DOWNES FISHEL HASS KIM LLP
Attorneys at Law

400 South Fifth Street, Suite 200
Columbus, Ohio 43215-5492
(614) 221 1216 PH
(614) 221 8769 FX
www.downesfishel.com

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LAYOFFS AND FURLOUGHS IN TOUGH TIMES

Presented By Marc A. Fishel
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Marc A. Fishel is a partner in the law firm of Downes Fishel Hass Kim LLP. He received his J.D. from Ohio State University and a Bachelor of Arts degree in political science from Cleveland State University. Mr. Fishel regularly represents public employers throughout the State of Ohio in all matters relating to labor relations. Marc has extensive experience in areas of representation include collective bargaining matters, disciplinary matters (arbitration and civil service), contract negotiations, mediation, and conflict resolution procedures. Mr. Fishel also represents employers in state and federal courts in employment related litigation. Mr. Fishel is a former member of the Board of Directors of the Ohio Public Employers Labor Relations Association and has served as an adjunct professor of employment law at Wittenberg University. He is a frequent speaker and lecturer on numerous issues relating to employment law.

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LAYOFFS AND JOB ABOLISHMENTS UNDER CIVIL SERVICE LAW

I. APPLICABLE LAW

A. Layoffs and Job Abolishments. For classified positions under civil service 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

3. Ohio Revised Code § 124.37 City Police and Fire Departments

B. For Counties. The Director of Administrative Services (DAS) promulgates rules in relation to layoffs and job abolishments that the appointing authority must follow.

1. No requirement for DAS to review layoffs or job abolishment.

2. No verification of retention points.

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. 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, p. 11.)

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. Courts and the State Employment Relations Board (SERB) have held that the "waiver" of the civil service law provisions regarding layoffs and job abolishments must be specific; otherwise, the civil service law provisions continue to apply. State ex rel. OAPSE v. Batavia (2000) 89 Ohio St. 3d 191.

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.

E. Voluntary Layoffs.

F. Furloughs (see below).

II. LAYOFF AND JOB ABOLISHMENT RATIONALE AND PROCEDURES

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)

   c. As a result of job abolishment.

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.

      1. Must prove actual efficiency.

   b. Reasons of economy.

      1. Estimated savings based on salary and benefits and/or current or projected deficiency to maintain current or projected levels of staffing and operations.

   c. For lack of work (permanent).

      1. Permanent not defined by statute.

3. Judicial Definitions for "job abolishment": *In re Moreno* (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 must determine whether or not a valid reason for layoffs or job abolishments exists. Even though County appointing authorities no longer are required to file a statement of rationale and supporting documentation with the DAS, a written statement justifying the action should be prepared.

   a. The County appointing authority must calculate retention points.

   b. Since a local civil service commission has the same authority as DAS, these changes also apply to cities. Again, city CSC's which have layoff rules should make sure that their civil service rules conform to these changes.

   c. 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. Additionally, 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 or reasons of economy: 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, 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.

While certification of lack of funds or lack of work is not specifically 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.

d. Abolishment Case law: *Cummings v. Youngstown,* (Mahoning, 1987), No. 86 CA 71 – Court 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.

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

i. The appointing authority must 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 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. O.A.C. § 124-7-01 Job abolishments and layoffs. 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.

While certification of lack of funds or lack of work is not specifically 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 layoffs or abolishment

Swepston v. Bd. of Tax Appeals of Ohio (Franklin 1993), 89 Ohio App. 3d 629 – Court 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.

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 St. 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.

III. ORDER OF LAYOFFS

A. When layoffs are necessary, the appointing authority decides in which classifications layoffs will occur or which positions are to be abolished and how many employees will be laid off. (O.R.C. § 124.322)

B. 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). Retention points are calculated based on pay periods. Employees begin with 100 retention points and receive an additional point for each full-time completed pay period. Part-time employees receive ½ point for each completed pay period.

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

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

A. Order of displacement within the Appointing Authority

1. An employee laid off due to a lack of funds or lack of work 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 (O.R.C. § 124.321 (D)(1)-(4)):

   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. Paper Layoff and Displacement

C. 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.

D. 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. LAYOFF 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 ten 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. 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.

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

A. Legislative authority – O.R.C. § 124.393

The mandatory cost savings program permits counties to implement furloughs of all employees not subject to a collective bargaining agreement for up to eighty hours (80) between July 1, 2009 and June 30, 2010 and an additional eighty (80) hours between July 1, 2010 and June 30, 2011. After June 30, 2011, a county may implement mandatory cost savings days consistent with O.R.C. § 124.393(B) in the event of a fiscal emergency. A fiscal emergency is defined as one or more of the following:

1. A fiscal emergency declared by the governor under O.R.C. § 126.05;
2. A lack of funds as defined by O.R.C. § 124.321;
3. For reasons of economy as defined by O.R.C. § 124.321.

B. Fiscal Emergency for Counties

Based on lack of funds or reasons of economy.

1. Ohio Revised Code § 124.321(B)(2) defines a lack of funds as a current or projected deficiency of funding to maintain current or sustain projected levels of staffing. This section does not require an

appointing authority to transfer money between funds in order to offset the deficiency. A lack of funds is presumed if employees are working under a grant or a similar funding mechanism and the grant is withdrawn or reduced.

2. Pursuant to O.R.C. § 124.321(D)(2)(a), reasons of economy is based on the appointing authority's estimated amount of savings with respect to salary and benefits. The need for such savings must be due to a reduced appropriation by executive or legislative action or to address a current or projected deficiency.

C. Ohio Revised Code § 124.393 specifically refers to county appointing authority. As a result, each appointing authority has the right to make its own determination if and how it will implement a mandatory cost savings program. The board of county commissioners may implement a plan for all exempt employees (those employees not subject to collective bargaining) for whom it serves as the appointing authority. Other county appointing authorities may adopt a commissioner plan or may implement their own plan.

D. The statute maintains flexibility for appointing authorities within the plan. Appointing authorities are not required to treat all exempt employees the same under the mandatory cost savings plan. Ohio Revised Code § 124.393(B)(1) specifically states that the plan may be implemented differently among employees based on their classifications, appointment categories or other relevant criteria. Based on this flexibility, the commissioners may approve different plans for different employees. For example, the county department of job and family services may have a different plan than other employees under the board of county commissioners.

E. A county appointing authority implementing a cost savings plan must have written guidelines to explain the plan. These guidelines do not need to be extensive.

F. An appointing authority's implementation of the mandatory cost savings plan is not subject to appeal to the State Personnel Board of Review. In addition, the statute does not require any specific notice requirements to the 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

Downes Fishel Hass Kim LLP
400 S. Fifth Street, Suite 200
Columbus, OH 43215

(614) 221-1216 – Telephone
(614) 221-8769 – Facsimile
www.downesfishel.com