

"CIVIL SERVICE SCHOOL" Key Notes from Class #6

Similar to disciplinary action, the process to lay off a classified County employee is very different from the process used in the private sector. Here's how.

- Layoff
- Position Abolishment
- Appeals of Either

As we saw in our session covering disciplinary action, classified civil servants in Ohio have the right to expect continued employment, short of disciplinary action for "just cause" or a legal abolishment or layoff of positions.

Layoff/position abolishment is a mandatory topic of collective bargaining, and there may be differences between ORC & contract language. If your department is covered by a CBA, look for this "callout" box throughout the handout for additional info that may apply!

The statutes governing a legal abolishment or layoff are found again in Chapter 124 of the ORC, specifically Sections 124.321 through 124.328. *We'll find that we will also need to rely on some info from the Ohio Administrative Code (OAC) as well.*

Chapter 124 | Department of Administrative Services - Personnel

Ohio Revised Code / Title 1 State Government

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Section

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Section 124.52 | Transfers - reinstatements.

Section 124.521 | Reduction in work force - layoffs - job abolishment.

Section 124.522 | Layoff procedures.

Section 124.525 | Layoff order.

Section 124.524 | Layoff displacement rights.

Section 124.525 | Retention points for continuous service and efficiency.

Section 124.526 | Layoff jurisdictions.

Section 124.527 | Layoff lists - reinstatement - reemployment.

Section 124.528 | Layoff, displacement appeals.

Section 124.55 | Transfers - appeal - reimbursement of expenses.

**We'll be reviewing
these particular
Sections...**

A County appointing authority has the sole discretion to either layoff or abolish positions when it determines that a reduction in the work force is necessary, including determining how many employees will be laid off & from which classifications, but it must do so in compliance with these statutes (unless there is a collective bargaining agreement with other steps defined). ORC 124.321 (A)



A **“Layoff”** is a termination of employment which may or may not be temporary & which may have recall or reinstatement possible within a year.

An **“Abolishment”** is the permanent deletion of a position, resulting in layoff.

There are 3 legal reasons for a layoff:

1. **A lack of funds** ORC 124.321 (B)(1)
2. **A lack of work** ORC 124.321 (C)(1)
3. **Position abolishment** ORC 124.321 (D)(1)

Refer to the CBA to see what permitted reasons exist to lay off a bargaining unit employee.

Lack of Funds	Lack of Work	Abolishment
<ul style="list-style-type: none"> Current or projected deficit which won't sustain current or projected staffing 	<ul style="list-style-type: none"> Current or projected decrease in workload or work required to be performed, resulting in excessive staffing 	<ul style="list-style-type: none"> Permanent deletion of a position from the table of organization
<ul style="list-style-type: none"> Not required to transfer funds to balance a shortfall 		<ul style="list-style-type: none"> Must follow ORC 124.321 (D)(1), (D)(2) and (D)(3) – see next page
<ul style="list-style-type: none"> Presumed when a grant has been lost or reduced 		

There are also 3 legal reasons for a position to be abolished, as stated in ORC 124.321 (D)(1):

- 1. Reorganization for efficient operation**
- 2. Reasons of economy**
- 3. Lack of work**

A “**lack of work**” is defined the same as it is above for a “layoff”, but on a permanent basis.

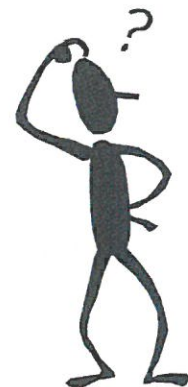
“**Reasons of economy**” is defined as projected savings from salary, benefits “and other matters” that would result from the abolishment of the position in question. Since salary & benefits is easy to cost out, and nobody really knows what “other matters” refers to, the statute also allows an appointing authority to do a position abolishment based on salary & benefits savings alone under the following conditions:

- a) *The appointing authority’s budget was cut by someone other than themselves (for example, the State) **OR** the appointing authority has a current or projected budget deficit which will not support continued staffing & operations;*
- b) *The abolishment must be done in “good faith” and not as a substitute for disciplinary action, and*
- c) *If the deficit would affect only a specific program or department, the appointing authority may only abolish a position in that specific program or department.*

However, there is no definition provided for a “reorganization for efficient operation”.

This can be a challenging to prove if an employee files an appeal with the State Personnel Board of Review (SPBR). While costs like salary & benefits can easily be calculated, and workloads can be measured, how do you prove that you will be “more efficient” in the future if you abolish a position?

While not impossible to do, and the lack of a specific definition may even allow greater flexibility in trying to make that case, (for example, reallocating resources may lead to efficiency), this should still be carefully considered as the “reason” when implementing a position abolishment. At a minimum, a study will need to be undertaken to show potential efficiencies to be gained.



DISPLACEMENT (BUMPING) PROCESS

This process differs somewhat between a “layoff” and an “abolishment”

LAYOFF

ORC 124.324

An employee to be laid off has the right to displace a co-worker **with the fewest retention points** (MQs apply) in the following order:

1. Within the same **classification**
2. Within the same **classification series** (i.e. they can displace the co-worker having the fewest retention points in the next **lowest** classification in the series or successively lower classifications as needed)
3. Within the **classification the employee held within the last 3 years prior** to their layoff classification, provided they still meet the minimum qualifications

Repeat after each round of “bumping” until the employee who has the fewest retention points in the affected classification has no “bumping” rights available—this employee is then laid off.

Keep in mind that the CBA will likely have a specific “bumping” process for bargaining unit employees that is a bit different from the statute.

ABOLISHMENT

ORC 124.321 (D) (3)

An employee whose position has been abolished has the following rights:

1. They have the right to fill an available vacancy **within their classification**
2. If they have more retention points than any other employee serving in the same classification, they can displace the co-worker **with the fewest retention points in their classification**
3. If they have the fewest retention points in their classification, they can fill an available vacancy **in a lower classification in the classification series**
4. If they have the fewest retention points in their classification, they can displace the co-worker **with the fewest retention points in the next or successively lower classification in the class series.**

An employee displaced by any of the above steps is then subject to the layoff displacement process.

An employee whose position is abolished & who has no displacement options is then laid off.

That looks like an exhausting process!
Do we really have to do it that way?

Speaking as someone who's had to do this more than a few times in their career, I can tell you yes—it is exhausting on multiple levels.

ORC 124.321 (E) does allow an appointing authority to have a “**paper layoff process**”.

This process permits the employer to simply offer the displacement options to employees one after the other, essentially “pre-selecting” their displacement choice, allowing the employer to hold off on an actual “layoff notice” until all bumping/displacement has happened and you know which employee(s) are left for the actual layoff.

If you have bargaining unit employees affected by a layoff, it is unlikely that the CBA will specifically allow a “speeded up” process like this.

For layoff/abolishment purposes, does it matter if an employee is part-time? What about if they are still on probation?

YES—it does matter! ORC 124.323

Once you've determined which classification is affected by the layoff, you should proceed through the process in this order:

- Part-time probationary employees
- Part-time permanent employees
- Full-time probationary employees
- Full-time permanent employees

*Note that this is within the affected **classification**; it doesn't mean you **have** to lay off all part-time employees first...*

OK...What the heck are "retention points"?

We've seen that retention points are very important; the more you have, the more likely you have some displacement rights; on the other hand, if you have the fewest, you are more likely to be laid off.

Think of retention points as being a way to measure "seniority", although we don't use that term for non-bargaining unit employees.

Specifics on retention points can be found in **ORC 124.325** and **OAC 123:1-41-09**. Here's a summary:

- Retention points measure "**continuous service**" within a layoff jurisdiction
- To keep it simple, a layoff jurisdiction is each County appointing authority, the State, a state university, etc...
- Continuous service is the period of **uninterrupted** service OAC 123:1-47-01
- Service becomes interrupted if there has been a "**break in service**" which is defined as a separation (not a leave) of 31 calendar days or more OAC 123:1-47-01
- Continuous service **transfers from one layoff jurisdiction to another**
- Each employee in the affected classification(s) starts with a **base of 100 points**
- They then receive **1 point for each pay period of full-time continuous service & ½ point for each pay period of other than full-time service**
- If 2 or more employees in the affected classification have the same # of retention points, the employee having the most recent start date of continuous service will be laid off first

This is another one of the examples of when we need to refer to the OAC, even though it technically no longer applies to Counties. The ORC doesn't contain info on how to calculate retention points, what must be contained in employee notices, or posting layoff list!

Layoffs involving bargaining unit employees are unlikely to involve retention points, but rather be based on bargaining unit seniority dates; make sure you refer to the CBA.

How does an employee exert their displacement rights? And do they have to?

The employee must notify their appointing authority of their intention to exercise a specific displacement option available to them **within 5 calendar days of receiving notice of layoff**. This timeframe can be modified if a "paper layoff process" has been approved for use. ORC 124.324 (C)

An employee may also choose not to exercise any displacement rights they have, and accept layoff instead.

An employee being laid off or displaced must be provided written notice, either hand-delivered at least 14 calendar days before the effective date or mailed via certified mail at least 17 calendar days before the effective date. **For a County employee, this notice must include the following:**

- The statutory reason for layoff or displacement
- The effective date
- The employee's total # of retention points
- The right to appeal to the SPBR within 10 calendar days of the notification
- What displacement options, if any, the employee now has, which must be exercised within 5 calendar days of the notification
- Advising the employee of their reinstatement rights & right to be re-employed
- The right to request a copy of OAC 123:1-41
- The requirement to maintain a current address
- Information on leave cash-outs

What info must be included in the employee's layoff/displacement notice?

(hint: you'll find this in OAC 123:1-41-10. But these notices will come from HR!)

The requirements for notice to a bargaining unit employee & their displacement rights may differ somewhat; refer to the CBA.

What's the difference between a layoff list & a recall list?

The **layoff list** must be posted at least 14 calendar days prior to any layoff, in a "conspicuous & public place accessible to affected employees". This list must include the names of all employees in the affected classifications (including lower ones in the class series), and show each employee's continuous service date, appointment status, classification, & retention points.

The **recall list** isn't required to be posted, but must be created & maintained. This list shows all laid off & displaced employees in **descending order of # of retention points** (i.e., highest # listed first). This list controls which employees are therefore offered recall or reinstatement first.

These requirements may differ for bargaining unit employees (for example, a layoff list may not be required to be posted). Refer to the CBA.

What is the reinstatement or recall process for a laid off or displaced employee?

Employees have recall/reinstatement rights for 1 year from the effective date.

These rights give them the first opportunity to fill any vacant positions in the affected classification/class series, even if it's not their former position. An employee who accepts recall/reinstatement when offered is removed from the recall list. If an employee declines reinstatement to their former classification, they are removed from the recall list. If an employee was offered an opportunity to return to a lower position in the class series from the classification they formerly held, they stay on the recall list, but for the future they may only be offered reinstatement to their actual former classification. ORC 124.327

Notice of recall/reinstatement must be sent by certified mail to the last known address of the employee, and they are provided 10 calendar days from date of receipt to return to work (this period may be extended for extenuating circumstances). Failure to report to work results in the employee being deemed to have declined recall/reinstatement. OAC 123:1-41-18

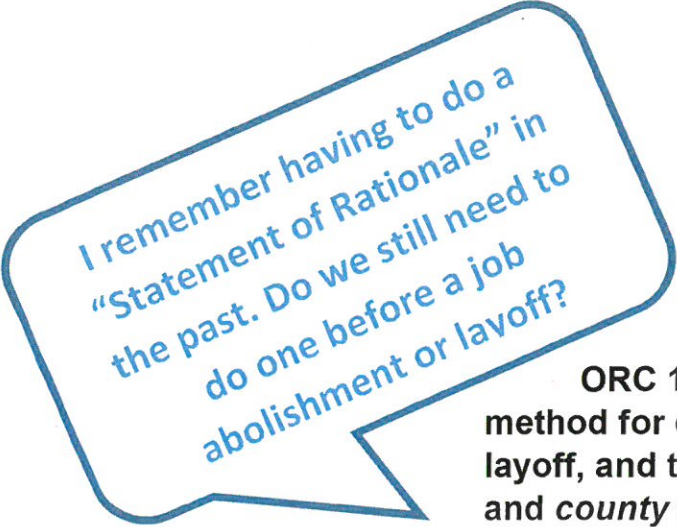
An employee who has been recalled/reinstated is required to start a **new** probationary period **if they had not completed their original probationary period (new hire or promotional) when they were laid off or displaced.**

Recall/reinstatement rights may differ for bargaining unit employees (for example, these rights may be for longer than 1 year, or they may not be required to start a probationary period over). Always check the CBA.

Can an employee appeal their layoff or displacement?

YES -- A classified employee may appeal a layoff, job abolishment or a displacement that is the result of a layoff, to the State Personnel Board of Review (SPBR). The appeal must be filed or postmarked no later than ten days after receipt of the layoff notice or after the date the employee is displaced. SPBR will examine whether the statutory process was followed, including but not limited to, whether an appropriate reason for layoff/displacement was given & supported by evidence, whether retention points were calculated properly, if the employee was provided proper notice, and if their own displacement rights (if any) were appropriately offered & implemented.

If the CBA allows bargaining unit employees to file a grievance on layoff/abolishment/displacement, and the grievance is permitted by CBA to go to binding arbitration, then the bargaining unit employee does not have the option to file an appeal with SPBR, unless the CBA gives the employee that option.



I remember having to do a
“Statement of Rationale” in
the past. Do we still need to
do one before a job
abolishment or layoff?

Great question! The “**Statement of Rationale**” is specifically mentioned in **OAC 123:1-41-04 (B)**, but not in the ORC. In the past, when the OAC applied to counties, it was clear that this was required.

ORC 124.322 does refer to “...rules...establishing a method for determining layoff procedures and an order of layoff, and the displacement and recall of laid-off state and county employees.” As we’ve discussed in the past, “rules” for civil service are generally regarded to be found in the Ohio Administrative Code (OAC), and are intended to amplify the actual statutes (found in Ohio Revised Code, or ORC). And, as we’ve seen, there are some situations in which the legislature removing county compliance with the OAC has actually created some challenges.

SO...my recommendation is that there always be a “Statement of Rationale” prepared before the appointing authority takes formal action to abolish a position and/or implement a layoff. If there is an appeal to SPBR (or a Union grievance taken to arbitration), the Statement will be valuable evidence that the appointing authority acted in “good faith”, considered various options, and had justifiable reasons to proceed.

A basis for “**lack of funds**” should include documents showing actual & projected revenues & expenses, a discussion on why revenues are decreasing and/or expenses are increasing, & how a reduction in positions would produce the necessary savings (remember to honestly factor in unemployment, extended health care department charges & cash-out of any leave).

A basis for “**lack of work**” should include documents showing statistical evidence of a trending decrease in workload (preferably at least a year) & explain why that trend is likely to continue.

A basis for “**abolishment**” should include documents explaining how economy or efficiency can be achieved as a result of a reorganization (for example, contracting out a task is not only less expensive but also allows limited resources to be dedicated to other needs), or that verifies that certain work will no longer be performed by certain employees (for example, if there was a merger with another agency, or the State has assumed a task/role that was formerly assigned to the County agency).

Another word about bargaining unit layoffs...

As we've seen, there are plenty of steps involved for a layoff or job abolishment. While the CBA will have an article in the contract addressing this topic, it may not cover everything that is required in the ORC.—in which case, a Court may rule that an affected bargaining unit employee is entitled to both CBA language AND any "missing" ORC statutory provisions.

For that reason, it's best to make sure that the CBA is clear. In the various CBAs under the authority of the Board of County Commissioners, for example, we have language in that CBA that states something like this:

"...the parties agree that this is the only layoff procedure that pertains to employees covered by this collective bargaining agreement."

And a final word about unclassified "layoffs"...

Because unclassified staff serve at the pleasure of their appointing authority, there isn't a required "abolishment" or "layoff" process for those positions. As we know, some positions are clearly unclassified (department heads appointed by the BCC, Executive Assistant to a County Commissioner, etc...) but others (those performing "fiduciary" or "administrative" responsibilities) could be challenged, so if you aren't crystal-clear on the status, it's advisable to follow & document the process identified in ORC.