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PRESENTATION TO THE
OHIO GFOA
22ND ANNUAL FALL CONFERENCE

LAYOFFS AND
JOB ABOLISHMENTS

PRESENTED BY: JONATHAN J. DOWNES
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FIRM PROFILE

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INTRODUCTION – JONATHAN J. DOWNES

Jonathan J. Downes is a partner in the Columbus firm of Downes Fishel Hass Kim LLP with over 30 years experience in numerous facets of employment law. Mr. Downes received his law degree from Case Western Reserve University and a Bachelor of Science degree in Business Administration from Virginia Tech. Jonathan is AV rated by Martindale-Hubbell and certified by the Ohio State Bar Association as a Specialist in Labor and Employment Law. Mr. Downes has been selected by his peers for inclusion in Best Lawyers in America® 2010 and named one of Central Ohio Top Lawyers 2009. Annually, since 2004, his peers in Ohio have voted Mr. Downes a “Super Lawyer” in Employment and Labor Attorneys. Mr. Downes has argued cases before the Ohio Supreme Court and the United States Sixth Circuit of Appeals. Jonathan has extensive experience at collective bargaining, arbitration, litigation, administrative matters, civil rights, and civil service law. He served on the Civil Service Review Commission for the State of Ohio, authored “Civil Service Law in Ohio” and edits the annual publication of the Ohio Civil Service and Collective Bargaining Laws Annotated. He is a member of the Ohio Management Lawyer’s Association and a charter member and past president of the Ohio Public Employers Labor Relations Association. Jonathan volunteers in his community in various capacities including serving on boards of a public library and a charter school and advises a high school mock trial team.

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LAYOFFS AND JOB ABOLISHMENTS
UNDER CIVIL SERVICE LAW

I. APPLICABLE LAW

- A. Layoffs and Job Abolishments must be made in accordance with the following statutory mandates:
1. Ohio Revised Code (“O.R.C.”) § 124.321 to § 124.328
 2. Ohio Administrative Code (“O.A.C.”) SPBR Rule § 124-7-01 (“Job abolishments and layoffs”) and ODAS § 123:1-41 (“Layoffs”)
 - a. O.A.C. provisions do not apply to municipalities
 - b. Note: O.A.C. provisions generally mirror the corresponding O.R.C. provisions or add detail to those provisions. Therefore, for the sake of brevity in a summary outline, O.A.C. provisions will not be separately addressed.
 3. Ohio Revised Code § 124.37 City Police and Fire Departments
- B. For County and State Agencies, the Director of Administrative Services (DAS) promulgates rules in relation to layoffs and job abolishments that the appointing authority must follow. O.R.C. § 124.321(A), (E) and O.R.C. § 124.322.
- C. Municipalities Under O.R.C. § 124.40, the municipal or city Civil Service Commission (CSC) has the authority and responsibility to administer the provisions of the civil service laws. These responsibilities include the administrative functions of DAS and the adjudicatory functions of the State Personnel Board of Review (SPBR).

Many municipal CSC’s do not have specific rules or policies regarding layoffs of employees and abolishment of positions. City CSC’s are not required to have rules for layoffs and abolishments. The statutory provisions have sufficient detail to provide for the abolishment of positions and the orderly layoff of employees. The standards, definitions and procedures for abolishments and layoffs contained in the civil service laws, O.R.C. § 124.321 to § 124.328, contain the rationale (lack of funds or work, reasons of economy, and abolishment) and procedural aspects of abolishments and layoffs for a city administration to follow and the CSC to review for compliance in the event of an appeal. O.R.C. § 124.37 provides the standards and procedures for layoff of police and fire department officers, not civilians.

- D. Effective October 17, 2009, county appointing authorities will no longer be required to file a statement of rationale with DAS concerning layoffs. DAS will not review retention points.
- E. Collective Bargaining Agreements For both counties and municipalities which have unions, the initial issue to review is whether or not a collective bargaining agreement (CBA) addresses the abolishment of positions and/or the layoff of employees. Many CBA's contain specific provisions for abolishment and layoffs. For those employees and positions included in or covered by a CBA the specific language of the CBA must be examined. (More discussion below.)

Equally, if the CBA contains provisions for the abolishment of positions and/or the layoff of employees the CBA must be further examined to determine if it includes a provision for appeal, the grievance procedure, and if the grievance procedure has been agreed to be the "exclusive" procedure for the appeal of abolishments and/or layoffs.

Generally CBA provisions for abolishments and/or layoffs will provide the reasons or rationale for such. Careful review and examination of these provisions must also be conducted prior to any abolishment or layoff.

The justification, documentation and proof for abolishments and/or layoffs under a CBA are usually very generally stated in a CBA. Utilization of the statutory standards will be beneficial in the implementation of an abolishment. This is especially important for the economic or budget presentation of the economic reasons and documentation.

In arbitration, employers should utilize the same methods of proof of the reasons or basis for an abolishment or layoff as has been utilized under the statutory framework. This will allow an employer to offer case law to support its position and rationale, as well as its methods, to implement abolishments and/or layoffs. Therefore, throughout this outline, where the discussion references DAS, County or SPBR procedures and rationale for abolishments and/or layoffs, municipalities may assume that these standards will apply, except (as noted above) in those instances a CBA exists and applies to those positions covered by the CBA.

II. LAYOFF AND JOB ABOLISHMENT PROCEDURE

- A. Valid reasons for layoffs and job abolishments O.R.C. § 124.321(B), (C), and (D).
 - 1. Reasons for layoffs
 - a. Lack of Funds: the appointing authority has a current or projected deficiency of funding to maintain current, or sustain projected,

levels of staffing and operations. A lack of funds is “presumed” for those positions funded under grants. O.R.C. § 124.321(B).

- b. Lack of Work: the appointing authority has a current or projected temporary decrease in the workload, expected to last less than one year, which requires a reduction of current or projected staffing levels. O.R.C. § 124.321(C).

2. Reasons for job abolishments O.R.C. § 124.321(D).

- a. As a result of a reorganization for the efficient operation of the appointing authority;

- b. Reasons of economy applied in court decision:

- i. *Swepton v. Bd. of Tax Appeals of Ohio* (Franklin 1993), 89 Ohio App. 3d 629 – Ct. held that while proper job abolishment may occur pursuant to merger of positions when reorganization has taken place for reasons of efficiency and economy, a job is not properly abolished under circumstances in which the appointing authority simply transfers that job’s duties to a new employee to perform.

- c. For lack of work (permanent).

3. Judicial Definitions for “job abolishment”: *In re Moreo* (Montgomery 1983), 13 Ohio App. 3d 22, the term “job abolishment” contemplates the permanent elimination of a specific position, while “layoff” contemplates the continued existence of a position which is temporarily unfilled because of lack of funds or lack of work.

B. Statement of rationale for layoffs/job abolishments and supporting documentation

1. Appointing authorities (for all workers not employed by the state) must determine whether or not a valid reason for layoffs or job abolishments exists. Until October 17, 2009, County appointing authorities must file a statement of rationale and supporting documentation with the DAS prior to sending the layoff notice **only in cases of layoffs**. O.R.C. § 124.321(B)(C)(D). In H.B.1 the requirement for Counties to submit the statement of rationale was deleted, effective October 17, 2009.

- a. In cases of job abolishments, the appointing authority should prepare a statement of rationale, however, DAS does not have the

- authority to review the statement prior to sending the layoff notice even if the job abolishment results in a layoff.
- b. The appointing authority must send its calculation of retention points to DAS for verification in cases of layoffs and job abolishments until October 17, 2009. (This requirement was also eliminated in H.B. 1.)
 - c. Ohio Revised Code § 124.321 was changed to eliminate the requirement of county appointing authorities to submit a statement of rationale to the Department of Administrative Services in the event of layoffs. This requirement was previously eliminated in cases of job abolishment. Also, DAS will no longer have the authority to review a county appointing authority's calculation of retention points.
 - d. Since a local civil service commission has the same authority as DAS, these changes also apply to cities. Again, cities should make sure that their civil service rules conform to these changes.
 - e. With respect to counties, the changes in O.R.C. §124.321 do not require the adoption of any new rules. There are several current provisions in the Ohio Administrative Code that will still apply to counties. For example, OAC 124:1-41-09 still governs the computation of retention points. Counties must also comply with OAC 124:1-41-10, which addresses the timing and contents of layoff notices.
2. Suggested supporting documentation for layoffs and job abolishments:
- a. Layoff for lack of work: Documents should provide statistical data covering a period of at least two years that indicates the decrease in workload. (Ex. Data showing a 20% decrease in claims filed to justify laying off 20% of the staff.)
 - b. Layoff for lack of funds: Documents should show projected revenues and projected expenditures that should then result in a projected deficit. The deficit should be equated to the number of positions to be laid off and how the action will produce the necessary savings.
 - c. Job abolishment: Documents should explain how the economy or better efficiency can be achieved as the result of reorganization. Include a table of the organization before and after the job abolishment. If the job abolishment is for lack of work

(permanent), then documents should include statistical information over the previous period that indicates the decrease in workload. Where applicable, revised job descriptions shall also be prepared for those positions that have absorbed the duties of other positions or have been combined or where duties are no longer performed.

i. Abolishment Case law: *Cummings v. Youngstown*, (Mahoning, 1987), No. 86 CA 71 – Ct. held that the documentation supporting a job abolishment need not be in any particular form nor need it be highly technical, but it must be more substantial than someone’s opinion. An attached copy of financial records or other factual basis supporting the rationale will be adequate.

d. Evidence or demonstration of reasons for abolishment, lack of funds or work:

i. The appointing authority shall demonstrate by a preponderance of the evidence that a job abolishment was undertaken due to a lack of a continuing need for the position based on: a reorganization for the efficient operation of the appointing authority; reasons of economy; or a lack of work expected to last one year or longer.

ii. The appointing authority shall demonstrate by a preponderance of the evidence that a layoff was undertaken due to a temporary lack of work or lack of funds expected to last less than one year.

iii. Layoffs and abolishments may only be affirmed if the appointing authority has substantially complied with procedural requirements set forth in section 124.321 of the Revised Code, et seq., and the administrative rules promulgated pursuant to these statutes.

C. Bad faith allegations under SPBR rule O.A.C. 124-7-01

1. 124-7-01 Job abolishments and layoffs.

a. Job abolishments and layoffs shall be disaffirmed if the action was taken in bad faith. The employee must prove the appointing authority's bad faith by a preponderance of the evidence.

b. Certification of lack of funds or lack of work is not required for job abolishments. It is the responsibility of the appointing authority to

document and establish the reasons for an abolishment, which may include fiscal considerations.

2. Judicial application of the “bad faith” challenge to an abolishment

Esselburne v. Ohio Dept. of Agriculture (Franklin 1988), 49 Ohio App. 3d 37 – Court held that the burden of proving that the abolishment was necessary and proper is on the appointing authority, not the employee. The appointing authority must be able to demonstrate by a preponderance of the evidence that a substantive reason existed for the abolishment.

When the employer abolished appellant’s position and then immediately appointed an unclassified employee to perform the same work, the employer could not establish a lack of work and the job abolishment was held to be in bad faith.

Bispeck v. Trumbull County Bd. of Commissioners (1988), 37 Ohio State 3d 26. The Ohio Supreme Court held that while the substantive burden of proof is on the appointing authority to show evidence that justifies the abolishment, the employee who alleges bad faith or procedural deficiency in the job abolishment has the burden to prove those allegations.

The legislature’s intent was to require the appointing authority to justify a job abolishment by proving the abolishment would result in more efficient operations. SPBR must consider the operations before and after the abolishment.

Feeney v. Ohio Dept. of Public Safety, 1996 Ohio App. Lexis 4550 (10th Dist. Ct. App. 1996). Employee reinstated after being terminated as an unclassified employee may have position subsequently abolished. Timing of two actions will require “closest scrutiny” by SPBR, but abolishment will be upheld where employer can show that work of the unit has been declining due to duplication of programs in other departments and through attrition of subordinates.

Blinn v. Ohio Bureau of Employment Services, 29 Ohio App. 3d 77 (10th Dist. Ct. App. 1985). Finding of bad faith by employer is not limited to situations in which lay off or abolishment was predicated on personal or political motivation. Bad faith occurs whenever layoffs or job abolishment are used to subvert the civil service system. When employees are “hand picked” to retain employment in positions that were essentially the same as those abolished when federal CETA program was replaced with JTPA program the layoff is in bad faith and the employees must be reinstated.

- D. Job abolishment procedures: If an abolishment results in a reduction of the workforce (i.e. layoffs), the appointing authority shall follow the procedures for laying off employees, subject to the following four modifications (O.R.C. § 124.321(D)(1)-(4)):
1. The employee whose position has been abolished shall have the right to fill an available vacancy within the employee's classification;
 2. If the employee whose position has been abolished has more retention points (these are explained below) than any other employee serving in the same classification, then the employee with the fewest retention points shall be displaced;
 3. 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;
 4. 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.

III. ORDER OF LAYOFFS

- A. When layoffs are necessary, or layoffs following job abolishments, the appointing authority decides in which classifications layoffs will occur and how many employees will be laid off. O.R.C. § 124.322
- B. The DAS promulgates rules establishing the method for determining layoff procedures and the order in which employees will be laid off. O.R.C. § 124.322
1. The order of layoffs must be based on length of service (retention points).
- C. Layoffs for the appointment categories shall occur in the following order (from first laid off to last): O.R.C. § 124.323(B)
1. Part-time probationary
 2. Part-time permanent
 3. Full-time probationary
 4. Full-time permanent
 - a. *Metzgar v. Summit County Children's Service Bd.* (Franklin 1982), 8 Ohio App. 3d 168, Ct. held that the fact that hours may be irregular, that the employee works his forty-hour week in a period

of over five days, or that the work locations may vary from day to day does not necessarily preclude an employee from being “full-time” for purposes of, layoff order.

IV. DISPLACEMENT (“BUMPING”) RIGHTS OF LAID-OFF EMPLOYEES

A. Order of displacement

1. An employee laid off due to a lack of funds or lack of work or laid off as a result of job abolishments has the right to displace the employee with the fewest retention points in the classification from which the employee was laid off or in a lower or equivalent classification, in the following order (O.R.C. § 124.324 (A)(1)-(3)):

- a. Within the classification from which the employee was laid off;
- b. Within the classification series from which the employee was laid off;
- c. Within the classification the employee held immediately prior to holding the classification from which the employee was laid off except that employee must meet the minimum qualifications and have served in the classification in the last 3 years.

2. Employees laid off as a result of a job abolishment have the right to displace as follows:

- a. Fill a vacancy within the classification from which they were laid off.
- b. An employee with fewer retention points in the same classification from which they were laid off.
- c. Fill a vacancy in a lower classification within the same classification series from which the layoff occurs.
- d. An employee with fewer retention points in a lower classification in the same classification from which the layoff occurs.

B. Notice of intention to displace: Employees shall notify the appointing authority of their intention to exercise their displacement rights within five days after receiving notice of layoff.

C. Classification Plan. In the event an appointing authority does not have a classification plan the appointing authority should examine the classifications

utilized in its organization and should assemble, if appropriate, a classification plan prior to the layoff and abolishments. Classification series should be considered for those classifications in a career path. This is not a difficult task.

V. LAYOFF LISTS AND REINSTATEMENT RIGHTS

A. Layoff Lists O.R.C. § 124.327(A)

1. Employees who have been laid off or who have been displaced to a lower classification in their classification series shall be placed on layoff lists.
2. Employees with the most retention points within each category of order of layoff shall be placed at the top of the layoff list to be followed by employees in descending order based on their number of retention points.
3. Laid-off employees shall be placed on layoff lists for each classification in the classification series equal to or lower than the classification in which the employee was employed at the time of layoff.
4. Notice to non-state employers: For purposes of layoff lists and reinstatement, employees who do not work for the State can only be placed on layoff lists of their own appointing authority. O.R.C. § 124.327(I).

B. Reinstatement Rights O.R.C. § 124.327(B)

1. Reinstatement Rights will be within the agency, appointing authority, from which the employee was laid off
 - a. Reinstatement rights last one year.
 - b. During the period (one year), in any layoff jurisdiction in which an appointing authority has an employee on the layoff list, the appointing authority shall not hire or promote anyone into that classification until all the people on the layoff list for that classification are reinstated or decline the position when it is offered. O.R.C. § 124.327(B)
2. Reinstatement procedures
 - a. Any employee accepting or declining reemployment to the same classification and same appointment type from which the employee was laid off or displaced shall be removed from the appointing authority and jurisdictional layoff list. O.R.C. § 124.327(D).

- b. Employees who do not exercise their displacement rights under O.R.C. § 124.324 shall only be entitled to reinstatement in the classification from which the employee was laid off. O.R.C. § 124.327(F).
- c. There shall be no probationary period for employees reinstated or reemployed upon reinstatement, except that an employee laid off during an original or promotional probationary period shall begin a new probationary period upon reinstatement. O.R.C. § 124.327(H)
 - i. *Bashford v. City of Portsmouth* (1990), 52 Ohio St. 3d 195. Ohio Supreme Court held that an employee who served four months as a probationary patrolman before he was laid off and who was recalled twenty-one months later and served another eleven months before being discharged was required to begin a new one-year probationary period upon recall pursuant to statute. Therefore, the Court found the employee to be properly terminated under state and local laws when he was terminated after eleven months following his recall from layoff. This employee had a twelve month probationary period.

VI. NOTICE TO EMPLOYEES

- A. OAC 123:1-41-10 (which is not required for cities but is advisable) requires written notice to affected employees that includes the following:
 - 1. Reason for layoff or displacement;
 - 2. Effective date of layoff or displacement;
 - 3. The employee's accumulated retention points;
 - 4. Right of employee to appeal layoff or displacement to the State Personnel Board of Review (or the CSC if in a city) and that the appeal must be postmarked 10 calendar days after the employee has been notified that he or she will be laid off or displaced;
 - 5. Statement advising the employee of the right to displace another employee and that the employee must exercise their right within five calendar days being notified of the displacement or layoff;
 - 6. A statement advising the employee of the right to reinstatement or reemployment;

7. A statement that, upon request by the employee, the appointing authority will make available a copy of Chapter 123:1-41 of the Ohio Administrative Code; and for city employees the layoff statute and any applicable CSC rules.
 8. A statement that the employee is responsible for maintaining a current address with the appointing authority;
 9. A statement that the employee may have the option to convert accrued unused vacation leave. Cities will want to decide if the conversion will be automatic at layoff or allow the balance of leave to be maintained.
- B. Written notice must be provided to employees at least seventeen days in advance of the effective date of the layoff if by certified mail or fourteen days in advance if by hand-delivery.

VII. LAYOFFS OF CITY POLICE AND FIRE DEPARTMENTS

- A. Reasons for layoff and procedure. Where a layoff is to occur in a city police or fire department the provisions of O.R.C. § 124.37 apply which provide essentially the same basis and procedure for layoffs as for non-safety forces employees. The displacement procedure is set forth in this Code section. The displacement procedure is by rank and the recall period is for three (3) years.
- B. Collective Bargaining Agreements. As noted above, the provisions of a CBA, if sufficiently specific, will prevail and apply. Careful review of those provisions must be made in order to determine whether the CBA or O.R.C. § 124.37 will apply. There must be sufficient specificity in the CBA for it to prevail over the statutory provisions. See O.R.C. § 4117.10(A) and State ex rel OAPSE/AFSCME v. Batavia Local School District Bd. Of Edn. 89 Ohio St.3d 191, 2000 Ohio 130, 729 N.E.2d 743, for the standard of “preemption” or “waiver”.
- C. City Manpower Ordinance. O.R.C. § 737.05 Composition of a Police Department and O.R.C. § 737.08 Composition of a Fire Department. Although a layoff has not been directly challenged on the basis of the manpower ordinance of a city, these two provisions outline, and most cities have, manpower ordinances for the city police and fire departments. Care should be taken to examine these ordinances to determine whether the ordinances will allow or provide for manning in numbers below the levels set forth in an ordinance or if the ordinances mandate certain levels. If the manpower ordinances require a specified number of officers (police or fire) at specified ranks, then these ordinances should be revised for consideration of modifications of the number of officers per rank.

There has been one decision which, although on a different theory, successfully challenged a city’s decision not to fill a vacant promotional position in the police department subsequent to a layoff. This decision also discussed and applied the

“waiver” standard discussed above. Kramer v. City of Norwood 2009 Ohio 1081, 2009 Ohio App. Lexis 919, (3-13-09 and 4-17-09).

VIII. APPEAL FROM LAYOFFS

- A. O.R.C. § 124.328: “A classified employee may appeal a layoff, or a displacement as a result of a layoff, to the State Personnel Board of Review. The appeal shall be filed or post-marked no later than ten days after receipt of the notice of layoff or after the employee is displaced... Classified employees... may appeal the decision of the State Personnel Board of Review to the Common Pleas Court... in accordance with O.R.C. § 119.12. For cities this means that the appeal is to be made to the City CSC.
- B. *Christophel v. Kukulinsky*, 61 F.3d 479 (6th Cir. 1995). The Sixth Circuit Court of Appeals held that, under Ohio law, unclassified civil servants have no right to appeal adverse job actions to the State Personnel Board of Review, unless the appeal is coupled with a claim that the employee was improperly designated as unclassified.

IX. SPECIAL ISSUES

- A. Classification Plan and Classification Series
- B. Court Challenges – Injunctions
- C. Picketing
- D. COBRA – Continuation of eligibility for coverage, costs.
- E. Mandamus Actions

X. FURLOUGHS AND REDUCTION OF WORK HOURS OR RATE OF PAY

- A. Legislative authority – O.R.C. § 124.393 (Counties only)

If a city is a charter city and the charter permits variance from the civil service laws the city may implement furlough provisions similar to the furlough provisions contained in O.R.C. § 124.393 for counties.

- B. Collective Bargaining Agreements
 - 1. Management and residual rights provisions
 - 2. Leave accumulation conversions
 - 3. Memorandum of understanding
 - 4. Duty to discuss/negotiate affects O.R.C. § 4117.10(A).

- C. Unclassified employees
- D. FLSA issues
- E. Classified employees – Voluntary furloughs and/or wage reductions
 - 1. Written agreement with employees

SAMPLE HOURS REDUCTION AGREEMENT

By signing this document I indicate my agreement to voluntarily reduce my hours of work from ____ hours per week to ____ hours per week. I agree not to work more than ____ hours per week without prior authorization of my supervisor, except in an emergency situation.

I understand that this will result in a proportional reduction in pay; as well as a reduction in the accumulation of those benefits, e.g., sick leave and vacation leave, that are based on my hours of work.

I agree that my hours may be increased as needed, but that I will regularly be assigned to work ____ hours per week. I further understand that even if I am authorized or assigned to work more than ____ hours per week, I am not entitled to time and one-half compensation unless and until I work more than forty (40) hours in a workweek in accordance with the County's current policy for overtime compensation.

I recognize that the County (OR City) may increase (or return) my work hours to ____ hours per week with at least fourteen days notice.

Signature Date

Print name