

Layoffs and Job Abolishments

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OVERVIEW

I. SIX BASIC COMPONENTS TO ABOLISHMENTS AND LAYOFFS:

- A. Establish the rationale and justification for the layoff.
- B. Identify the selection criteria for layoff.
- C. Communicate the plan and procedures.
- D. Make selection decisions.
- E. Review list of affected employees.
- F. Notify affected employees.

II. PROCEDURES FOR ABOLISHMENTS AND LAYOFFS

A. Layoffs and Job Abolishments of Classified Civil Servants:

1. Ohio Revised Code (“O.R.C.”) § 124.321 to § 124.328.
2. Police and fire department reductions in force layoffs are governed by O.R.C. § 124.37, which predates the 2007 changes contained in HB 187 and also predates the procedures in O.R.C. §§ 124.321 - 124.328. Case law indicated that there is some overlap or coordination between the two sets of provisions.

Statute dealing with reductions in work force, including abolishment of positions, applied to decision to abolish position within police force, while statute dealing with removals, reappointments, and demotions due to reductions in force in police and fire departments applied to demotions and layoffs following abolishment of position. *McAlpin v. Shirey* (Ohio App. 1 Dist., 06-25-1997) 121 Ohio App.3d 68, 698 N.E.2d 1051.

B. Civil Service Commissions (CSC).

Municipalities and civil service townships must follow the abolishment and layoff provisions O.R.C. § 124.321-124.328 and balance with O.R.C. § 124.37 (police/fire) provisions. Even with the changes in several legislative acts these provisions were not coordinated.

Additionally, unless the City is a charter city and has passed ordinances and/or authorized administration the staffing/manpower statutes apply and must be addressed in the event of a reduction in force.

CSC has the authority to promulgate rules for abolishments and layoffs or adopt some or all the rules of State Personnel Board of Review (“SPBR”), although

copying the SPBR rules is not recommended due to the differences in organization of state and county agencies compared to cities.

Discussion and case law for layoffs in cities where the employees are under a collective bargaining agreement is presented later in this outline.

Case regarding CSC procedures.

Municipal civil service commission properly adopted and used Revised Code and Administrative Code when determining whether non-chartered city's layoff of employee followed proper procedure, despite lack of specific procedure governing layoff seniority calculations, as preamble to commission's rules and regulations stated that state rules took precedence over municipal rules. *City of Warren v. Warren Municipal Civil Service Commission*, (Ohio App. 11 Dist., Trumbull, 12-13-2002) no. 2001-T-0068, 2002-Ohio-6929, 2002 WL 31813104, Unreported.

Where a layoff notice sent to city employees contains the city auditor's statement, and such notice is copied and contemporaneously sent to the civil service board, sufficient compliance with O.R.C. § 124.321(B) exists, and a layoff of firemen for lack of funds is valid. *Aksterowicz v. Lancaster*, No. 43-CA-88 (5th Dist. Ct. App., Fairfield, 6-7-89).

City was not required to follow statutory disciplinary proceedings in order to reduce police officer's pay rate such reductions by demotion were permitted when it became necessary through lack of funds or work. O.R.C. § 124.37(A). *Deem v. Fairview Park*, 2011 WL 5507393 (Ohio App. 8 Dist.) 2011-Ohio-5836.

III. LAYOFF AND JOB ABOLISHMENT REASONS O.R.C. § 124.321

A. Reasons for Layoffs and Job Abolishments.

1. Reasons for layoffs.

- a. Lack of funds - The appointing authority determines there is a current or projected deficiency of funding to maintain current, or sustain projected, levels of staffing and operations. O.R.C. § 124.321(B).

Positions with a dedicated funding source, i.e., grant funded positions; lack of funds is presumed if funding is reduced or withdrawn. O.R.C § 124.321(A)(2).

This section of the Revised Code does not require any transfer of funds to offset deficiency for programs funded by federal program, special revenue accounts or proprietary accounts.

- 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).

The appointing authority determines the staffing levels indicated by current or projected decrease in workload and if staffing levels are or will be excessive.

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

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. *In re Moreno*, 13 Ohio App. 22 (Montgomery 1983).

“Abolishment” means the deletion of a position(s) from an organization, for any one or combination of the following reasons:

- a. As a result of a reorganization for the efficient operation of the appointing authority.
 - i. *Penrod v. Ohio Dept. of Admin. Svcs.*, 113 Ohio St. 3d 239 (2007). Employer must show a more efficient operation, not simply doing the same work with fewer employees.

But:

Carter v. Ohio Dept. of Health, 28 Ohio St. 3d 463 (1986). Employer can abolish position and contract for the same services if it is more economical.

Ohio Dep't of Rehab. & Corr. v. Middlestead, 2011-Ohio-2370. Department of Rehabilitation and Correction employee must prove employer’s bad faith in laying off employee and abolishing position, when the department was motivated “acted for reasons of economy and complied with the relevant procedural and notice requirements.”

- b. For reasons of economy.
- i. The reasons for economy shall be based on estimated savings of salary, benefits and related cost. The appointing authority's decision must be based on the inability to maintain current or projected staffing levels and operations due to:
- Reductions of operating appropriation.
 - Current of projected deficiency in funding.
- ii. Principles required for abolishments based on savings for salary and benefits only:
- Abolishment must be in good faith and not as a subterfuge for discipline.
 - For abolishment for a specific program, only positions within that program may be abolished.
 - For abolishments not for a specific program the appointing authority identifies the appropriate position(s) based on reasons of economy.

Case regarding merger and abolishment.

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. This matter also included a discussion regarding bad faith which is discussed below. *Swepton v. Bd. of Tax Appeals of Ohio*, 89 Ohio App. 629 – Ct (Franklin 1993).

- c. For lack of work (permanent).

Lack of work as a basis for the permanent abolishment of positions (and any resulting layoff) anticipates that the lack of work will exceed one year. This basis or rationale for abolishment is generally combined with other reasons such as reorganization or economy.

Appointing authority determines which positions are to be abolished. O.R.C. § 124.321(D)(3).

3. If the abolishment of positions results in a reduction of the work force, procedures for layoff apply.
4. Appointing authorities must first determine whether or not a valid reason for layoffs or job abolishments exists.
5. Only state agencies, not counties, must file a statement of rationale and supporting documentation with the DAS prior to sending the notice of abolishment. O.R.C. § 124.321(B)(1). HB 1, July 1, 2009.

