The witness stated that Appellant's position was part of the

Division of Prevention, Bureau of Environmental Health, Recreational Programs Section and that she and her staff provided engineering plan review and consultation services.

Mr. McHugh confirmed that Appellant provided services in support of the marina, manufactured home park, and agricultural labor camp programs, as well as the swimming pools and spas program. He noted that Appellant and her staff travelled to construction sites to do inspections and consulted with property owners to be sure that they were in compliance with applicable regulations.

The witness recalled that he was called to a meeting with senior staff, including ODH's director, chief operating officer, chief legal counsel and other Division chiefs in early 2011 to discuss information received from the Office of Budget and Management (OBM) that ODH would be receiving a substantial reduction in general revenue funds in the upcoming biennial budget. Mr. McHugh testified that he was told during that meeting that the Division of Prevention would receive a \$1.7 million cut.

The witness stated that the only practical way to absorb the funding reduction was to make program and personnel cuts and indicated that he immediately met with his bureau heads and instructed them to begin evaluating their programs. Mr. McHugh recalled that ODH's fiscal liaison, Sean Keller, also attended that meeting. He noted that the bureau chiefs looked at areas of concern that had already been identified and evaluated their existing programs to see not only how well they met the agency's overall goals and mission, but also how fiscally "healthy" the programs were. Mr. McHugh indicated that he also instructed his bureau chiefs to consider program impact, trends forward and opportunities to save. He testified that the Bureau of Infectious Disease and the Bureau of Environmental Health were both able to identify opportunities to trim costs.

Mr. McHugh observed that the Bureau of Environmental Health had been tracking its fee-based marina, manufactured home park, swimming pool, and agricultural labor camp programs for some time. He explained that these programs typically collect funds through license fees and plan review fees, and that the money generated by these fees are meant to cover staffing costs for the programs. The witness noted that Appellant's position was funded by fees from three of the programs she worked with, including pools and manufactured homes, but ODH's Budget Office had notified him in January 2011 that the fees were not generating

sufficient income and it had become necessary to make up the shortfall in payroll funding for her position with GRF funds.

Mr. McHugh testified that following extensive discussions with the head of the bureau, Gene Phillips, and ODH's fiscal liaison, he made the decision to recommend elimination of the marina, manufactured home park, and agricultural labor camp programs, as well as the abolishment of the Environmental Engineer 5 position encumbered by Appellant, a Sanitarian Program Specialist 2 position, and a Design Engineer 2 position in the Bureau of Environmental Health. He indicated that the remaining fee-based programs of swimming pools and spas, and recreational camps were not recommended for elimination. The witness noted that although the revenue generated by fees related to the swimming pool and spa program increased in April 2011, the trend analysis indicated that there would not be enough additional funds to support existing engineering staff. Mr. McHugh stated that following the abolishment of the three above-referenced positions, the duties previously performed by Appellant with regard to the pool and campground programs were reassigned and are now being performed by the remaining Design Engineer 2.

The witness noted that ultimately the manufactured home and agricultural labor camp programs were not eliminated and those duties were also reassigned to the remaining Design Engineer 2 position. He observed that the programs are very poorly fiscally supported and must be subsidized by GRF funds. Mr. McHugh stated that to date he has received no indication that the Design Engineer 2 has been unable to keep up with the workload generated by the programs or other consulting responsibilities.

Sean Keller testified that he is presently employed by ODH as acting Assistant Chief of the Division of Prevention and has held that position for approximately six months. He noted that at the time of Appellant's job abolishment and layoff he held the position of Division Administrator and performed financial management services for the division.

The witness recalled that in early 2011 he was involved in preparing ODH's biennial budget for 2012-2013. Mr. Keller stated that fiscal problems related to the Bureau of Environmental Health's fee-based programs had been brought to his attention, and in January 2011 Appellant's position began to be paid partially out of GRF funds due to deficits in the program accounts; he estimated that eighty percent

of Appellant's position was funded with program fees and twenty percent was funded with GRF.

Mr. Keller testified that he did not make the decision as to which programs or positions should be eliminated. He indicated that his role in the process was limited to providing requested financial information to his supervisors. The witness recalled that ODH projected that it would save approximately \$145,000 in payroll costs as a result of the abolishment of positions. He indicated that ODH received an 11.4% reduction in GRF funds for Fiscal Year 2012.

Appellant testified in her case in chief that she believed that her duties had been reassigned to an individual who is not an engineer, in violation of Ohio Revised Code Section 4733.22. She noted that a large percentage of her duties remained to be performed as a result of the failure to eliminate the manufactured home and agricultural labor camp programs and observed that Mr. McHugh is unfamiliar with her day-to-day job duties.

Appellant stated that she also believed funds had been diverted from the swimming pool program fees in violation of Ohio Revised Code Section 3749.03, which should have been used to fund her position. She testified that she believed ODH acted in bad faith in abolishing her position of Environmental Engineer 5.

FINDINGS OF FACT

Based upon the testimony presented and evidence admitted at record hearing, I make the following findings of fact:

Appellant was employed by Appellee ODH in a position classified as Environmental Engineer 5 in the Division of Prevention. Her position was funded by program-generated fees and GRF funds. Effective June 4, 2011, her position was abolished. Appellant was not able to displace another employee and was subsequently laid off.

ODH received an 11.4% reduction in GRF funds for Fiscal Year 2012. Appellant's position was abolished due to budget reductions and for economy. A total of eleven encumbered positions with the Division of Prevention were abolished, representing a savings of approximately \$145,000 in payroll costs. Appellee

provided a notification to Appellant of her job abolishment and layoff, which substantially complied with the requirements of O.A.C. 123:1-41-10.

At the time the job abolishment and layoff were implemented, ODH anticipated elimination of the marina, manufactured home park, and agricultural labor camp programs. Ultimately, only the marina program was eliminated. Appellant's remaining job duties were assigned to and are being performed by an employee classified as a Design Engineer 2.

CONCLUSIONS OF LAW

Abolishment means the permanent deletion of a position from the organization or structure of an appointing authority predicated upon a lack of continued need for the position due to reorganization for efficient operation, economy, or lack of work. R.C. 124.321 (D). This definition presents three tests that must be met in order to abolish a position. First, there must be a permanent (expected to last over one year, O.A.C. 124-7-01 (A)(1)) deletion of a position from the organization. Second, that deletion must be made due to a lack of continued need for the position. Third, the lack of continued need must be justified by either reorganization for efficient operation, reasons of economy, or lack of work. O.A.C. 124-7-01 (A)(1). In order to successfully defend a contested abolishment, not only must an appointing authority demonstrate adequate justification for the abolishment of a position, it must also show compliance with the procedural requirements set forth in the Administrative Code.

In addition, an appointing authority must successfully rebut a valid *prima facie* showing of "bad faith," should one be demonstrated. Bad faith does not depend upon a finding that an employer acted with a political or personal animus, or failed to comply with procedural requirements, but may also be evidenced by an attempt to subvert the civil service system to allow the selection of handpicked employees to fill jobs that would have been available to workers based on seniority and retention points. See *Blinn v. Bureau of Employment Services* (1985), 29 Ohio App.3d 77.

R.C. 124.321(D)(1) provides that an appointing authority may abolish positions "for any one or any combination" of the three listed reasons: 1) reorganization for efficient operation; 2) economy; or 3) lack of work. R.C. 124.321(D)(2)(a) notes that "economy" is to be determined at the time the

abolishment is proposed, based on the appointing authority's estimated amount of savings with respect to salary, benefits and other matters associated with the position abolishment. Testimony at record hearing established that the August 11, 2009, abolishment was predicated primarily on Appellee's projected inability to financially sustain its existing staffing levels over the coming year due to an 11.4% reduction in its GRF funds for Fiscal Year 2012. I find that the evidence and testimony presented by Appellee is sufficient to demonstrate that the abolishment of Appellant's position was made for reasons of economy.

As previously noted, the parties stipulated to Appellee's procedural compliance with the Ohio Administrative Code in effectuating the abolishment of Appellant's position and her resulting layoff. Accordingly, I find that Appellee has met its burden of proof in the instant matter.

Therefore, I respectfully **RECOMMEND** that the abolishment of Appellant's position and her subsequent layoff from employment with Appellee be **AFFIRMED**.


Jeannette E. Gunn
Administrative Law Judge

JEG: