STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

TARA SMITH,

Appellant,

v. Case No. 12-LAY-08-0192

BELMONT COUNTY BOARD OF HEALTH,

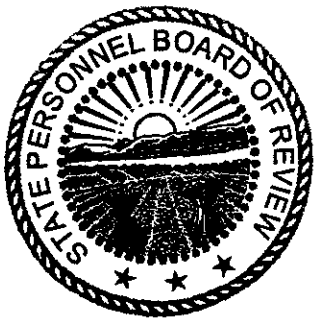
Appellee

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 entirety of the record, 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 Appellant Smith's layoff from her WIC Peer Helper position is **AFFRIMED**, and her layoff from her Car Seat Technician position is **DISAFFIRMED**.



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, June 12, 2013.

Clerk

ENTERED
6/12/13

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

Tara Smith,	Case No. 12-LAY-08-9192
Appellant,	
and	
Carrie Kinsel,	Case No. 12-LAY-08-0196
Appellant,	
v.	April 12, 2013
Belmont County Board of Health,	BETH A. JEWELL
Appellee.	*Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on due to Appellants' timely appeals of their September 28, 2012 layoffs from employment with Appellee. On October 31, 2012, the two cases were consolidated upon Appellee's motion. A record hearing was held on November 28, 2012. Appellants were present at the record hearing and represented themselves. Appellee was present at record hearing through its designee, James King, Deputy Health Commissioner; and was represented by Frank Hatfield, Attorney at Law.

Appellant Tara Smith had been employed by Appellee as a part-time Public Health Aide, working title WIC Peer Helper/Car Seat Technician, since February 4, 2008. Appellant Carrie Kinsel had been employed by Appellee as a part-time Public Health Aide, working title WIC Clerk, since June 30, 2008. On August 20, 2012, by hand delivery, and again on August 26, 2012, by certified mail, Appellee notified each Appellant of her layoff due to lack of funds as defined by Ohio Revised Code section (R.C.) 124.321. The letters from Appellee informed Appellants that they were unable to exercise displacement rights.

STATEMENT OF THE CASE

At the commencement of the hearing, Appellants and Appellee entered into several stipulations. The parties stipulated that Appellee had experienced a 26 percent cut in WIC funds from fiscal year 2012 to fiscal year 2013, reducing WIC funding from $422,000 annually to $315, 000 annually. The parties also stipulated that on August 26, 2012, Appellee provided Appellants with timely layoff notices that complied with all procedural requirements set forth in the Ohio Revised Code and Ohio Administrative Code. The parties additionally stipulated to the factual accuracy of the recitations set forth in Appellant Smith's exhibits 12A and 12B and Appellee's exhibits H1-H4 and I1-I3. Appellants and Appellee agreed that the disputed issues presented to this Board are the legal validity of Appellee's assertion that Appellants were unable to exercise displacement rights to bump into other positions within the Belmont County Board of Health and that Appellant Smith was wrongly relieved of her Car Seat Technician duties.

Appellee called three witnesses in its case in chief: Linda Mehl, Michael Kinter, and James King. Appellants testified in their cases in chief and cross-examined Appellees' witnesses. The stipulations, testimony, and exhibits form the basis for the Findings of Fact set forth below.

FINDINGS OF FACT

Since June 2008, Linda Mehl has been employed by Appellee as Director of Nursing and WIC Director. Under the terms of the WIC grant funds provided to Appellee through the Ohio Department of Health, WIC grant funds must be spent of WIC program activities. Eighty-five percent of WIC funds are allocated to staffing expenditures, and fifteen percent to direct programming costs such as travel, training, office supplies, and rent. Ms. Mehl's duties include program and grant reporting, grant writing, staff supervision and oversight of Appellee's nursing, health education, and WIC programs. The WIC-funded staff included one full-time WIC Coordinator, two full-time Registered Nurses, two full-time Public Health Aides, one part-time Registered Nurse and four part-time Public Health Aides, including Appellants. (Appellee Exhs. A, H, I; Appellants' Exhibit, Belmont County Board of Health website, www.belmontcountyhealth.org/Main%20Pages/staff.htm, viewed 8/21/2012) Appellant Kinsel's WIC Clerk salary was funded 100 percent from WIC grant funds. Appellant Smith worked twelve seven-hour days per month in her WIC Peer Helper position, which was funded 100 percent from WIC grant funds. Appellant Smith also worked two seven-hour days per month as a Car Seat

Technician. The Car Seat Technician work was funded through Appellee's general fund. The Car Seat Technician duties are part of the Child Passenger Safety Program, a regional program that provides car seat education and distribution. (T., Mehl)

After the cut in WIC funds was announced, Appellee, recognizing that it would need to cut WIC program staff to meet the lower WIC budget, examined its WIC staffing. The least senior part-time WIC-funded Public Health Aide, Carol Vargo, resigned, and her position was not filled. Part-time Public Health Aide Kristina Scott had 172 retention points, the most within the Public Health Aide classification. Appellant Smith had 158 retention points and Appellant Kinsel had 153 retention points; they were laid off. Appellee also laid off one part-time Registered Nurse, Cheryl Scheehle, whose position was funded through the WIC grant. Ms. Scheele had 180 retention points. Ms. Scheehle was eligible to bump another Registered Nurse, Holly Sroka, who had fewer retention points but whose position was funded not through the WIC grant but through other funding sources. Ms. Scheehle chose not to bump Ms. Sroka. (T., Mehl; Appellee Exhs. B, H, I, L, M)

In determining how to implement the necessary layoffs due to the WIC funding cut, Deputy Health Commissioner King consulted with Michael Kinter, then-Belmont County Human Resources Manager, for advice. The County Board of Health does not have its own class plan; rather, it follows the procedures outlined in the Ohio Revised Code and Ohio Administrative Code. Mr. Kinter explained to Deputy Health Commissioner King that under the applicable law, employees are laid off according to classification, that "bumping" or displacement rights apply only within a classification series, and that part-time employees are laid off before full-time employees. Deputy Health Commissioner King double-checked all retention point calculations with the county auditor. (T., Kinter, King)

The clerical work of the Board of Health, including vital statistics, is overseen by a Clerk/Registrar. (Appellee Exhs. A, B) Appellee's clerical staff had been short-handed from time to time since 2008 because its clerical employees had been on various types of leave. At some time during her years of employment with Appellee, Appellant Kinsel had filled in on a temporary basis at the Board of Health's receptionist desk, handling walk-ins and phone calls for approximately an eight-month period. Appellant Kinsel was paid from Appellee's general fund when performing these duties, and she continued to do her regular part-time WIC Clerk duties during that time. Appellant Smith also sporadically assisted with clerical work within the Board of Health. (T., Mehl, King, Kinsel, Smith)

On August 13, 2012, following the death of Shirley Shumaker, Secretary/Deputy Registrar of Vital Statistics on April 15, 2012, Appellee hired Paula Pollock and Kim Barto as part-time permanent employees in the Secretary 1 classification, class number 12551. Ms. Barto had been hired as an intermittent secretary, but Appellee made her a permanent employee because the workload required the position to work more than 1000 hours per year, the maximum number of hours permitted for an intermittent employee. As an interim, Ms. Pollock had been filling a part-time Secretary 1 position because of another Board of Health employee's medical leave. After this employee's death, Ms. Pollock was hired to fill the position as a part-time permanent employee. None of these positions were WIC-funded positions, nor were any within the Public Health Aide classification series. (T., King; Appellants' Exhibits: August 13, 2012 Board of Health Meeting Minutes; Belmont County General Health District Personnel Policy Manual, Section 3.06; Ohio Classification Specification, Class Title Secretary 1, Code 12551, Paula Pollock PT Permanent; Ohio Classification Specification, Class Title Secretary 1, Code 12551, Kim Barto PT Permanent)

After she was informed of her layoff, Appellant Smith wrote a letter to Appellee dated August 21, 2012, in which she asked what was going to happen to her Car Seat Technician duties. (Appellant Exh. 6) After her inquiry, Appellee informed Appellant Smith that the car seat work was going to be done through East Ohio Regional Hospital.

ANALYSIS, DISCUSSION, AND CONCLUSIONS OF LAW

Relevant Statutory Provisions

R.C. 124.321 provides in relevant part as follows:

> (A) Whenever it becomes necessary for an appointing authority to reduce its work force, the appointing authority shall lay off employees or abolish their positions in accordance with sections 124.321 to 124.327 of the Revised Code. ...
> (B)
> (1) Employees may be laid off as a result of a lack of funds within an appointing authority.... For appointing

> authorities that employ persons whose salary or wage is paid other than by warrant of the director of budget and management, the appointing authority itself shall determine whether a lack of funds exists.
>
> (2) As used in this division, a "lack of funds" means an appointing authority has a current or projected deficiency of funding to maintain current, or to sustain projected, levels of staffing and operations. This section does not require any transfer of money between funds in order to offset a deficiency or projected deficiency of funding for programs funded by the federal government, special revenue accounts, or proprietary accounts. Whenever a program receives funding through a grant or similar mechanism, a lack of funds shall be presumed for the positions assigned to and the employees who work under the grant or similar mechanism if, for any reason, the funding is reduced or withdrawn.

R.C. 124.324 provides in relevant part as follows:

> (A) A laid-off employee has the right to displace the employee with the fewest retention points in the following order:
> (1) Within the classification from which the employee was laid off;
> (2) Within the classification series from which the employee was laid off;
> (3) Within the classification the employee held immediately prior to holding the classification from which the employee was laid off, except that the employee may not displace employees in a classification if the employee does not meet the minimum qualifications of the classification or if the employee last held the classification more than three years prior to the date on which the employee was laid off.

Analysis and Discussion

With the exception of Appellant Smith's Car Seat Technician position, the record reflects that Appellee's notification to Appellant complied with the procedural and substantive aspects of the layoffs of Appellants due to the funding cut in the WIC grant. With respect to Appellant Smith's Car Seat Technician position, Appellee did not demonstrate that a layoff was justified by lack of funds; nor did Appellee demonstrate by a preponderance of the evidence that Appellant Smith had voluntarily resigned from this position.

An appointing authority must successfully rebut a valid prima facie showing of "bad faith," should one be demonstrated. See Blinn v. Bureau of Employment Services (1985), 29 Ohio App.3d 77. Essentially, Appellants contended at hearing that Appellee subverted the civil service laws by not allowing them to bump employees working in the Secretary 1 classification. However, the evidence in the record regarding Appellee's treatment of Appellants does not support a finding of bad faith. In implementing the layoffs and determining displacement rights, Appellee was required to follow the procedures specified in the state civil service law, including the provisions cited above. Appellee has done precisely that in determining that Appellants were not legally entitled to bump into the Secretary 1 positions. These positions are within a different classification series. All evidence in the record, including exhibits submitted by both Appellants and Appellee, confirms that Appellants' WIC-funded positions were classified Public Health Aide positions rather than Secretary 1 positions, and that while Appellants may have assisted with secretarial work on a temporary basis from time to time, Appellants did not hold Secretary position classifications, or any classifications other than those they were hired into, during the three years preceding their layoffs.

As stated in the Findings of Fact, after she was informed of her layoff, Appellant Smith wrote a letter to Appellee dated August 21, 2012, in which she asked what was going to happen to her Car Seat Technician duties. (Appellant Exh. 6) After her inquiry, Appellant Smith was informed that the car seat work was going to be done through East Ohio Regional Hospital.

Appellee does not dispute that the car seat program was not eliminated, nor was its funding cut; rather, in early August 2012, before Appellant Smith's layoff, Appellee contracted with East Ohio Regional Hospital to handle the Car Seat Technician work previously performed by Appellant Smith. Ms. Mehl testified at

record hearing that she "believed" that sometime over the summer, after Appellee was notified of the reduction in WIC grant funds but before Appellant was notified of her layoff, she had offered Appellant Smith the opportunity to continue doing the Car Seat Technician work to and that Appellant Smith declined the offer because of the potential impact on unemployment benefits; Ms. Mehl produced nothing in writing to verify this conversation. Appellant Smith recalled that Ms. Mehl told Ms. Smith, "I did not figure you would want to do [car seat program] because it would hurt your unemployment." Ms. Mehl told Appellant Smith on August 22, 2012 that the two "must have had a miscommunication." From a review of all evidence presented on this issue, Appellee made the decision to contract out the car seat work based upon the assumption that Appellant Smith would not want to continue doing it, rather than upon Appellant Smith voluntarily resigning this position. Appellant Smith's recollection is credited in this regard and is borne out by the immediate action she took to question Appellee about what was happening to her car seat work. Appellee has not demonstrated by a preponderance of the evidence in the record that Appellant Smith voluntarily relinquished her Car Seat Technician duties, or that Appellee needed to layoff Appellant Smith from these duties because of a lack of funds.

RECOMMENDATIONS

Case No. 12-LAY-08-0192:

A review of all evidence and testimony presented reveals that Appellee has demonstrated by a preponderance of the evidence that Appellant Smith's layoff from her WIC Peer Helper position was justified as a result of lack of funds and was carried out in compliance with the requirements of the Ohio Revised Code and Ohio Administrative Code. However, Appellee did not demonstrate by a preponderance of the evidence that Appellant Smith's layoff from her Car Seat Technicina position was in compliance with the law. Therefore, it is respectfully **RECOMMENDED** that the State Personnel Board of Review **AFFIRM** Appellant Smith's layoff from her WIC Peer Helper position, and **DISAFFIRM** her layoff from her Car Seat Technician position.

Case No. 12-LAY-08-0196:

A review of all evidence and testimony presented reveals that Appellee has demonstrated by a preponderance of the evidence that Appellant Kinsel's layoff was justified as a result of lack of funds and was carried out in compliance with the

requirements of the Ohio Revised Code and Ohio Administrative Code. Therefore, it is respectfully **RECOMMENDED** that the State Personnel Board of Review **AFFIRM** Appellant Kinsel's layoff.

Beth A. Jewell

BETH A. JEWELL
Administrative Law Judge

BAJ: