STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

KENNETH W. SCHMIDT,

Appellant,

v.

Case Nos. 11-ABL-05-0148
11-LAY-05-0149

DEPARTMENT OF TAXATION,

Appellee

ORDER

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

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

Wherefore, it is hereby **ORDERED** that the abolishment of Appellant's position and his subsequent layoff from employment is **AFFIRMED**.

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, September 19, 2012.

ENTERED
9/19/12 cc

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

Kenneth W. Schmidt,	Case Nos. 11-ABL-05-0148 11-LAY-05-0149
Appellant	
v.	June 12, 2012
Department of Taxation,	
Appellee	Jeannette E. Gunn *Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

The instant appeal came on to be heard on November 9 and 10, 2011, pursuant to Appellant's timely appeal from an abolishment of his position as TCA Supervisor 1. Appellant was present at record hearing and was represented by Joan E. Pettinelli, Attorney at Law. Appellee was present at record hearing through its designee, Administrative Counsel Gregory Siegfried, and was represented by Assistant Attorneys General Joseph N. Rosenthal and Matthew J. Karam.

The matter at hand involved similar issues of fact and law as other appeals filed contemporaneously by employees of Appellee whose positions were also abolished, accordingly, all of the appeals arising from the closure of Appellee's Taxpayer Service Centers were condolidated for purposes of the record hearing.

Appellant stipulated to the jurisdiction of the Board to consider the instant appeal, as well as to the procedural compliance of Appellee's notification of job abolishment and layoff with the provisions of Ohio Administrative Code Section 123:1-41-10.

STATEMENT OF THE CASE

Steven Gray testified that he is currently employed by Appellee and is responsible for oversight of Human Resources. He noted that prior to accepting his current position he was responsible for managing Appellee's Payroll/Benefits Unit and its Recruiting/Staffing Unit. Mr. Gray indicated that the Department of Tax employs approximately 1,200 individuals.

The witness stated that he was familiar with Appellee's seven Taxpayer Service Centers (the Centers or TSCs) located in the State of Ohio. He explained that employees working in the Centers provided taxpayer services to walk-in clients, conducted tax enforcement investigations, and performed some ancillary services (such as real estate or legal services) as needed. Mr. Gray recalled that the TSCs were closed effective July 1, 2011, and confirmed that he was the Project Manager responsible for coordinating the closures.

Mr. Gray indicated that Appellee formulated a plan to allow enforcement agents and auditors working in the Centers to perform their duties as telecommuters. He noted that although Appellee recognized a need for these employees to be geographically located, it also wanted them to be more mobile. The witness agreed that Appellee incurred hardware costs in implementing the telecommuting plan in 2011.

Mr. Gray testified that Appellee also made a decision that the direct taxpayer services provided by Tax Commissioner Agents (TCAs) housed in the Centers no longer needed to be provided on a geographic basis and could be more efficiently delivered by consolidating all of the positions and their functions at a centralized location in Franklin County. He indicated that the Department negotiated the change in headquarters with union representatives and received approval from the Department of Administrative Services (DAS) to transfer the headquarter county for exempt employees before implementing the change, as both bargaining unit and exempt positions were affected.

Mr. Gray explained that as a result of these two business decisions, Appellee concluded that it was no longer necessary to physically maintain the Taxpayer Service Centers. He noted that he was not involved in making the decisions to implement telecommuting, centralize taxpayer services or close the service centers, but did participate in discussions leading to the creation of the rationale for job abolishments and subsequent layoffs that was ultimately submitted to DAS (Exhibit 1).

Mr. Gray confirmed that Appellant Schmidt's position within the Business Program Management Office (the "BPMO") was housed in the Cleveland TSC. He noted that the primary role of Appellant Schmidt's unit was to perform data purification tasks. The witness recalled that the duties performed by the BPMO were specifically considered during the job abolishment process and after gathering information and having discussions with managers he was instructed to include the BPMO positions in the job abolishments.

The witness testified that the job abolishments were based on reasons of economy and indicated that Appellee realized cost savings in the areas of payroll and the costs associated with maintaining a physical office, such as building leases and data lines. Mr. Gray stated that while there were also some associated expenses that accompanied the closure of the offices, such as contract cancellation fees and unemployment costs, Appellee ultimately saved money by abolishing positions and closing the Centers. He noted that "cash outs" of employee sick and/or vacation time are not requested by DAS to be considered in an abolishment/layoff rationale because that is a cost that exists no matter when or how an individual leaves employment.

The witness testified that once Appellee received approval to proceed with the abolishments and layoffs from DAS, they also began terminating leases and arranging for relocation of physical assets. Mr. Gray confirmed that all employees in positions affected by the abolishments and layoffs received letters of notification containing information about displacement rights. He indicated that there were no exempt positions into which the Appellants were able to displace.

Mr. Gray confirmed that there have been postings for Taxpayer Service Agent positions since the abolishment/layoff took place, due to vacancies arising through attrition. He stated that no new positions had been created and that all of the vacant positions are located in Franklin County. The witness observed that any of the Appellants were able to apply for the available positions; he noted that an employee whose TCA Supervisor position was abolished in the Cleveland area applied for and was promoted to TCA Supervisor 3 in Franklin County.

Mr. Gray confirmed also that some auditor positions were vacant at the time of the abolishment/layoff, and that additional auditor positions have become vacant since that time due to attrition. He noted that the Commissioner has elected to not yet fill those vacancies.

Kevin McNeil testified that he has been employed by Appellee for approximately 17 years and currently holds the position of Chief Financial Officer. He stated that he oversees and administers a yearly operating budget of approximately $140M, and is also responsible for facilities management.

The witness recalled that in early 2011, Appellee housed employees in locations in downtown Columbus in the State Office Tower; its Northland facility in north Columbus, and in Taxpayer Service Centers located around the state. He

stated that he had personally visited most of the TSCs in the course of his employment and understood that they housed audit and enforcement agents, as well as taxpayer services employees, with some locations having additional employees or units.

Mr. McNeil recalled that in early February 2011 he was asked to compile information on operating costs for the TSCs (Exhibit 1, Attachment 5). The witness noted that this was not the first time he had been asked for this information by administrators and he was not told at that time that there was an intent to close the Centers. He indicated that, ultimately, a decision was made to close the Centers and abolish positions; Mr. McNeil noted that he was not the individual who made that decision. The witness testified that as a result of the closure of the TSCs, one hundred thirteen positions were abolished, with the majority of those affected being tax commissioner agents and supervisors.

Mr. McNeil stated that the operating cost information he provided to Appellee projected yearly payroll costs for taxpayer services staff at $8.2 million dollars, which encompassed pay and all benefits, including healthcare and retirement. He noted that he included information regarding building rental, computer data connections, telephone lines and estimated usage, facility badge monitoring systems, travel reimbursement, supplies and equipment.

The witness explained that when he was asked to provide more detailed information to accompany the abolishment rationale submitted to DAS he included additional information regarding operational costs, such as information reflecting a bonus to be paid to all state employees in 2012 (Exhibit 1, Attachment 4). He recalled that he was provided with a list of the positions that were designated to be abolished. Mr. McNeil noted that he also provided information on expenses that would offset the projected savings from closing the TSCs, including costs for unemployment compensation, penalties for termination of data lines, and costs for moving physical assets. He testified that after all savings and offsetting expenses were calculated, Appellee saved approximately $7 million as a result of closing the Centers and abolishing positions.

The witness confirmed that some of the programs operated in the Centers generated revenue for Appellee. He stated that revenue generation and potential loss was not considered when estimating savings because the programs were to continue to be delivered. Mr. McNeil explained that sick/vacation time cash outs were also not considered in computing potential savings because they do not represent a financial obligation to the department; with each payroll some funds are

deposited into a "pool" and when someone cashes out their time the money comes from that existing pool.

Nadine Sparks testified that she is presently employed by Appellee and holds the position of Human Capital Management Manager. Ms. Sparks stated that in March 2011 she received a list from her supervisor, Steve Gray, showing the Taxpayer Service Centers that were being closed, along with a list of the divisions housed in each of those facilities. She noted that she was not involved in the decision of which positions to abolish, or in the development of the underlying rationale, and that the final decision to close the Centers and abolish positions came from the Tax Commissioner's office.

The witness recalled that Mr. Gray asked her to familiarize herself with the policies and processes needed to carry out the position abolishments arising from the closure of the Centers. She stated that she was also asked to assist in preparing materials to accompany the abolishment rationale that was submitted to DAS. Ms. Sparks noted that she calculated retention points, created rationales for individual positions, provided position descriptions for the affected positions and prepared employment histories. The witness stated that she gave the information she prepared to Mr. Gray and Administrative Counsel Greg Siegfried.

Ms. Sparks testified that the job duties previously performed by Appellants were no longer performed after their positions were abolished, with the exception of some of the duties previously performed by Appellant Schmidt, which were reassigned to a TCA Supervisor 3 position. She noted that the duties that were reassigned fell within that employee's position description and were projected to require less than twenty percent of his working time, which is considered minimal under DAS guidelines.

The witness testified that she was familiar with the tables of organization reflecting the agency's organization both before and after the proposed job abolishments which were included with the materials submitted to DAS. Ms. Sparks noted that when she prepared the Table of Organization reflecting the structure of the agency following the closure of the TSCs there were several vacant positions. She also noted that some of the employees in positions shown as occupied on the Table of Organization resigned or retired after June 30, 2011. The witness indicated that approximately twenty TCAs were able to displace into vacant auditor positions, while some chose to resign or retire. Ms. Sparks recalled that no one was placed into a position if they did not meet the minimum qualifications for that position. The witness noted that applicants who did not meet specific degree

requirements for available positions had the option to submit documentation outlining their experience and education.

Ms. Sparks confirmed that there have been multiple postings for TCA positions in Franklin County since the job abolishment. She noted that the positions posted were not newly created, but were being backfilled to replace employees who had left the agency. The witness observed that it is permissible to carry vacancies on a table of organization and positions are filled based upon business needs.

Ms. Sparks confirmed that after receiving approval from DAS to proceed with the job abolishments and layoffs, notification letters and accompanying documentation were provided to affected employees.

Allen Lenko testified that he is presently employed by Appellee in a position classified as Tax Program Administrator 1 and oversees the Business Program Management Office. He noted that he has held his present position since 2005 or 2006 and has been employed by Appellee for a total of approximately twenty-four years. The witness explained that the focus of his position is to coordinate the design and implementation of the STARS computer system. He observed that Appellee has been developing the STARS system since 2003 and anticipates a roll-out of the first phase in July 2012.

The witness indicated that data purification was an essential aspect of development of the STARS system, as information coming from the previously utilized computer system (ITAS) needed to be consistent and accurate. Mr. Lenko recalled that Appellant Schmidt worked closely with vendors to find ways to cleanse and modify data anomalies. He testified that he considered that task to be Appellant Schmidt's most important responsibility.

Mr. Lenko stated that he first became aware that Appellant Schmidt's position was being considered for abolishment when it was announced that the TSCs were being closed. He recalled that prior to that time he was asked in a meeting with the Tax Commissioner and other individuals to explain the function of the unit, as well as provide historical background as to why the unit was created and why the prior administration had considered it to be important. The witness stated that he advocated for the continuation of the unit and later provided some additional follow-up information but still was not aware that the unit and positions therein were being considered for abolishment.

The witness confirmed that Appellant Schmidt reported directly to him until the summer of 2010, but that he had no direct knowledge of his day-to-day job duties after that time. Mr. Lenko indicated that he did not know whether data purification tasks continued to be performed after the abolishment of Appellant Schmidt's position in July 2011.

Bradley Marshall testified that he is presently employed by Appellee in a position classified as TCA Supervisor 3. He indicated that he has held his present position for approximately two and one-half years and has been employed by Appellee since 2003 in a variety of positions. The witness stated that he is responsible for oversight of all activities within the Compliance Division, as well as some duties related to the STARS project. He recalled that he has been involved with the STARS project since approximately 2008 and is responsible for performing tasks related to data purification as part of that project.

The witness observed that he was not Appellant Schmidt's direct supervisor at any time prior to the abolishment of Appellant's position and was not familiar with the day-to-day job duties that he performed. Mr. Marshall confirmed that in late 2010 Appellant Schmidt began providing him with weekly and monthly reports showing the data that his unit was working on. He noted that both he and Appellant Schmidt participated in weekly telephone project meetings.

Mr. Marshall recalled that at some time in 2011 he was told that Appellant Schmidt's job duties were being reassigned to him. He confirmed that he has personally performed on a limited basis some of the data purification duties previously performed by Appellant Schmidt. The witness noted that he also performed data purification tasks prior to the abolishment of Appellant Schmidt's position.