B. Supporting Documentation for Abolishments and Layoffs.

Previously, DAS required, for state and county agencies, a statement or rationale be prepared and filed with DAS. This requirement no longer exists. It is evidence of good faith and business-related reasons for abolishments of layoffs. Preparation of the reasons/rationale and supporting evidence is beneficial for a SPBR or CSC hearing and a best practices step that will benefit an appointing authority in other ways.

1. Layoff for lack of work - Documents should provide statistical data covering a reasonable period that indicates the decrease in workload. For example, data for a County DJFS showing a 20% decrease in claims filed to justify laying off 20% of the staff. Data showing decreases in housing starts and inspections to justify layoff of inspectors.
2. Layoff for lack of funds - Documents should show projected revenues and projected expenditures that would then, if continued, result in a projected deficit. The deficit should reflect the number of positions to be laid off and how the action will produce the necessary savings. Projections of deficits are only needed.
3. 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.

Case regarding proof of financial need.

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. The Court held that financial

records or other factual basis supporting the rationale would be adequate. *Cummings v. Youngstown*, , No. 86 CA 71 (Mahoning, 1987).

C. Procedural and Substantive Rules and Standards for Abolishments.

1. 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: reorganization for the efficient operation of the appointing authority; reasons of economy; or a lack of work expected to last one year or longer.
2. 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.
3. Layoffs and abolishments may only be affirmed if the appointing authority has substantially complied with procedural requirements set forth in § 124.321 of the Revised Code, et seq., and the administrative rules promulgated pursuant to these statutes.
4. Certification of lack of funds or lack of work is not required for job abolishments.
5. When a position is abolished or an employee is laid off, displacement rights, as set forth in division (C) of section 124.321 of the Ohio Revised Code, shall be afforded to the employee.

D. Layoffs Following Abolishments. O.R.C. § 124.321(D)(3).

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 five modifications

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 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.
5. If there is no successively lower position the employee may displace the least senior person (assuming that person has fewer retention points) in a position that the employee held within the past 3 years if the employee still meets the minimum qualifications for the position.

E. Court Application of Standards for Abolishment - Analysis for “Efficiency.”

Evidence was sufficient to support State Personnel Board of Review decision that county children services board failed to meet its burden of proving that three jobs in its department were abolished as part of reorganization for increased “efficiency.” and, therefore, employees’ reinstatement was warranted; evidence indicated that the underlying reasons were the economy. There was no analysis done to show any efficiency would be or was gained. O.A.C. 124-7-01(A)(1). *Summit Cty. Children Servs. Bd. v. State Personnel Board of Review*, 2011 WL 2112536 (Ohio App. 10 Dist.). 2011-Ohio-2543.

County DJFS incurred a budget reduction of approximately 40%, necessitating a reduction in staff and reorganization. The SPBR hearing focused on the impact of reduced funding, the cost savings of the staff reductions, efficiency and adherence to civil service layoff procedures. In order to abolish a position, three tests must be met: (1) the position must be permanently deleted from the organization; (2) the deletion must be made due to a lack of a continued need for the position, expected to last over one year; and (3) 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. Evidence supported a justification for the abolishment. *Wahlers v. Ottawa County Department of Job and Family Services*, 11-ABL-05-0171 (SERB 2011).

Nowels v. Ohio Department of Health, 10th Dist. Case No. 11AP-975 (April 26, 2012), 2012-Ohio-1844. Importance of properly citing to rationale.

Appellant was employed by the Ohio Department of Health (ODH) as a Syphilis Elimination Project Coordinator, funded entirely by federal money, the total federal grant money for the program increased slightly between 2009 and 2010.

The statement of rationale stated that the elimination of the position was sought “as part of an overall reorganization for reasons of *economy*”.

Appellant appealed. SPBR upheld the layoff. Common Pleas Court affirmed. SPBR and the Common Pleas Court held that ODH supported its statement of

rationale where it was able to find more effectual economic means of using the money. Upon eliminating Appellant's position, ODH would use the freed up funds from the abolishment to pay salaries of other individuals paid from another budget. That, in turn, freed up funds from the other budget, which allowed ODH to increase the funding to local health departments. The Tenth District reversed and held that ODH did not sustain its burden to prove the sufficiency of its substantive reason for abolishing the position.

The Ohio Supreme Court in *Penrod v. Ohio Dept. of Admin. Services*, 113 Ohio St.3d 239, 864 N.E.2d 79 (2007), clarified that an appointing authority may not alter its rationale after the fact, by pointing to facts that support the abolishment for a different reason than the reason(s) submitted to DAS. Thus, the issue for the Tenth District was whether ODH's plan to free up funds was an actual savings even though ODH did not reduce its expenditures. The Court defined "savings" as "a specific and calculable reduction in the appointing authority's expenditures." The Court noted the absence of case law affirming the abolishment of a position for reasons of economy absent evidence that there was an actual reduction in expenditures.

The money realized from abolishing Appellant's position was reallocated, which is a reorganization for purposes of **efficiency**, but not for purposes of **economy**. Allowing ODH to abolish this position for reasons of economy would result in any job abolishment being sufficiently justified since any job abolishment results in salary and benefits reductions. "Where an appointing authority is not facing reduced appropriations or budget deficiency, it must justify a job abolishment based on estimated savings beyond the position's salary and benefits" in order to claim a necessity for reasons of economy.

City is not required to prove that abolishment of an assistant police chief position resulted in increased economy of efficiency, only need to establish that decision was designed to promote efficiency. *McAlpin v. Shirey*, 121 Ohio App. 3d 68. (Ohio App. 1st Dist., 6-25-97).

While proper job abolishment respecting civil service position may occur pursuant to merger of positions when reorganization has taken place for reasons of efficiency and economy, job is not abolished under circumstances in which appointing authority simply transfers that job's duties to new employee to perform. *Swepton v. Bd. of Tax Appeals of Ohio* (Ohio App. 10 Dist., 07-27-1993) 89 Ohio App.3d 629, 626 N.E.2d 1006, motion overruled 68 Ohio St.3d 1410, 623 N.E.2d 567.

Abolishment of civil service positions in order to contract work to private employers is not unlawful when done for reasons of economy. *Carter v. Ohio Dept. of Health* (Ohio 1986) 28 Ohio St.3d 463, 504 N.E.2d 1108.

Pursuant to reorganization of a city engineering department, abolishment of the position of chief technical aide and creation of the position of planner is proper where the position of chief technical aid is no longer necessary based upon the time sheets revealing (1) a steady increase over two years of time spent by the aide on planning commission duties, most recently an average of 34 per cent; and (2) many days when planning responsibilities occupied most, if not all, of the aide's time. *Hehl v. City of Avon Lake Civil Service Com'n* (Ohio App. 9 Dist., Lorain, 04-27-1994) No. 93CA005656, 1994 WL 149238, Unreported, dismissed, appeal not allowed 70 Ohio St.3d 1454, 639 N.E.2d 793.

O.R.C. § 124.321(D) does not permit an appointing authority to "abolish" a classified position in order to render it an unclassified position. *Griffith v. Department of Youth Services* (Franklin 1985) 28 Ohio App.3d 76, 502 N.E.2d 239, 28 O.B.R. 117.

IV. PAPER LAYOFFS O.R.C. § 124.321(E).

Appointing authorities may establish a "paper layoff" process in which employees to be laid off or displaced may be required, before the date of the paper layoff, to pre-select their options for displacing other employees. O.R.C. § 124.321(E).

V. CLASSIFICATIONS AND ORDER OF LAYOFF.

A. Employer Determines Classifications and Number of Employees for Layoff. O.R.C. § 124.322.

The statute clearly establishes that the appointing authority determines the classifications for layoff or abolishment. Only a showing of abuse of discretion will set aside this determination. If the layoff is due to an abolishment, the abolishment is subject to scrutiny.

That statute also clearly authorizes the appointing authority determine the number of employees. The factors, or rationale, for that number must be justified.

Case regarding classification.

O.R.C. § 124.322 requires that layoffs be made according to seniority within classifications of the appointing authority considered as a whole; it is irrelevant that under some accounting system a particular division of the appointing authority is financially self-sustaining. *Tolson v. City of Middletown* (Butler 1985) 24 Ohio App.3d 162, 493 N.E.2d 988.

B. Retention Points. O.R.C. § 124.325..

Retention points - The order of layoffs must be based in part on length of service. Retention points are calculated at 1 point for each pay period in which the employee received pay for full-time positions or .5 points for part-time positions.

In those agencies, departments where there has been a merger between city and county office employees will be credited their continuous service prior to the merger. O.R.C. § 124.325(D).

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 a layoff order. *Metzgar v. Summit County Children’s Service Bd.* (Franklin 1982), 8 Ohio App. 168.

Efficiency in service, i.e. performance evaluations, may also be considered when determining the order of layoffs. O.R.C. § 124.322 (A).

Cases Regarding Calculation of Retention Points.

Municipal Service Commission properly verified the city’s calculation of retention points regarding City’s Director of Operations who was laid off from his position as a result of having the lowest retention points among the employees considered for layoffs. Statute stated that the order of layoffs shall be based in part on length of service and may include efficiency in service, appointment type, or similar other factors, and another statute required Director Administrative Services to verify the retention points, which should reflect the length of continuous service, and efficiency in service. *Tempesta v. Warren* (Ohio App. 11 Dist., Trumbull, 12-23-2010) No. 2010-T-0054, 2010-Ohio-6434, 2010 WL 5550222, Unreported, cause dismissed 128 Ohio St.3d 1467, 945 N.E.2d 1063, 2011-Ohio-1989.

C. Appointment Categories, Order of Layoff O.R.C. § 124.323.

The appointment categories, although not recognized as such outside the layoff provisions, realistically identify part and full time as an order for layoff. This provision serves to protect the full-time employees.

Although there are no reported decisions to date interpreting the part-time status, the statute only requires the order of the layoff, by appointment category, in the order listed.

1. Part-time probationary.
2. Full-time probationary.
3. Part-time permanent.
4. Full-time permanent.

D. Part-time Employees.

The provisions of O.R.C. § 124.323 do not indicate or require that all part-time employees in all classifications of an appointing authority must be eliminated or laid off prior to the layoff of permanent full-time employees. The order of categories for layoff (and later displacement) addresses the employees (part-time then full-time) in the affected classifications. Also, other sections of layoff procedures identify that specific positions may be abolished or incumbent laid off.

If an appointing authority decides to retain part-time employees some factors to consider are:

1. Differences in position duties/classifications between full-time positions abolished/laid off and part-time positions retained.
2. Economic and organizational reasons to maintain the part-time personnel.
3. Employee impact/morale.

VI. DISPLACEMENT/BUMPING RIGHTS OF LAID-OFF EMPLOYEES O.R.C. § 124.324

There is some confusion between layoff/displacement provisions following an “abolishment” in O.R.C. § 124.321(D)(3) (discussed above) and the general displacement provisions of O.R.C. § 124.324 which addresses the displacement rights of a “laid off” employee. The abolishment of a position under O.R.C. § 124.321 allows the affected employee the right to assume a vacant position in their classification of class series. The displacement provisions under O.R.C. § 124.324 do not include the option to assume vacant positions in the classification of classification series. The assumption is that if the layoff is for lack of work or funds then vacant positions would not likely exist.

A. Order of Displacement for Laid Off Employees. (O.R.C. § 124.324(A)(1)-(3)).

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 as long as the employee meets the minimum qualifications or last held that classification more than three years prior to the date the employee was laid off.

**B. Displacement within the Same Appointing Authority and Layoff Jurisdiction.
O.R.C. § 124.324(B).**

1. After being laid off from the classified civil service, an employee shall displace another employee within the same appointing authority and layoff jurisdiction (see below) in the following manner:
 - a. Each laid-off employee possessing more retention points shall displace the employee with the fewest retention points in the next lower classification or successively lower classification in the same series.
 - b. Employees displaced by an employee with more retention points shall displace the employee with the fewest retention points in the next lower classification or successively lower classification in the same series. This process shall continue, if necessary, until the employee with the fewest retention points in the lowest classification of the classification series of the same appointing authority has been reached and, if necessary, laid off.
2. Determination of “appointing authority” is dependent upon the statutory grant of authority. For instance, in cities this can be established by charter or statute. The clerks in one “office” could be, or not, separate from others in another “office” depending on their appointing authority, i.e. safety vs. service departments.

County Commissioners have the authority to create various “departments, divisions and sections...” O.R.C. § 302.12(A). These may include for example buildings, inspections, EMS, 911, sanitary engineer, code compliance, IT, etc. The “appointing authority” for displacement will require an examination of how the County Commissioners structured these functional units and what Revised Code provisions were utilized.

C. Notice of Intention to Displace, 5 Days. O.R.C. § 124.324(C).

Employees must notify the appointing authority of their intention to exercise their displacement rights within five (5) days after receiving notice of layoff.

If a paper layoff process has been instituted, the notice requirements under the paper layoff process must be followed in lieu of the statutory five day notice.

D. Limits on Displacement. O.R.C. § 124.324(D).

Employees may not displace to positions with specific minimum qualifications or bona fide occupational qualifications unless they meet those requirements.

E. Retention Points. O.R.C. § 124.325(A).

The statute utilizes the term “retention points” which essentially mean seniority (length of service) and merit, efficiency in service, or similar other factors deemed appropriate by the director (or CSC/city).

The retention points for length services are to be based on rule (procedures) established by DAS or the CSC and are typically based on a set number of points for a defined period of time, i.e. four points per calendar year or protected. Verification of retention points by DAS for state employees is required. Civil service commissions have the responsibility to verify lists at the city or townships.

Efficiency in service credit may not exceed 10% of the total retention points.

If two or more employees have identical retention points length of continuous service becomes the tie breaker.

F. Mergers of City and County Offices, Functions or Duties. O.R.C. § 124.325(D).

When cities and counties merge, functions or duties are merged, or there is a transfer of functions or duties between a city and county, the new employer of the affected employee must treat the employee’s prior service with a former employer “as if it had been served with the new employer.”

G. Layoff Jurisdictions. O.R.C. § 124.326.

The layoff jurisdictions for the order of layoff, displacement, reinstatement and reemployment are:

1. State - districts as established by DAS.
2. County - Within each county appointing authority.

3. Universities/jurisdictions - by institution.

No reference is made for cities or townships.

VII. LAYOFF LISTS AND REINSTATEMENT RIGHTS O.R.C. § 124.327.

A. Layoff Lists of Employees. 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 as determined under O.R.C. § 124.323.
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 the layoff lists of their own appointing authority. O.R.C. § 124.327(I). “Layoff jurisdiction” provisions have no practical application to county, city, or township layoffs.

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

1. Rights within the agency from which the employee was laid off.
 - a. Reinstatement rights last one year.
 - b. During the one year period, 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 who are qualified for that classification are reinstated or decline the position when it is offered. O.R.C. § 124.327(B).
2. Rights with other agencies within the layoff jurisdiction (State agencies only). O.R.C. § 124.327(C).
 - a. Reinstatement rights only exist for the same classification in the other agencies of the State if the employee meets all minimum

- qualifications for the classification and it is reviewed for validity by DAS.
- b. Reinstatement rights only arise after layoff lists for the employees appointing authority have been exhausted.
3. Reinstatement procedures. O.R.C. § 124.327(D)-(I).
- 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) and (E).
- b. Employees who do not exercise their displacement rights under O.R.C. § 124.324 or decline reinstatement to a position in a lower classification in their classification (not including part-time positions) shall only be entitled to reinstatement in the classification from which the employee was laid off. O.R.C. § 124.327(F) and (G).
4. Probationary period. O.R.C. § 124.327(H)

There shall be no probationary period for employee 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).

Case regarding reinstatement and probationary period.

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. *Bashford v. City of Portsmouth* (1990), 52 Ohio Est. 195.

VIII. APPEAL FROM LAYOFF O.R.C. § 124.328

A. Appeals for Classified Employees O.R.C. § 124.328 which reads:

“A classified employee may appeal a layoff, or a displacement as a result of a layoff, to the SPBR. 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 displace. In cases involving the laying off of classified employees, the affected employee or the appointing authority may appeal the decision of the state personnel board of review to the court of common pleas in accordance with O.R.C. § 119.12.”

Employees (only classified) may appeal abolishments of their position, their layoff, or their displacements, to the SPBR, or the civil service commission. Following revision in HB 187 both employees and appointing authorities may appeal to courts.

B. Appeals Cases.

1. Unclassified employees - no right of appeal. 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. *Christophel v. Kukulinsky*, 61 F.3d 479 (C.A. 6 (Ohio) 1995).
2. Time to appeal - calendar days. The ten days allowed by O.R.C. § 124.328 for filing an appeal are calendar days, not working days. *Sekerak v. Fairhill Mental Health Center* (Ohio 1986) 25 Ohio St.3d 38, 495 N.E.2d 14, 25 O.B.R. 64.
3. Appeal from SPBR or CSC. Classified employees in the “state service” who have been laid off must appeal orders of the state personnel board of review to the Franklin County Court of Common Pleas; classified employees of a municipal civil service commission who have been laid off must appeal to the common pleas court in the county where they reside. *Ludwig v. Willoughby- Eastlake City School Dist. Bd. of Educ.* (Lake 1983) 10 Ohio App.3d 229, 461 N.E.2d 919, 10 O.B.R. 324.
4. Abolishment of position - appeal of decision. Ten-day period for employee’s filing of appeal with State Personnel Board of Review (SPBR), challenging abolishment of her position with county agency, ran from time employee’s position was abolished, despite argument that employee did not have grounds for appeal until her coworker was rehired after having also been laid off; employee’s appeal could only be an appeal of abolishment of her job or termination of her employment, not hiring of someone else to a different job. O.A.C. 124-1-03(B). *Brush v. Licking Cty. Child Support Enforcement Agency*, 2011 WL 3557185 (Ohio App. 10 Dist.). 2011-Ohio-399.

5. Appeal dismissal - layoff not a failure to attend appeal. Where an employee neither attends a hearing nor offers any excuse for his absence, a motion to dismiss for failure to appear should be granted. *Jacko v Stillwater Health Center*, PBR 82-LAY-03-0876 (1982).

C. Layoffs of City Police and Fire Departments Employees. O.R.C. § 124.37.

It is advisable to utilize the same standards for rationale for layoffs or abolishments in city or township fire or police department. The procedure for layoff places the least senior person on layoff. The police-fire provision does not contemplate abolishments. Abolishment remains an option especially for restructuring. However, the manpower allocation O.R.C. § 137.05, discussed below, must be addressed in a layoff.

1. 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.
2. Layoff affirmed - reduction of pay rate. City was not required to follow statutory disciplinary proceedings in order to reduce police officer's pay rate; such reductions by demotion were permitted when it became necessary through lack of funds or work. R.C. 124.37(A). *Deem v. Fairview Park*, 2011 WL 5507393 (Ohio App. 8 Dist.), 2011-Ohio-5836.
3. 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".
4. 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 (mandamus), 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).

5. Fire department layoff - Shortest length of service. Statute providing that city is required, when making demotions in fire department, to first lay off “the youngest employee in point of service” and that when city abolishes position above rank or regular fireman, the “youngest officer in point of service in the next lower rank” is to be demoted, refers to employee who has the shortest length of service at a particular rank, not the employee at a given rank who has the shortest length of service in the department overall. R.C. 124.37. When a fire department employee is demoted to the next lower rank because his position has been abolished, and there is not a vacancy at that next lower rank, he bumps the least senior member at that lower rank, who must be demoted to the next lower rank. R.C. 124.321. *Norris v. Elyria*, 195 Ohio App.3d 256, 959 N.E.2d 592, 2011-Ohio-4169.
6. Notice of layoff - Sufficiency of service. Where a layoff notice sent to city employees contains the city auditor’s statement, and such notice is copied and contemporaneously sent to the civil service board, sufficient compliance with O.R.C. § 124.321(B) exists, and a layoff of firemen for lack of funds is valid. *Aksterowicz v. Lancaster*, No. 43-CA-88 (5th Dist Ct App, Fairfield, 6-7-89).

IX. GOOD FAITH STANDARD AND LAYOFFS.

D. Good Faith Standard.

Both the statute and administrative code require good faith in abolishments and layoffs. O.R.C. § 124.321(1)(2)(b)(i)[abolishments] and O.A.C. 124-7-01. The SPBR rule reads:

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.

E. Cases Applying Good Faith Standard.

1. Burden to establish good faith. 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. *Esselburne v. Ohio Dept. of Agriculture* (Franklin 1988), 49 Ohio App. 37.
2. Burden to establish bad faith. 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. *Bispeck v. Trumbull County Bd. of Commissioners* (1988), 37 Ohio St.3d.
3. Scrutiny's of action. 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. *Feeney v. Ohio Dept. of Public Safety*, 1996 Ohio App. Lexis 4550 (10th Dist. Ct. App. 1996).
4. Personal or political motivation bad faith. Finding of bad faith by employer is not limited to situations in which layoff 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 "handpicked" 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. *Blinn v. Ohio Bureau of Employment Services*, 29 Ohio App. 3d 77 (10th Dist. Ct. App. 1985). See also State ex rel. *Gould v. Ohio Bureau of Employment Services* (1985) 28 Ohio App.3d 30.
5. Timing of abolishments - bad faith. The Ohio Department of Taxation ("ODT") reorganized, creating separate audit and taxpayer services divisions. Pursuant to the reorganization, DAS created a new Tax Auditor

Classification series that included a newly created Tax Auditor Agent Manager position. Although the audit division began operating in July 2001, the employees were classified in the “old Tax Commissioner Agent and Tax Commissioner Supervisor series because the new classification series of Tax Auditor Agent and Supervisor series were not effective until October 10, 2001.” Before creating the new audit division, the Tax Commissioner assured employees no job losses or decreases in pay would occur due to the reorganization. After the new classifications became effective in October 2001, ODT submitted a statement of rationale to DAS to abolish various positions, including Henschen's Tax Commissioner Supervisor 3 position. ODT purposefully waited until after the new audit division classifications were effective and filled to proceed with the abolishments. Had the abolishments occurred before the new classifications were effective, employees with superior retention points could have displaced those employees with less retention points who were hired to work in the new audit series but were still classified under the old series. Noting O.A.C. 124-7-01, the Court stated “[t]he evidence presented established that the abolishments were delayed until after the new classifications in the Tax Auditor Agent series were created, effective, and filled. By doing so, ODT eliminated the possibility of any displacement rights of the holders of the abolished positions” and thus bad faith was shown. *Henschen v. Ohio Dept. of Taxation*, 10th Dist. No. 06AP-341, 2007-Ohio-2528.

X. SUBSTANTIAL COMPLIANCE WITH PROCEDURES - CASES

In order for a layoff of an employee in the classified service to be effective, the appointing authority must substantially comply with the procedural requirements promulgated by the director of administrative services. *State ex rel. Potten v. Kuth* (Ohio, 03-19-1980) 61 Ohio St.2d 321, 401 N.E.2d 929, 15 O.O.3d 391.

The Supreme Court of Ohio stated SPBR may “disaffirm layoff orders not only where it finds that the appointing authority acted arbitrarily, unreasonably, or unlawfully, but also where it finds from an independent review of the layoff that the decisions made and actions taken by the appointing authority regarding the layoff of employees were improper or unnecessary.” *State ex ref. Bispeck v. Bd. of Commrs. of Trumbull Cty.* (1988), 37 Ohio St.3d 26, 29, quoting *State ex ref. Ogan v. Teater* (1978), 54 Ohio St.2d 235, 245.

The Supreme Court, however, also stated “we should be cautious not to pluck a few statements from *Bispeck* and apply them overly literally.” *Penrod v. Ohio Dept of Adm. Servs.*, 113 Ohio St.3d 239, 2007-Ohio-1688, *Bispeck* and *Penrod* both concerned an agency's substantial compliance with the substantive aspects of the statutes and regulations governing the implementation of abolishments. An agency's failure to comply with a statutory requirement for implementing an abolishment “need not rise to

the level of bad faith for the abolishment to be overturned; it is sufficient that [the agency] failed to comply with the statutory requirements.”

The Warren County courts found that the municipal civil service commission properly adopted and used Revised Code and Administrative Code when determining whether non-chartered city’s layoff of employee followed proper procedure, despite lack of specific procedure governing layoff seniority calculations, as preamble to commission’s rules and regulations stated that state rules took precedence over municipal rules. *City of Warren v. Warren Municipal Civil Service Com’n*, 2002, 2002-Ohio-6929, 2002 WL 31813104, Unreported.

Municipal civil service commission’s correction of non-chartered city employee’s verified retention points was not arbitrary and capricious, as city provided original incorrect number to commission, initial documents did not contain employee’s service as deputy clerk, and, once employee raised issue of miscalculation on appeal, commission became aware of the previous service and proceeded to correct miscalculation. *City of Warren v. Warren Municipal Civil Service Com’n*, 2002, 2002-Ohio-6929, 2002 WL 31813104, Unreported.

Evidence was sufficient to support finding that non-chartered city employee’s prior work as deputy clerk was as a continuous, full-time employee and thus that she had accumulated sufficient retention points to set aside layoff, although appointment was limited to two years each term; evidence indicated that employee worked regular schedule of 26 consecutive bi- weekly pay periods, and that employee began working as secretary for administration department on day after term as deputy clerk expired. *City of Warren v. Warren Municipal Civil Service Com’n*, 2002, 2002-Ohio- 6929, 2002 WL 31813104, Unreported.

XI. CHECKLIST OF VARIOUS CBA PROVISIONS

Does collective bargaining agreement “completely” replace the civil service?

Review various collective bargaining provisions, including:

A. Layoff Provisions.

1. Displacement from or to non-bargaining unit positions “Chinese Wall” provision.
2. Seniority only layoff
3. Appeals through grievant/arbitration procedure.

B. Seniority Provisions - Versions.

1. Bargaining unit.
2. Classification.
3. Service date with employer.

4. Does the contract contain language excluding “prior service” definition of civil service law R.C. §9.84 or does prior service count in seniority?
5. Seniority for union representatives (super seniority).

C. Proof.

1. Burden of proof on employer for establishing need for and procedural requirements of layoff.
2. Burden of proof on employees (union) to establish any allegations of bad faith, disparate treatment, subterfuge or procedural error

D. Duty to Negotiate/Discuss Layoff.

Unless there is specific language in the CBA there is no duty to negotiate the decision to layoff but ... wise to review with Union, opportunity to discuss.

Although O.R.C. section 4117.08(C)(5) gives the employer the right to layoff, this right is limited by other obligations set forth in Chapter 4117 of the Ohio Revised Code. Even if layoffs are effectuated under Chapter 124 of the Ohio Revised Code, the employer must comply with the bargaining requirements under State collective bargaining statute. *In re: Cuyahoga County Board of Commissioners*, SERB 89-006 (3/15/89).

The General Assembly did not contemplate that unions would become equal partners in the running of the enterprise in which they are employed: RC 4117.08(A) and 4117.08(C), read together, are an effort to somehow balance the need of public employers to make management decisions against the right of public employees to bargain about their working conditions, and this effort is not realized by requiring bargaining over every management decision that affects working conditions. *In re: SERB v. Youngstown City School Dist. Bd. of Ed.*, SERB 95-010 (6-30-95).

E. Bumping/Displacement.

Review bumping or displacement provisions of CBA as there may be limits:

1. Between bargaining units.
2. From supervisor to bargaining unit.
3. From bargaining unit to non-bargaining unit.
4. Ability to perform.

F. Hidden Provisions in CBAs.

Other, hidden provisions/clauses in CBAs which may create substantive issues:

1. Minimum staffing/manning clauses (example language).

Article 19 Minimum Staffing Each shift in the jail and each shift on road duty shall be staffed with at least one (1) supervisor and four (4) deputies. The Employer will make every effort to maintain the minimum staffing level. However, it is expected that occasional lapses may occur throughout the next three (3) years that shall be reasonably construed by the Union. Should the absence of an Employee in the jail or on the road be the cause of mandated overtime, the mandated Employee shall be from the classification that caused the overtime.

2. Use or restrictions of use of non-bargaining unit employees: volunteers, part-time employees, intermittent employees.
3. Zipper clauses.
4. Successor provisions.
5. Subcontracting provisions (example provisions).

Article 5 Subcontracting During the term of this Agreement, the Employer will not contract or subcontract work normally performed by employees covered by this Agreement if employees are on layoff or would be placed on layoff, unless the affected employees would be unable to perform the work in question due to lack of skills, equipment, schedule requirements or work volume.

Article 14 Special Deputies The parties agree that the Employer may continue to utilize special deputies for special details, such as parades, fairs, special traffic control, scheduled educational events, and declared emergencies in which regular forces are not deemed adequate to fulfill the Employer's mission. Transportation of prisoners shall not be treated as special detail.

6. Non-discrimination provisions in CBA.
7. Choice of civil service or collective bargaining agreement.

XII. LAYOFFS AND COLLECTIVE BARGAINING AGREEMENTS - CASES

Most collective bargaining agreements (“CBA”) have provisions for layoffs of employees. The language of the CBA generally follows the statutory process prior to the modifications in HB 187 (July 1, 2007 effective date). Also, some CBA’s do not include all the steps or procedures in statutory layoff provisions.

The standards and substantiation for layoffs should be explained and supported when presenting the employer's position at arbitration. Supporting case law is also important to submit as generally arbitrators will follow these standards and precedent.

Appeals, or motion to vacate (O.R.C. § 2711) of an arbitrations decision are available. The standard for a motion to vacate is higher than appeals under O.R.C. § 124.328 and O.R.C. § 119.12.

Cases applying collective bargaining agreements and conflict with civil service law:

Layoff provisions apply unless CBA expressly contains procedure. Appellants were a local union of public school employees and certain non-teaching employees of a school district. Appellees were the members of the school district's board. As the result of a contract with a private company, appellees resolved to abolish appellants' positions, and lay them off. Appellants then filed a grievance, alleging appellees violated a collective bargaining agreement in contracting out the work. Appellee superintendent denied the grievance, and the matter was submitted to arbitration. Unsatisfied by arbitration, appellants filed a complaint for a writ of mandamus, seeking to compel appellees to reinstate appellants. The court of appeals held that appellees' actions were proper under the agreement, and upheld appellees' decision to abolish the positions and lay off appellants. Appellants sought review. The Supreme Court reversed, granted the writ compelling the reinstatement of appellant employees, and remanded for determination of back pay and lost fringe benefits, as the collective bargaining agreement failed to specifically show that the party intended to preempt statutory rights. *State ex. Rel. OAPSE/AFSCME v. Batavia Local School Dist.* 89 Ohio St. 3d 191 (2000).

CBA prevails over conflicting laws. The provisions of a collective bargaining agreement entered into pursuant to O.R.C. Ch 4117 prevail over conflicting laws, including municipal home-rule charters enacted pursuant to Ohio Court Art XVIII §7, except for those laws specifically exempted by O.R.C. 4117.10(A). *Cincinnati v. Ohio Council 8, American Fedn. of State, Cty. & Mun. Emp., AFL-CIO* (Ohio 1991.) 61 Ohio St.3d 658, 576 N.E.2d 745, 1991 SERB 4-87.

Right to subcontract for "efficiency." Generally public employers have authority to subcontract when it can be shown that it is for "efficient operation" (RC § 124.321). The issue becomes more difficult under a collective bargaining agreement if the layoff language does not allow or provide for layoffs for the efficiency of operations. *CWA v. OSU* 24 Oh. St. 3d 191 (1986)

CBA prevails over conflicting law. Under O.R.C. § 4117.10, provisions of a collective bargaining agreement prevail over conflicting provisions in O.R.C. § 124.27 or charter municipality civil service commission rules. *State, ex rel. City of Canfield v. Frost* (Ohio, 1990) 53 Ohio St.3d 13, 557 N.E.2d 1206.

Employer who must follow CBA may not need to file statement of rationale. When the sole issue before an arbitrator is whether a sheriff acted properly in laying off employees due to lack of sufficient funds pursuant a collective bargaining agreement, an award of the grievance based up the failure of the sheriff to file a statement of rationale and supporting documents with the director of administrative services pursuant to O.R.C. § 124.321(B) is based upon a matter not submitted to him and is error. *Kelly v FOP/Ohio Labor Counsel, Inc.*, No. 94-CA-53, 1995 WL 63884 (2d Dist. Ct. App, Clark, 1-17-95).

CSC hears appeal when CBA silent. City civil service commission had jurisdiction to consider union firefighter's appeal from city's decision to layoff firefighters, even though collective bargaining agreement between city and firefighters' union provided for final and binding arbitration, where, because statutory rights were excluded or omitted from agreement collective bargaining agreement did not explicitly demonstrate intent of parties to preempt firefighters' statutory rights. *Dryden v. New Philadelphia Civil Service Com'n* (Ohio App. 5 Dist., Tuscarawas, 07-25-2005) No. 2005AP020019, 2005-Ohio-3919, 2005 WL 1802765. Unreported.

Arbitrator restricted to CBA. Arbitrator's decision vacated when he went outside terms of CBA and found that, in his opinion, the lack of funding for a Sheriff's Office by the County violated state law. *FOP/OLC v. Perry County Commissioners, et al.* 2003 Ohio 4038, 2003 Ohio App. Lexis 3601 (7-24-03).

Removal of the "Chinese wall" for displacement. Collective bargaining agreement between city and municipal employees' union, prohibiting senior non-bargaining unit employees from exercising "bumping rights" against less-senior employees of union's bargaining unit to avoid layoff, did not automatically modify, as to employees who were members of a second union, city civil service commission rule allowing senior employees to bump less senior employees, and thus employees represented by second union could exercise bumping rights against less-senior employees represented by second union; collective bargaining agreement could not modify city rules as to employees who were not parties to the agreement. O.R.C. § 4117.10(A). *Zupp v. Mun. Civ. Serv. Comm.*, 187 Ohio App.3d 614, 933 N.E.2d 281 (Ohio App. 10 Dist.). 2010-Ohio-26.

The court in *State ex rel. Robinson v. Dayton*, 2012-Ohio-5800, ¶ 39, 984 N.E.2d 353, 363 noted that *Zupp* pertained to employees who were laid off and declined to apply the principles in *Zupp* to those discharged or otherwise disciplined.

Injunctive relief not appropriate. Order providing that village and village mayor submit village safety workers' union's claims for injunctive relief did not violate rule requiring that no final judgment be entered before time for village and mayor to file answer has expired; trial court did not address union's claims for declaratory relief, but only ruled on union's claims for injunctive relief because collective bargaining agreement provided remedy for parties' dispute in form of grievance procedure and binding arbitration. Rules

Civ. Proc., Rules 7(A), 12(A)(1). *Mingo Junction Safety Forces Assoc. Local 1 v. Chappano*, 2011 WL 2671500 (Ohio App. 7 Dist.), 2011-Ohio-3401.

Last chance agreement and layoff. Employee laid off while serving under the terms of a last chance agreement (“LCA”) and included in a bargaining unit with a union contract (“CBA”) court ruled that his only remedy was under grievance - arbitration procedure. The LCA was silent on the matter of layoff, therefore CBA provisions control as exclusive remedy. *Gindin v. W. Reserve Psychiatric Hosp.* 10th Dist. No. OOAP-912 (6-14-2001) and *Cerrone v. University. Of Toledo* 10th Dist. 2012-Ohio-953 (3-6-2012).

XIII. COST SAVINGS AND WORK WEEK SCHEDULES

A. Mandatory Cost Savings Program (CSP) - O.R.C. § 124.393.

Counties may implement a mandatory cost savings program beginning July 1, 2009. O.R.C. § 124.393.

The mandatory cost savings program permits counties, municipalities and townships to implement furloughs of employees not subject to a collective bargaining agreement for up to 80 hours between June 30 and July 1 of each year in the event of a fiscal emergency.

Appeals of reductions in pay or work week implemented under cost savings days, furlough provisions, and reduced work week programs provisions of O.R.C. §§ 124.393 or 124.394 are not appealable under the discipline provisions of civil service law, O.R.C. § 124.34. No independent appeal is established in either provision.

B. Modified Work Week Schedule Programs - O.R.C. § 124.394.

This provision addresses modified work week schedule programs based on a fiscal emergency. The modified work week program, similar to the cost savings programs, is not a modification or reduction in pay that can be appealed to the State Personnel Board of Review (SPBR) if an affected employee is in the classified civil service. O.R.C. § 124.34(A).

Pursuant to O.R.C. § 124.394, a county, township, or municipal corporation appointing authority may establish a modified work week schedule program applicable to its exempt employees. A modified work week schedule program can provide for a reduction from the usual number of hours worked during the week by exempt employees immediately before the establishment of the program. Revised Code § 124.394 allows the reduction in hours to include any number of hours so long as the reduction is not more than 50% of the usual hours worked by exempt employees immediately before the establishment of the program. Similar to O.R.C. § 124.393, the program can be administered differently among exempt

employees based on classifications, appointment categories, or other relevant distinctions.

C. Fiscal Emergency Under O.R.C. §§ 124.393 and 124.394.

A fiscal emergency is defined under the original language of O.R.C. § 124.393 as one or more of the following:

1. A fiscal emergency declared by the governor under O.R.C. § 126.05.
2. A fiscal watch or fiscal emergency was declared or determined under § 118.023 or § 118.04 of the R.C.
3. A lack of funds as defined by O.R.C. § 124.321.
4. For reasons of economy as defined by O.R.C. § 124.321.

XIV. ESTABLISHING THE FINANCIAL POSITION (LACK OF FUNDS)

A. Show trends of fiscal position (be ready to show details).

Show trend/projection based on current income and expenses.

1. Income/receipts (by category).
2. Expenses (including health insurance).
3. Carryover balances - trend (can show deficit spending).

B. Show reasonable efforts to project/reduce expenditures.

C. Show reasons for reduced income (e.g. tax receipts, investment income etc.).

D. Alternate income, efforts made to explore optional, additional sources of income (letters written, etc.).

E. Establish the amount of carryover needed.

F. Show reasons/restrictions on funds.

1. Capital funds.
2. Restricted funds.

G. Be ready to explain every expenditure.

H. Show efforts to reduce costs.

1. Positions not filled.
2. Equipment purchases delayed or canceled.

I. Demonstrate all calculations to determine employees to be laid off.

J. Show costs of layoff, including.

1. Unemployment compensation costs.
2. Conversion of :
 - a. Compensatory time.
 - b. Vacation leave.
 - c. Personal leave.

K. Be prepared to explain why some classifications or positions are not affected (to respond to allegations of targeting or disparate treatment).

L. For specific operations demonstrate why and how these are separately funded.

M. Policy: Explain why.

3. Funds not available.
4. Funds not transferred.

N. Tax or levy: efforts to increase income.

1. Tax.
2. Levy.
3. User fees.
4. Ballot efforts.

XV. PRACTICAL AND POLICY ISSUES

A. Be ready to explain/respond how the employer will continue to provide service.

B. Identify/ differentiate between.

1. Required (necessary) services.
2. Optional services.

C. Be prepared to explain why certain programs, functions were not affected.

1. Those positions which generate revenues.
2. Those positions independently financed.
3. Restricted funds: CDJFS, County Engineer, DARE, Public Defender, Veterans Service Commission, courts.
 - a. Separate fund.
 - b. Separate appointing authority.
 - c. Mandated services.

XVI. OPTIONS TO LAYOFF (INITIAL ISSUE: CLASSIFIED OR UNCLASSIFIED)

- A.** All unclassified subject to work schedule modification.
- B.** Reduced workweek.
- C.** Voluntary layoff (furlough).
- D.** Furlough/temporary layoff (widely used in private sector).
- E.** Reduction in benefits.
- F.** Part-time status.

XVII. WHAT ARE COMMON REASONS LAYOFFS ARE OVERTURNED?

- A.** Layoffs disproportionately affect bargaining unit classifications and not supervisory, managerial employees.
- B.** Failure to adequately prove or explain lack of funds.
- C.** Failure to establish what/why other funds not available.
- D.** Bad faith subterfuge: targeted positions; “favorites” not laid off.
- E.** Procedural flaws.
- F.** Transfer of employees from positions abolished/laid off.
- G.** Other, nonessential services continued.
- H.** Failure to establish policy reasons for decisions.
- I.** Compliance with procedural requirements.

XVIII. PRACTICE TIPS FOR PRESENTING A LAYOFF CASE (SPBR, CSC, OR ARBITRATION)

- A.** Use person best able to explain and respond to financials.
- B.** Show efforts made/considered for additional funds.
- C.** Have department head/elected official prepared to testify for the policy reasons.
- D.** Use the civil service case law to support your position and/or explain process.
- E.** Educate the arbitrators of the standard.
- F.** Exchange documents in advance of hearing.
- G.** Show efforts made to avoid/reduce layoffs.
- H.** Have case ready before layoff.
- I.** Take time rather than rush.
- J.** Get das review in advance.
- K.** Costs.
- L.** Use single charts and summaries and have supporting documents available.
- M.** Use best fiscal information.
- N.** Have economic expert ready to testify e.g. Auditor, fiscal officer, etc.

NOTICE OF LAYOFF/ABOLISHMENT

Dear _____:

This is to inform you that you are being laid off from your position of _____ due to (lack of work, lack of funds or job abolishment). Your retention points have been calculated as _____. This lay off is effective fourteen (14) days from the date of this letter or _____

You may have the ability to displace an employee who has fewer retention points in a lower classification. You must advise _____ in writing within five (5) clays of the date of this letter if you wish to exercise any displacement rights you may have.

You may appeal this lay off to the State Personnel Board of Review¹, 65 E. State Street., 12th Floor, Columbus, Ohio 43215, in writing, filed or postmarked within ten (10) days of the date of this letter.

You will be placed on a recall list and you will retain recall rights for one year from the date of the lay off. During this time it is your responsibility to make sure that the agency has a current address at which you may be contacted. Failure to maintain a current correct address may cause you to lose your reinstatement rights.

If you request it, a copy of O.A.C. 123:1-41² will be provided to you.

Your final pay check will include payment for all earned, unused vacation, personal leave and compensatory time.

¹ Substitute Civil Service Commission for city employees or grievance procedure if position included in collective bargaining agreement.

² Substitute O.R.C. provisions for city civil service or collective bargaining agreement where applicable.

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 (or City) 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.

Employee Signature Date

Print name

Accepted:

Appointing Authority Representatives

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