

[Cite as *Moore v. Ohio Dept. of Rehab. & Corr., Allen Corr. Inst.*, 2010-Ohio-5970.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

John D. Moore,	:	
	:	
Appellant-Appellant,	:	
	:	No. 10AP-381
v.	:	(C.P.C. No. 09CVF12-18054)
	:	
Dept. of Rehabilitation & Correction,	:	(REGULAR CALENDAR)
Allen Correctional Institution,	:	
	:	
Appellee-Appellee.	:	
	:	

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D E C I S I O N

Rendered on December 7, 2010

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*NcNees Wallace & Nurick LLC, Samuel N. Lillard, Brett E. Younkin, and Anthony D. Dick*, for appellant.

*Richard Cordray, Attorney General, Mahjabeen F. Qadir, and Joseph N. Rosenthal*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, John D. Moore ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas affirming an order by the State Personnel Board of Review ("SPBR"), in which SPBR affirmed appellant's layoff

from his employment with appellee, Ohio Department of Rehabilitation & Correction ("ODRC" or "appellee").

{¶2} Appellant began state employment in September 1984, working at ODRC's Allen Correctional Institution ("ACI") since March of 1987. At the time of the actions giving rise to this case, appellant was employed as a Correction Grievance Officer 2 ("CGO2").

{¶3} ODRC, like all other state agencies, was directed to reduce its budget for the 2008-2009 biennium as a result of budgetary hardships being experienced by the state. As part of this budget reduction, ODRC elected to lay off a number of employees in order to reduce payroll expenses.

{¶4} The first step in the layoff process was to identify unclassified positions to be revoked, in order to allow those in the revoked positions to exercise any rights to fall back into the classified service. At ACI, one of the unclassified positions identified for revocation was a deputy warden position held by Edwin Dunn ("Dunn"). In order to effectuate Dunn's fallback rights as guaranteed by R.C. 5120.382, a new CGO2 position was created at ACI, and Dunn exercised his fallback rights by taking that position.

{¶5} ODRC then moved to abolish one of the two CGO2 positions for reasons of economy. ODRC calculated the retention points for appellant and Dunn, and determined that Dunn had more retention points. As a result, Dunn had the right to displace appellant from his position. Dunn exercised that right, resulting in appellant being served with a notice that he was being laid off from his position. Appellant then took disability leave from his position at ACI.

{¶6} Appellant filed two separate appeals with SPBR, one an appeal of the abolishment of the CGO2 position, and one an appeal of his displacement and subsequent layoff from that position. Appellee filed a motion seeking dismissal of some of the claims asserted by appellant, arguing that: (1) appellant had no right to appeal the abolishment of the CGO2 position because he did not actually occupy that position; and (2) appellant could not assert that appellee acted in bad faith to challenge his displacement.

{¶7} A hearing was held before an Administrative Hearing Officer. Appellant argued at the hearing that ODRC acted in bad faith by moving Dunn into a position that had already been designated for abolishment, knowing that this would result in appellant being laid off instead of Dunn. Appellant also argued that the second CGO2 position into which Dunn was placed was not properly created, and Dunn could therefore not have displaced appellant from the first CGO2 position. Specifically, appellant argued that the second CGO2 position had been created by ODRC when new positions can only be created by the Department of Administrative Services ("DAS"), meaning the new position had not been created in accordance with the law.

{¶8} At the hearing, ODRC offered rebuttal testimony from Clarissa Harris ("Harris"), a Human Capital Management Senior Analyst with ODRC's central office. Harris explained ODRC's procedure for the creation of new positions within the agency, and testified that ODRC was not required to obtain DAS approval for the creation of new positions because ODRC is a "decentralized" agency. Harris further testified that ODRC's procedure was properly followed in the creation of the second CGO2 position. On cross-examination, Harris testified that, as a decentralized agency, DAS had

granted ODRC the authority to create new positions by granting specific ODRC employees with passwords necessary to create those positions within the Ohio Administrative Knowledge System ("OAKS"), the computer system used for personnel activities by the state of Ohio.

{¶9} After the hearing, the Administrative Hearing Officer issued a report and recommendation.<sup>1</sup> In the report, the hearing officer granted that portion of appellee's motion seeking dismissal of the abolishment appeal, but concluded that appellant was entitled to assert a bad faith claim in challenging his displacement. The hearing officer concluded that ODRC had properly followed the law when it revoked Dunn's unclassified status and placed him into the second CGO2 position, and properly followed the law in abolishing the second CGO2 position and determining that, due to Dunn's higher number of retention points, Dunn had the right to displace appellant from his position. The hearing officer's report did not specifically address appellant's argument that the second CGO2 position had not been properly created.

{¶10} The hearing officer concluded that appellant had failed to prove bad faith by a preponderance of the evidence, and that ODRC had established that it had properly followed all necessary procedures, and thus recommended that appellant's layoff be affirmed. Appellant filed objections to the hearing officer's report, continuing to argue that ODRC's placement of Dunn into a CGO2 position that had already been designated for abolishment showed that ODRC acted in bad faith, and also continuing

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<sup>1</sup> Two different hearing officers actually prepared the report – one for the portion of the hearing (which covered multiple employee appeals) regarding ODRC's rationale for the layoffs and the procedures followed for all of the layoffs, and one for that portion of the hearing unique to appellant's appeal.

to argue that the second CGO2 position had never been properly created. SPBR issued an order accepting the hearing officer's report and affirming appellant's layoff.

{¶11} Appellant appealed SPBR's order to the Franklin County Court of Common Pleas. After briefing by the parties, the court issued a decision affirming SPBR's order. With respect to appellant's argument regarding creation of the second CGO2 position, the court cited evidence in the record indicating that ODRC had the authority to create new positions with the tacit approval of DAS. The court found that this evidence constituted reliable, probative, and substantial evidence that the new position had been properly created. The court then concluded that appellant had failed to identify any statute or other authority that would prohibit DAS from delegating the authority to create new positions to other state agencies. Finally, the court cited the fact that the statutory language relied upon by appellant to support his argument that only DAS has the authority to create new positions, R.C. 124.09(D), speaks only in terms of DAS "approval" for the creation of new positions, not the actual creation of the positions.

{¶12} With respect to appellant's argument that ODRC acted in bad faith, the court determined that appellant failed to establish that ODRC's actions were taken for the purpose of subverting the civil service system. The court therefore concluded that SPBR's layoff order should be affirmed.

{¶13} Appellant then filed this appeal, and asserts two assignments of error:

1. THE LOWER COURT ERRED IN FINDING THAT THE AGENCY DID NOT VIOLATE R.C. §124.09 WHEN IT ATTEMPTED TO CREATE A SECOND "CORRECTIONAL GRIEVANCE OFFICER 2" CLASSIFIED POSITION AT ALLEN CORRECTIONAL INSTITUTION WITHOUT OBTAINING THE REQUIRED APPROVAL OF THE DEPARTMENT OF ADMINISTRATIVE SERVICES.

2. THE LOWER COURT ERRED IN FAILING TO FIND THAT THE AGENCY ACTED IN "BAD FAITH" IN VIOLATION OF O.A.C. §§ 123:1-41-08(F) AND 124-7-01 AND RELEVANT CASE LAW WHEN IT PLACED ANOTHER EMPLOYEE INTO A CLASSIFIED POSITION THAT HAD ALREADY BEEN SLATED FOR ABOLISHMENT SO THAT THE EMPLOYEE COULD DISPLACE MR. MOORE FROM HIS CLASSIFIED POSITION.

{¶14} Pursuant to R.C. 119.12, a court of common pleas reviewing the decision of an administrative agency may affirm the agency's order if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence, and is otherwise in accordance with law. *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826. This requires the common pleas court to engage in a two-step process. The first involves a hybrid factual/legal inquiry, in which the court defers to the agency's resolution of evidentiary conflicts and factual findings, unless the court concludes that the agency's findings are internally inconsistent, impeached by evidence in the record, rest upon improper inferences or are otherwise unsupportable. *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 1993-Ohio-182. The second step requires the court of common pleas to construe and apply the law. *Id.*

{¶15} An appellate court's review of a trial court's determination regarding an administrative order is more limited, being confined to a consideration of whether the trial court abused its discretion in making that determination. *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191. However, the appellate court's review of issues of law is plenary. *Bartchy*, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339.

{¶16} In his first assignment of error, appellant argues that the trial court erred in concluding that the second CGO2 position into which Dunn was placed was properly created. Specifically, appellant argues that R.C. 124.09(D) specifically requires the Director of DAS to approve the creation of all new positions in the state civil service, and that no evidence was offered that DAS ever approved the creation of the second CGO2 position.

{¶17} ODRC employee Harris testified at the hearing before SPBR that, as a "decentralized" agency, ODRC was not required to obtain DAS approval for creation of the new position. In the absence of any statutory provision distinguishing between "centralized" and "decentralized" agencies, or otherwise setting forth an exception to the R.C. 124.09(D) provision requiring DAS approval of the creation of new civil service positions, there is no legal basis to support the conclusion that ODRC was not required to obtain DAS approval for the second CGO2 position. Appellee has not pointed to any provision in state law identifying any such exception to R.C. 124.09(D).

{¶18} However, the issue in this case is not whether ODRC could have created the second CGO2 position without DAS approval. Rather, the issue is whether DAS took some action that constituted approval of the position's creation.

{¶19} In its decision affirming SPBR's order, the trial court pointed to the fact that R.C. 124.09(D) speaks only in terms of approval of a new civil service position, not the creation of the position, and accepted appellee's argument that DAS approval could be shown by implication, and was not required prior to creation. R.C. 124.09(D) does not specify the manner in which DAS approval of a new civil service position must be shown explicitly or can instead be shown implicitly, nor does it specify whether that approval

must come prior to the position's creation, or can be established some time after the creation. Thus, the trial court did not err in its interpretation of R.C. 124.09(D) that DAS approval could be shown by implication, and was not required to occur prior to creation of the position.

{¶20} The evidence offered at the hearing established that in order to create the second CGO2 position, it was necessary to use OAKS to obtain a new position control number, and that ODRC took this action within OAKS with regard to the CGO2 position. DAS thus implicitly approved the creation of the new position by allowing this action to be taken within OAKS. In addition, the newly created CGO2 position was identified in the layoff rationale that was submitted to DAS as one of the positions that was to be abolished.

{¶21} Taken together, this evidence established that DAS did implicitly approve of the creation of the second CGO2 position, either at the time of its creation or when it accepted ODRC's layoff rationale. Thus, the trial court did not abuse its discretion in concluding that SPBR had before it reliable, probative, and substantial evidence that the second CGO2 position was created with DAS approval.

{¶22} Consequently, appellant's first assignment of error is overruled.

{¶23} In his second assignment of error, appellant argues that the trial court erred when it failed to find that ODRC acted in bad faith with respect to his layoff. Ohio Adm.Code 124-7-01(A) provides that SPBR will disaffirm abolishments or layoffs that are taken in bad faith. Bad faith can be established by evidence or reasonable inferences from the evidence that job abolishments were used as a subterfuge to subvert the civil service system. *Henschen v. Ohio Dept. of Taxation*, 10th Dist. No.

06AP-341, 2007-Ohio-2528. "Where the intent and consequence of the employer's method is to subvert the civil service system to allow the selection of handpicked employees to fill jobs that should have been available to civil service workers based upon seniority and retention points, bad faith has been shown." *Blinn v. Ohio Bur. Of Emp. Serv.* (1985), 29 Ohio App.3d 77, 80.

{¶24} Appellant argues that bad faith was shown in this case by the timing of the creation of the second CGO2 position. At the hearing before SPBR, ACI Warden Jesse Williams testified that he had identified the second CGO2 position as a position that would be abolished on March 13, 2008, but that Dunn was not moved into that position until March 16, 2008. Appellant argues that Dunn's placement into a position that had already been identified for abolishment, and more specifically a position ODRC knew was unnecessary because it was duplicative of appellant's position, constituted bad faith because ODRC knew that this action would result in appellant being laid off, thus showing that ODRC's intent was to remove him from his position.

{¶25} In her decision after the hearing, the SPBR hearing officer noted that the timing of the revocation of Dunn's unclassified deputy warden position, coming so close in time to the creation and subsequent abolishment of the second CGO2 position, could on its face indicate bad faith, but the hearing officer nevertheless concluded that bad faith was not present because the actions taken by ODRC were necessary in order to effectuate Dunn's fallback rights. The hearing officer pointed out that if Dunn had fewer retention points than appellant, it would have been Dunn who would have been laid off rather than appellant.

{¶26} In its review of appellant's appeal, the court of common pleas pointed out that, although Dunn was placed into the newly created CGO2 position on March 16, 2008, the retention point calculations were not provided to DAS until April 8, 2008. It was only after the retention point calculations were made that it could be determined that Dunn would have the right to displace appellant from his position. The court therefore determined that SPBR's determination that appellant had failed to provide sufficient evidence to support his claim of bad faith was supported by reliable, probative, and substantial evidence, and therefore affirmed SPBR's order.

{¶27} We cannot say the trial court abused its discretion in affirming SPBR's order regarding appellant's bad faith claim. The evidence established that the actions taken by ODRC in creating the second CGO2 position were necessary to effectuate Dunn's fallback rights, and were not aimed at ensuring appellant's removal from his job.

{¶28} Consequently, appellant's second assignment of error is overruled.

{¶29} Having overruled appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

McGRATH and CONNOR, JJ., concur.

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