Mr. Marshall testified that he presently assigns data purification work to other divisions to correct identified problems and then follows up on the work he has assigned. He noted that he does not spend a significant amount of time performing data purification tasks and observed that the amount of time he spends now is not appreciably more than the time he devoted to the task prior to 2011. Mr. Marshall indicated that the queries formerly run by Appellant Schmidt have been automated and now go directly to the affected division(s) for correction without having to be assigned by him.

Appellant Ken Schmidt testified that he was employed by Appellee as a TCA Supervisor in the Performance Excellence Division of the BPMA at the time of his

position abolishment and had held that position since 2005. He noted that his primary job duty was to perform data purification tasks in support of the STARS project. The witness indicated that he met the minimum qualifications for both the TCA and auditor positions.

FINDINGS OF FACT

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

Effective July 1, 2011, Appellee closed the seven Taxpayer Service Centers it maintained in various locations throughout the State of Ohio. As a result of the closure of those Centers, Appellee abolished the positions of the direct taxpayer services staff and other employees (including Appellants) housed in those locations. Effective that same date, Appellee converted tax enforcement and audit personnel to a telecommuting model.

Prior to its abolishment, Appellant Ken Schmidt held a position classified as Tax Commissioner Agent Supervisor 1. His primary job duty was to perform data purification tasks in support of the STARS project. Following the abolishment of Appellant Schmidt's position, a *de minimis* amount of his data purification duties were reassigned to Bradley Marshall, a TCA Supervisor 3. The duties previously performed by the other Appellants were not reassigned after the abolishment of their positions and following the TSC closures, direct taxpayer services have been centralized in Franklin County.

Appellee's rationale supporting the job abolishments, which was submitted to DAS for approval, was based upon reasons of economy. Appellee realized cost savings in the areas of payroll and the costs associated with maintaining a physical office. After total savings and offsetting expenses were calculated, Appellee saved approximately $7 million as a result of closing the Centers and abolishing positions.

Upon receipt of approval to proceed from DAS, Appellee provided notification letters and information regarding displacement rights to the employees affected by the job abolishments and layoffs. The materials provided by Appellee substantially complied with the procedural prerequisites of OAC 123:1-41-10. Appellee also began terminating leases and arranging for relocation of physical assets. Some employees were able to "bump" into another vacant position within the agency,

however, none of the Appellants in the instant matter were able to exercise displacement rights and were subsequently laid off.

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.

The parties stipulated prior to record hearing that Appellee substantially complied with the procedural prerequisites of OAC 123:1-41-10 in relation to the notification of abolishment and layoff provided to Appellants. In addition, Appellee provided sufficient testimony and evidence at record hearing to support a conclusion that it substantially complied with all other applicable procedural requirements of the Ohio Revised Code and Ohio Administrative Code in effectuating the abolishment of Appellants' positions. Accordingly, this Board may proceed to consider the sufficiency of the rationale relied upon by Appellee.

Revised Code Section 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. In its

rationale, Appellee cited economy as justification for the abolishment of Appellants' positions. Revised Code Section 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.

I find that Appellee presented evidence to establish by a preponderance of the evidence that it recognized an overall savings of approximately $7 million as a result of closing the Centers and abolishing positions. Testimony and evidence established that, with the exception of a *de minimis* amount of tasks that were transferred to Mr. Marshall, Appellant Schmidt's duties were no longer performed following the abolishment of his position.

Appellants also noted that there were other ways for Appellee to reduce costs, rather than closing the Centers and abolishing positions, however, this Board's authority does not extend to a review of the relative merits of business decisions that could have potentially been made by an appointing authority. I find that Appellants did not present sufficient testimony or evidence to demonstrate bad faith on the part of Appellee in closing the TSCs and abolishing their positions.

Therefore, because Appellee has demonstrated adequate justification for the abolishment of Appellant's position, as well as its compliance with the procedural requirements set forth in the Ohio Revised Code and Ohio Administrative Code, I respectfully **RECOMMEND** that the abolishment of Appellant's position and his subsequent layoff from employment be **AFFIRMED**.

Jeannette E. Gunn
Administrative Law Judge

JEG: