

ARBITRATION DECISION NO.:

450

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

State of Ohio

DATE OF ARBITRATION:

March 17, 1992

DATE OF DECISION:

June 24, 1992

GRIEVANT:

OCSEA, Local 11,
AFSCME, AFL-CIO

OCB GRIEVANCE NO.:

NONE

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Linda K. Fiely, Esq.
Lynn Dennison

FOR THE EMPLOYER:

Elliott T. Fishman, Esq.

KEY WORDS:

Five-Year Rule
Bumping Rights
Contract Interpretation

ARTICLES:

Article 18 - Layoffs
 §18.01-Layoffs
 §18.02-Guidelines
 §18.05-Bumping in the
Same Office, Institution
or County
 §18.04-Bumping in
the Agency Geographic
Jurisdiction
 §18.05-Limits
 §18.06-Geographic
Divisions

§18.07-Classification**Groupings****§18.08-Recall****§18.09-Re-employment****Article 22 - Performance****Evaluation****Article 43 - Duration****§43.02-Preservation****of Benefits****FACTS:**

The issue of whether the Contract precluded bargaining unit employees from utilizing bumping rights under the "Five Year Rule" pursuant to Section 124.324(A)(4) of the Ohio Revised Code was mutually submitted to arbitration for final resolution. The parties stipulated to the following facts: 1) Appendices I and J were specifically negotiated to circumvent application of current civil service law contained in the Ohio Revised Code (ORC) and the Ohio Administrative Code (OAC) rules pertaining to promotions and layoff, 2) the parties met to negotiate Appendices I and J and were represented by persons having expertise in the rules of Ohio Civil Service Law and personnel procedures.

UNION'S POSITION:

The Union argued that the plain and unambiguous language of the Contract supported the inclusion of the Five Year Rule in the Contract. The State failed to prove that Article 18 demonstrates a Union waiver or forfeiture of the rights provided by the ORC. The Union argued that even if the Arbitrator does find that the Union waived its rights under Article 18, Article 43 of the Contract preserved the Five Year Rule as a benefit subject to determination by section 124.324(4) of the ORC and by rule 123:1-41-12(D) of the OAC. The State's established past practice indicated that the Union position regarding the Five Year Rule is a reasonable one.

EMPLOYER'S POSITION:

The State argued that the contractual rights of laid off employees to displace other employees were substantially different from the statutory rights of laid off employees to displace other employees. The State also argued that Articles 18.02 through 18.05 constituted a complete scheme of bumping procedures and superseded ORC 124.324 and OAC 123:1-41-11 through 123:1-41-12. Further, state law and the language of the Contract itself clearly precluded the application of the Five Year Rule. Sustaining the Union grievance by incorporating the Five Year Rule into the Contract would be a violation of the Arbitrator's powers. The fact that the State mistakenly applied the Five Year Rule in a few instances did not constitute a past practice or an acknowledgment that the Article 18 embodies the Five Year Rule.

ARBITRATOR'S OPINION:

The Arbitrator held that Article 18, unlike other Contract sections, mandated that layoffs be made pursuant to ORC sections 124.321-.327 and OAC rules 123:1-41-01 to 22, except as modified by the Contract. Sections .02 through .07 of Article 18 specifically and explicitly modify ORC and OAC rules and procedures. The Arbitrator determined that nothing in any of these sections contradicted, modified or eliminated the Five Year Rule. Therefore, the Arbitrator concluded that the ORC and OAC rules and procedures controlled the application of the Five Year Rule. The Arbitrator stressed the fact that her role in the arbitration process was to give the intended meaning to the negotiated Contract language, not to add or subtract from that language. The Arbitrator held that the State could have eliminated the application of the Five Year Rule only by specifically prohibiting its application in sections 18.02 through 18.05.

ARBITRATOR'S AWARD:

The Arbitrator concluded that Article 18 does not exclude or overcome the Five Year Rule and that the Five Year Rule is applicable to bargaining unit employees.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

**OCSEA, Local 11
AFSCME, AFL-CIO**
Union

and

State of Ohio
Employer.

RE: Bumping Rights and
"The Five Year Rule"

Briefs Received:

March 17, 1992

Rebuttal Received:

May 21, 1992

Award Date:

June 24, 1992

For the State:

Elliot T. Fishman, Esq.

For the Union:

Linda K. Fiely, Esq.

Lynn Dennison

The parties agreed to submit the Issue to the Arbitrator on briefs:

Issue Presented

Do the provisions of the Agreement between the parties preclude bargaining unit employees from utilizing bumping rights under the "five-year rule," pursuant to Section 124.324.(A)(4) of the Ohio Revised Code?

The parties stipulated to the following facts:

Stipulated Facts

1. Appendix I and Appendix J were specifically negotiated by the parties so they would not be bound by the current civil service law in the Ohio Revised Code and the Ohio Administrative Rules that pertained to promotions and layoff jurisdictions.

2. On at least two occasions, the parties met specifically in Washington, DC, at the Union's offices to negotiate both Appendix I and Appendix J. Those in attendance for both parties were people that had expertise in Ohio Civil Service Law and Rules as well as personnel procedures.

The relevant contract section reads as follows:

ARTICLE 18 - LAYOFFS

Section 18.01 - Layoffs

Layoffs of employees covered by this Agreement shall be made pursuant to Ohio Revised Code Sections 124.321-.327 and Administrative Rule 123:1-41-01 through 22, except for the modifications enumerated in this Article.

Section 18.02 - Guidelines

Retention points shall not be considered or utilized in layoffs. Performance evaluations shall not be a factor in layoffs. Layoffs shall be on the basis of inverse order of state seniority.

Section 18.03 - Bumping in the Same Office, Institution or County

The affected employee may bump any less senior employee in an equal or lower position in the same, similar or related class series within the same office, institution or county (see Appendix I) provided that the affected employee is qualified to perform the duties.

Section 18.04 - Bumping in the Agency Geographic Jurisdiction

If the affected employee is unable to bump within the office, institution or county, then the affected employee shall have the option to bump a less senior employee in accordance with Section 18.03 within the appropriate geographic jurisdiction of their Agency (see Appendix J).

Section 18.05 - Limits

There shall be no bumping for Bargaining Unit 3 employees in the Department of Rehabilitation and Corrections. There shall be no inter-agency bumping. There shall be no inter-unit bumping except in those cases allowed by current administrative rule or where a class series overlaps more than one unit.

Section 18.06 - Geographic Divisions

The jurisdictional layoff areas shall not be, utilized. Instead, the geographic divisions of each agency shall be used (see Appendix J).

Section 18.07 - Classification Groupings

For the purposes of this Article, Appendix I shall be changed as follows: In Unit 4, groupings 3 and 4 shall be combined.

Section 18.08 - Recall

When it is determined by the Agency to fill a vacancy or to recall employees in a classification where the layoff occurred, the following procedure shall be adhered to:

The laid-off employee with the most state seniority from the same, similar or related classification series shall be recalled first (see Appendix I). Employees shall be recalled to a position for which they meet the minimum qualifications as stated in the Classification Specification. Any employee recalled under this Article shall not serve a new probationary period, except for any employee laid off who was serving an original or promotional probationary period which shall be completed. Employees shall have recall rights for a period of eighteen (18) months.

Notification of recall shall be by certified mail to the employee's last known address. Employees shall maintain a current address on file with the Agency. Recall rights shall be within the Agency and within recall jurisdictions as outlined in Appendix J. If the employee fails to notify the Agency of his/her intent to report to work within seven (7) days of receipt of the notice of recall, he/she shall forfeit recall rights. Likewise, if the recalled employee does not actually return to work within thirty (30) days, recall rights shall be forfeited.

Section 18.09 - Re-employment

Re-employment rights in other agencies shall be pursuant to Administrative Rule 123:1-41-17. Such rights shall be for eighteen (18) months.

The relevant Ohio Revised Code reads as follows:

LAYOFFS; DISPLACEMENTS

124.321 - Layoff procedures; lack of funds for work; lack of work; abolishment of positions

(A) Whenever it becomes necessary for an appointing authority to reduce its work force the appointing authority shall lay off employees or abolish their positions in accordance with sections 124.321 to 124.327 of the Revised Code and the rules of the director of administrative services.

(B) Employees may be laid off as a result of a lack funds within an appointing authority. For appointing authorities which employ persons whose salary or wage is paid by warrant of the auditor of state, the director of budget and management shall be responsible for determining whether a lack of funds exists. For all other appointing authorities which employ persons whose salary or wage is paid other than by warrant of the auditor of state the appointing authority shall itself determine whether a lack of funds exists and shall file a statement of rationale and supporting documentation with the director of administrative services prior to sending the layoff notice.

A lack of funds means an appointing authority has a current or projected deficiency of funding to maintain current, or to sustain projected, levels of staffing and operations. This section does not require any transfer of money between funds in order to offset a deficiency or projected deficiency of federal funding for a program.

The director of budget and management shall promulgate rules, under Chapter 119. of the Revised Code, for agencies whose employees are paid by warrant of the auditor of state, for determining whether a lack of funds exists.

(C) Employees may be laid off as a result of lack of work within an appointing authority. For appointing authorities whose employees are paid by warrant of the auditor of state, the director of administrative services shall determine whether a lack of work exists. All other appointing authorities shall themselves determine whether a lack of work exists and shall file a statement of rationale and supporting documentation with the director of administrative services prior to sending the notice of layoff.

A lack of work, for purposes of layoff, means an 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. The determination of a lack of work shall indicate the current or projected temporary decrease in the workload of an appointing authority and whether the current or projected staffing levels of the appointing authority will be excessive.

(D) Employees may be laid off as a result of abolishment of positions. Abolishment means the permanent deletion of a position or positions from the organization or structure of an appointing authority due to lack of continued need for the position. An appointing authority may abolish positions as a result of a reorganization for the efficient operation of the appointing authority, for reasons of economy, or for lack of

work. The determination of the need to abolish positions shall indicate the lack of continued need for positions within an appointing authority. Appointing authorities shall themselves determine whether any position should be abolished and shall file a statement of rationale and supporting documentation with the director of administrative services prior to sending the notice of abolishment. If an abolishment results in a reduction of the work force, the appointing authority shall follow the procedures for laying off employees, subject to the following 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.

(E) The director of administrative services shall promulgate rules, under Chapter 119. of the Revised Code, for the determination of lack of work within an appointing authority, for the abolishment of positions by an appointing authority, and for the implementation of this section.

124.322 - Classifications affected; length and efficiency of service

Whenever a reduction in the work force is necessary, the appointing authority of an agency shall decide in which classification or classifications the layoff or layoffs will occur and the number of employees to be laid off within each affected classification. Employees shall be laid off using systematic consideration of length of continuous service and efficiency in service. Credit for relative efficiency shall not exceed ten per cent of total retention points. The director of administrative services shall promulgate rules, under Chapter 119. of the Revised Code, for the determination of the length of service and efficiency in service of employees.

124.323 - Appointment categories; priorities

(A) Employees shall be laid off in the order set forth in this section within the primary appointment categories of temporary, intermittent, part-time, seasonal, and full-time, and other appointment categories as established by the director of administrative services.

(B) Whenever a reduction in force is necessary within each of the primary appointment categories first temporary, then intermittent, then part-time, then seasonal, and then full-time employees shall be laid off in the following order:

- (1) Employees serving provisionally who have not completed their probationary period after appointment;
- (2) Employees serving provisionally who have satisfactorily completed their probationary period after appointment;
- (3) Employees appointed from certified eligible lists or who are certified and who have not completed their probationary period after appointment;
- (4) Employees appointed from certified eligible lists or who are certified and who have successfully completed their probationary period after appointment.

124.324 - Displacement of other employees; procedures

(A) A laid-off employee has the right to displace the employee with the fewest retention points in the classification from which the employee was laid off or in a lower or equivalent classification, in the following order:

- (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 a classification which has the same or similar duties as the classification from which the employee was laid off, in accordance with the list published by the director under division (B)(2) of section 124.311 of the Revised Code;
- (4) Within the classification the employee held immediately prior to holding the classification from which the employee was laid off.

Divisions (A)(3) and (4) of this section shall not apply to employees of cities, city health districts, and counties, except for employees of county departments of human services.

A laid-off employee in the classified service has the right to displace an employee with the fewest retention points in the classification that the laid-off employee held immediately prior to holding the classification from which he was laid off, if the laid-off employee was certified in the former classification. If a position in that classification does not exist, then the employee may displace employees in the classification that he next previously held, and so on, subject to the same provisions. The employee may not displace employees in a classification if the employee does not meet the minimum qualifications of the classification, or if the employee held the classification more than five years prior to the date on which the employee was laid off, except that failure to meet minimum qualifications shall not prevent the employee from displacing employees in the classification that he next previously held within that five-year period.

If, after exercising displacement rights, an employee is subject to further layoff action, his displacement rights shall be in accordance with the classification from which he was first laid off.

The director shall verify the calculation of the retention points of all employees in an affected classification in accordance with section 124.325 of the Revised Code.

(B) Following the order of layoff, an employee laid off in the classified civil service shall displace another employee within the same appointing authority or independent institution and layoff jurisdiction in the following manner:

(1) 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 classification series; except that a laid-off provisional employee shall not have the right to displace a certified employee;

(2) Any employee displaced by an 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 classification series; except that a displaced provisional employee shall not displace a certified employee. 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 or independent institution has been reached and, if necessary, laid off.

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

(D) No employee shall displace an employee for whose position or classification there exists special minimum qualifications, as established by a position description, classification specifications, or by bona fide occupational qualification, unless the employee desiring to displace another employee possesses the requisite minimum qualifications for the position or classification.

(E) If an employee exercising his displacement rights must displace an employee in another county within the same layoff district, the displacement shall not be construed to be a transfer.

(F) The director of administrative services shall promulgate rules, under Chapter 119. of the Revised Code, for the implementation of this section.

124.325 - Retention points; mergers of city and county offices or functions

(A) Retention points to reflect the length of continuous service and efficiency in service for all employees affected by a layoff shall be verified by the director of administrative services.

(B) An employee's length of continuous service will be carried from one layoff jurisdiction to another so long as no break in service occurs between such transfers or appointments.

(C) Retention points for efficiency in service shall be determined by averaging the employee's latest two annual performance evaluations. An employee with less than two years of service will have the latest performance evaluation used. Any employees with less than one year of service will have their final probationary evaluation used.

(D) Should two or more employees have an identical number of retention points, employees having the shortest period of continuous service shall be laid off first

(E)(1) As used in this division, "affected employee" means a city employee who becomes a county employee, or a county employee who becomes a city employee, as the result of any of the following:

- (a) The merger of a city and a county office;
- (b) The-merger of city and county functions or duties;
- (c) The transfer of functions or duties between a city and county.

(2) For purposes of this section, the new employer of any affected employee shall treat the employee's prior service with such former employer as if it had been served with the new employer.

(F) The director shall promulgate rules, in accordance with Chapter 119. of the Revised Code, to establish a system for the assignment of retention points for each employee in a classification affected by a layoff and for determining, in those instances where employees have identical retention points, which employee shall be laid off first.

124.326 - Order of layoff and displacement; jurisdictions

(A) The order of layoff and displacement shall apply within layoff jurisdictions. Each of the layoff jurisdictions, as defined in this section, is autonomous and layoff, displacement, reinstatement, and reemployment procedures shall apply only within the jurisdiction affected by the layoff.

(B) The layoff jurisdictions is as follows:

(1) District layoff jurisdiction: the order of layoff shall be followed on a district-wide basis within each state agency, board, commission, or independent institution. The director of administrative services shall establish layoff districts for state agencies, boards, and commissions.

(2) County jurisdiction: within county agencies, the order of layoff shall be followed within each county appointing authority.

(3) University and college jurisdiction: each state-supported college and university is a separate,

indivisible layoff jurisdiction throughout which the order of layoff shall be followed, except that a branch campus outside the layoff district of its main campus shall be considered a separate layoff jurisdiction. For purposes of division (B)(3) of this section, the Ohio agriculture research and development center shall be considered a branch campus of the Ohio state university.

The layoff jurisdiction described in division (B)(3) of this section shall not apply to employees who:

(a) Are laid off for a temporary period of up to one hundred ten consecutive days; or (b) Have specialized skills, knowledge, or training necessary for the performance of their job.

A state-supported college or university may adopt rules pursuant to Chapter 119. of the Revised Code to provide for the layoff of employees who are subject to division (B)(1) or (2) of this section,.

(C) As used in this section, "independent institution" means an institution under the control of a managing officer or board of trustees with the power to appoint or remove employees as provided by statute.

124.327 - Layoff lists; reinstatement rights

(A) Employees who have been laid off or have, by virtue of exercising their displacements rights, been displaced to a lower classification in their classification series, shall be placed on appropriate layoff lists. Those employees with the most retention points within each category of order of layoff, as established in section 124.323 of the Revised Code, shall be placed at the top of the layoff list to be followed by employees ranked in descending total retention order. 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.

(B) An employee who is laid off retains reinstatement rights in the agency from which he was laid off. Reinstatement rights continue for one year from the date of layoff. During this one-year period, in any layoff jurisdiction in which an appointing authority has an employee on a layoff list, the appointing authority shall not hire or promote anyone into that classification until all laid-off persons [sic] on a layoff list for that classification are reinstated or decline the position when it is offered.

(C) Each laid-off or displaced employee, in addition to reinstatement rights within the employee's appointing authority, shall have the right to reemployment with other agencies within the layoff jurisdiction but only in the same classification from which the employee was initially laid off or displaced. Layoff lists for each appointing authority must be exhausted before jurisdictional reemployment layoff lists are used.

(D) Any employee accepting or declining reinstatement to the same classification and same appointment type from which the employee was laid off or displaced shall be removed from the appointing authority's layoff list.

(E) Any employee accepting or declining reemployment to the same classification and the same appointment type from which the employee was laid off or displaced shall be removed from the jurisdictional layoff list.

(F) An employee who does not exercise his option to displace under section 124.324 of the Revised Code shall only be entitled to reinstatement or reemployment in the classification from which the employee was displaced or laid off.

(G) An employee who declines reinstatement to a classification lower in the classification series than the classification from which the employee was laid off or displaced, shall thereafter only be entitled to reinstatement to a classification higher, up to and including the classification from which the employee was

laid off or displaced, in the classification series than the classification that was declined.

(H) Any employee reinstated or re-employed under this section shall not serve a probationary period upon reinstatement or reemployment except that an employee laid off during an original or promotional probationary period shall begin a new probationary period.

(I) For the purposes of this section, employees whose salary or wage is not paid directly by warrant of the auditor of state shall be placed on layoff lists of their appointing authority only.

The relevant Ohio Administrative Rule reads as follows:

CHAPTER 123:1-41 – LAYOFFS

123:1-41-01 - Layoffs

(A) Employees in the classified civil service of state and county offices and state-supported colleges and universities may be laid off whenever a reduction in force is necessary due to a lack of funds, lack of work, or the abolishment of positions.

(B) If it becomes necessary for an appointing authority to reduce its work force, the appointing authority shall lay off employees in accordance with sections 124.321 to 124.327 of the revised Code and the rules of this chapter of the Administrative Code.

(C) If an appointing authority abolishes positions in the civil service, the abolishment of positions and any resulting displacement of employees shall be made in accordance with sections 124.321 to 124.327 of the Revised Code and the rules of this chapter of the Administrative Code.

123:1-41-02 - Determination of lack of funds and lack of work for agencies whose employees are paid warrant of the auditor of state

(A) Determination of lack of funds. The director of the office of budget and management shall be responsible for determining whether a lack of funds exists for appointing authorities whose employees are paid by warrant of the auditor of state. The determination of lack of funds shall be made in accordance with the rules promulgated by the director of the office of budget and management.

(B) Determination of lack of work. The director shall determine whether a lack of work exists for appointing authorities whose employees are paid by warrant of the auditor of state. The appointing authority shall file along with a request for determination of lack of work, adequate information to establish that a lack of work exists. Such information may consist of a comparison between current work levels and work levels when a lack of work did not exist, which may include statistical data and additional supporting materials.

(C) Verification of retention points. Verification of retention points shall not be completed prior to a determination that a lack of work or lack of funds exists.

123:1-41-03 - Determination of lack of funds or lack of work for county offices, and state-supported colleges and universities and the filing of a statement of rationale and supporting information

(A) Determination of lack of funds or lack of work for county offices, and state-supported colleges and universities. The determination of the existence of a lack of funds or a lack of work for county offices and state-supported colleges and universities shall be made by the appointing authority of the county office or the appointing authority of the state-supported college or university.

(B) Filing of a statement of rationale and supporting documentation by county offices. The appointing authority of a county office shall provide the director with a statement of rationale and supporting information for the determination of the lack of funds or lack of work as is available prior to the time the layoff notices are mailed or delivered to the affected employees. The statement of rationale and supporting information shall be filed with the director prior to sending the notice(s) of a layoff to employee(s).

123:1-41-04 - Abolishment of positions in the classified service

(A) Reasons for abolishment. An appointing authority may abolish positions in the classified civil service for any of the following reasons: as a result of a reorganization for the efficient operation of the appointing authority; for reasons of economy; or for lack of work which is expected to be permanent. A lack of work shall be deemed permanent if it is expected to last more than one year.

(B) Determination and filing a statement of rationale and supporting information. The determination to abolish positions shall be made by the appointing authority.

State agencies and county offices. The appointing authorities of state agencies whose employees are paid by warrant of the auditor of state and of county offices shall file with the director a statement of rationale and supporting information for the determination to abolish positions. The statement of rationale and supporting information shall contain information as is available prior to the time the layoff notices are mailed or delivered to the employees to be laid off as a result of the abolishments.

123:1-41-05 - Displacement of employees due to abolishment of positions

(A) Displacement rights of employees whose positions are abolished. If an abolishment of positions results in the reduction of the work force, the appointing authority shall follow the procedures for laying off employees as contained in this chapter, subject to the following modifications.

(1) The employee whose position is abolished shall have the right to fill an available vacancy within the employee's classification;

(2) If a vacancy is not available in the employee's classification or the employee does not wish to exercise his option to fill an available vacancy and if the employee whose position has been abolished has more retention points than another employee in the classification, then the employee with the fewest retention points shall be displaced. The employee displaced as a result of the operation of this paragraph may be offered an available vacancy within the classification or a lower classification in the classification series. If an employee is displaced as a result of the operation of this paragraph, he shall be subject to the layoff procedures of this chapter.

(3) If the employee whose position has been abolished has the fewest retention points of employees in that classification, the employee shall have the right to fill an available vacancy in his classification or in the next or successively lower classifications in the classification series.

(4) If a vacancy is not available in the next or successively lower classifications within the classification series or the employee whose position has been abolished does not wish to exercise his option to fill an available vacancy in the next or successively lower classification in the classification series and the employee has fewer retention points than any other employee in his current classification, but more retention points than other employees in the next or successively lower classifications, then the employee whose position was abolished shall displace the employee with the fewest retention points in the next or successively lower classifications in the classification series. The employee displaced as a result of the operation of this paragraph may be offered an available vacancy in his classification or lower classifications in the classification series and shall be subject to the layoff procedures of this chapter.

(B) Order of layoff applied. In order to exercise the displacement rights provided in this rule, the order of layoff shall be applied prior to an employee exercising his displacement rights.

(C) Displacement of employee with fewest retention points. In no event shall a provisional employee displace a certified employee nor shall any employee be able to exercise displacement rights against an employee with more retention points.

(D) Notice of available vacancies. At the time the retention point list is submitted to the director the appointing authority shall notify the director of all available vacancies within the layoff jurisdiction.

(E) Movement of employees due to displacement. Any displacement of an employee to another county within the same layoff jurisdiction due to the abolishment of positions and the operation of this chapter shall not be construed to be a transfer.

123:1-41-06 - Determination by appointing authority of classifications for layoff

Whenever a reduction in the work force is necessary, the appointing authority shall determine the classification or classifications in which the layoff or layoffs will occur and the number of employees to be laid off within each classification.

123:1-41-07 - Order of layoff of employees

(A) Appointment categories established. For purposes of this chapter the appointment categories for order of layoff of employees are as follows: part-time temporary, full-time temporary, intermittent, part-time seasonal, full-time seasonal, part-time permanent and full-time permanent.

(B) Progression of layoff. Layoffs shall be based upon ascending retention point order beginning with the employee having the fewest retention points. In cases where two or more employees have identical retention points the tie shall be broken in accordance with rule 123:1-41-09 of the Administrative Code.

(C) Order of layoff within appointment categories. Within each appointment category employees shall be laid off in the following order:

- (1) Employees serving provisionally who have not completed their probationary period after appointment;
- (2) Employees serving provisionally who have completed their probationary period after appointment;
- (3) Certified employees who have not completed their probationary period after appointment;
- (4) Certified employees who have completed their probationary period after appointment

(D) Determination of certified status of employees. An employee will be deemed as certified if appointed from a certified eligible list, certified in their position pursuant to an examination or the operation of section 124.271 of the Revised Code and Chapter 123:1-10 of the Administrative Code, or if the employee retained his certification pursuant to the operation of section 124.311 of the Revised Code and Chapter 123:1-24 of the Administrative Code.

(E) Order of layoff. In the classifications selected for layoff the appointing authority shall layoff employees and employees shall displace employees using the following "order of layoff":

- (1) Part-time, temporary provisional employees in the same classification who have not completed their probationary period.
- (2) Part-time, temporary, provisional employees in the same classification who have completed their probationary period.
- (3) Part-time, temporary, certified employees in the same classifications who have not completed their probationary period.

- (4) Part-time, temporary, certified employees in the same classifications who have not completed their probationary period.
- (5) Full-time, temporary, provisional employees in the same classification who have not completed their probationary period.
- (6) Full-time, temporary, provisional employees in the same classification who have completed their probationary period.
- (7) Full-time, temporary, certified employees in the same classifications who have not completed their probationary period.
- (8) Full-time, temporary, certified employees in the same classifications who have completed their probationary periods.
- (9) Intermittent, provisional employees in the same classification who have not completed their probationary period.
- (10) Intermittent, provisional employees in the same classification who have completed their probationary period.
- (11) Intermittent, certified employees in the same classifications who have not completed their probationary period.
- (12) Intermittent, certified employees in the same classifications who have completed their probationary periods.
- (13) Part-time, seasonal, provisional employees in the same classification who have not completed their probationary period.
- (14) Part-time, seasonal, provisional employees in the same classification who have completed their probationary period.
- (15) Part-time, seasonal, certified employees in the same classifications who have not completed their probationary period.
- (16) Part-time, seasonal, certified employees in the same classifications who have completed their probationary periods.
- (17) Full-time, seasonal, provisional employees in the same classification who have not completed their probationary period.
- (18) Full-time, seasonal, provisional employees in the same classification who have completed their probationary period.
- (19) Full-time, seasonal, certified employees in the same classifications who have not completed their probationary period.
- (20) Full-time, seasonal, certified employees in the same classifications who have completed their probationary periods.
- (21) Part-time, permanent, provisional employees in the same classification who have not completed their probationary period.
- (22) Part-time, permanent, provisional employees in the same classification who have completed their probationary period.
- (23) Part-time, permanent, certified employees in the same classifications who have not completed their probationary period.
- (24) Part-time, permanent, certified employees in the same classifications who have completed their probationary periods.
- (25) Full-time, permanent, provisional employees in the same classification who have not completed their probationary period.
- (26) Full-time, permanent, provisional employees in the same classification who have completed their probationary period.
- (27) Full-time, permanent, certified employees in the same classifications who have not completed their probationary period.
- (28) Full-time, permanent, certified employees in the same classifications who have completed their probationary period.

123:1-41-08 - Verification of retention points

(A) General. Employees shall be laid off using the following system for systematic consideration of continuous service and relative efficiency in service. Employees shall be assigned retention points in accordance with the period of continuous service of the employee and for relative efficiency. An employee's total retention points shall be the sum of the base retention points plus the retention points assigned for continuous service and for relative efficiency in service.

(B) Computation of retention points. The appointing authority shall compute the total retention points for each employee in the classifications affected by a layoff or position abolishment, including the classifications in which displacement may occur.

(C) Date for calculation of retention points. Retention points shall be calculated as of the day lists of retention points are received by the director for verification.

(D) Submission of information to the director. The appointing authority shall submit the list of employees' retention points with the request for verification. The list submitted for verification of retention points must identify those persons being considered for layoff and/or the positions being considered for abolishment.

If an appointing authority indicated a different date of original hire for computation of retention points than the date of hire indicated by the director, then the change must be supported by documentation which shall be submitted with the list.

(E) Verification by the director. The director shall verify the calculation of retention points of the employees of appointing authorities whose employees are paid by warrant of the auditor of state or the employees of county offices.

(F) Movement into and out of affected classifications. Once an appointing authority has submitted the list of retention points and employees to the director the appointing authority may not move employees into or out of affected classifications by means of promotions, intra-transfers, voluntary demotions, lateral or classification changes, or reassignments, except that inter-transfers out of an agency or implementation of the findings of a position audit commenced prior to the date of the submission of the list for verification of retention points shall be implemented.

(G) Personnel actions and recall lists. Personnel action forms and recall lists resulting from a layoff or displacement must be received by the director at least seven days prior to the effective date of a layoff or displacement.

(H) Notice of layoff, displacement, and sick leave conversion forms. A copy of the notice of layoff or displacement to employees shall be forwarded to the director with the personnel actions resulting from a layoff. If an employee had displacement rights in a layoff the appointing authority must indicate to the director whether or not the employee exercised his displacement rights. If the employee did not exercise his displacement rights or the employee did not notify the appointing authority of his desire to exercise his displacement rights the personnel action forms, or other appropriate forms, must indicate that fact.

Appointing authorities whose employees are paid by warrant of the auditor of state must include with the personnel action forms sick leave conversion forms. If the employee did not submit a sick leave conversion form the personnel action form must indicate that fact.

Appointing authorities must include with the personnel action forms all forms submitted by the employee indicating the counties the employee designated as available for recall purposes for reinstatement or reemployment.

123:1-41-09 - Computation of retention points

(A) Assignment of retention points for continuous service. Employees shall be assigned a base of one hundred retention points. Computation of retention points for continuous service shall be made by crediting each full-time employee with one retention point for each completed thirteen weeks of continuous state service.

Retention points for continuous service for other than full-time employees shall be calculated on the basis of one point for each completed five hundred twenty hours of service. If an appointing authority utilizes an established work week which is less than forty hours per week, the computation of retention points for continuous service shall be based on the number of hours normally worked in a thirteen-week period.

Overtime shall not be considered for purposes of computation of retention points for continuous service.

(B) Assignment of retention points for relative efficiency.

(1) Performance evaluations used. Computation of retention points for efficiency in service (relative efficiency) shall be made by using the performance evaluations of employees. Only the performance evaluations on file with the director at the time retention point lists are submitted for verification shall be used for the calculation of retention points for relative efficiency.

Performance evaluations to be used in calculating retention points of employees who have completed the required probationary period following appointment shall be used as follows:

(a) Averaging the latest two annual performance evaluations; or

(b) Using the latest annual performance. If the employee has less than two years but more than one year of continuous service unless the employee had a one-year probationary period then the final probationary period evaluation shall be used; or

(c) Using the final probationary performance evaluation, if the employee has less than one year of continuous service and has completed their probationary period.

No retention points for relative efficiency shall be given to employees who have not completed their probationary period.

(2) Formula for assigning retention points. Assignment of retention points for efficiency in service shall be made according to the following formula:

Total Score On

Performance Evaluation Points

20 and below	0
21 through 28	1
29 through 36	2
37 through 44	3
45 through 52	4
53 through 60	5
61 through 68	6
69 through 76	7
77 through 84	8
85 through 92	9
93 through 100	10

(3) Assignment of retention points if no performance evaluation exists. An employee who has completed his probationary period and who has not been evaluated in accordance with Chapter 123:1-29 of the

Administrative Code or whose performance evaluations are not on file in the department of administrative services shall be assigned the maximum number of retention points for efficiency.

(4) Use of special performance evaluations. In no event shall special performance evaluations be used for computing retention points for relative efficiency of an employee.

(C) Tie breaker. In the event two or more employees have identical retention points as calculated by this rule the tie shall be broken by utilizing, in the following order, the following methods:

- (1) First, employees having most recent date of continuous service from which no break in service has occurred shall be laid off or displaced first; and
- (2) Second, the appointing authority shall determine the employee to be laid off or displaced first.

(D) Continuous service of employees. In the event an employee is transferred the employee's length of continuous service will be deemed unbroken so long as no break in service occurs from one layoff jurisdiction to another. In the event an employee is transferred from one appointing authority to another or receives an appointment with another appointing authority, e.g., from one state agency to another, from a county office to a state agency, from a state agency to a state-supported college or university, etc., the employee's length of continuous service will be deemed unbroken so long as no break in service occurs from one appointing authority to another.

123:1-41-10 - Notification of layoff or displacement

(A) Notification of layoff or displacement. Each employee to be laid off shall be given advance written notice by the appointing authority. Such written notice shall be hand delivered to the employee at work or mailed by certified mail to the employee's last known address on file with the appointing authority. If hand-delivered such notice shall be given at least fourteen calendar days before the effective date of layoff or layoff due to displacement and the day of hand-delivery shall be the first day of the fourteen-day period. If mailed, such notice shall be mailed at least seventeen calendar days before the effective date of the layoff or layoff due to displacement. The day the letter is mailed shall be the first day of the seventeen-day period.

(B) Content of layoff or displacement notice. Each notice of layoff or displacement shall contain the following information:

- (1) The reason for layoff or displacement;
- (2) The effective date of the layoff or displacement;
- (3) The employee's accumulated retention points;
- (4) The right of the employee to appeal a layoff or displacement to the state personnel board of review and that the appeal must be made within ten days after the employee is notified that he is to be laid off or the employee is displaced;
- (5) A statement advising the employee that he may have the right to displace another employee and that the employee must exercise his displacement rights within five days of the date he is notified that he is displaced or is notified of layoff;
- (6) A statement advising the employee of the right to reinstatement or reemployment;
- (7) A statement that, upon request by the employee, the appointing authority will make available a copy of Chapter 123:1-41 of the Administrative Code;
- (8) A statement that the employee is responsible for maintaining a current address with his appointing authority'
- (9) A statement that the employee may have the option to convert accrued unused leave, if such opportunity to convert leave exists; and'
- (10) For employees of state agencies, boards, or commissions, a statement that the employee has the

option to select the counties within the layoff district that the employee desires to be on the recall lists.

123:1-41-11 - Displacement rights of employees

(A) General. Each employee laid off, or displaced as a result of a layoff, shall have the right to displace another employee with the fewest retention points in the manner provided in this rule. Displacement rights of an employee may only be exercised within the employee's appointing authority and within the layoff jurisdiction as established in this chapter.

For purposes of this chapter and division (A) of section 124.324 of the Revised Code, a "same or similar classification" is a classification that has the same or similar duties as the classification from which an employee is laid off and is listed as a same or similar classification in accordance with division (B)(2) of section 124.311 of the Revised code and listed in rules 123:1-24-06 to 123:1-24-13 of the Administrative Code.

An "equivalent or lower classification" shall be, for purposes of displacement rights, a classification with an equivalent or the same pay range assignment or a classification with a lower pay range assignment.

(B) Exercising of option to displace. An employee who is to be laid off may exercise his displacement rights under the provisions of this chapter or be laid off. Displacement occurs the date an employee is notified that another employee has exercised his right of displacement and that the employee with fewer retention points is to be displaced. A displaced employee may exercise his right to displace another employee if such right to displace exists. If the displaced employee does not have the right to displace another employee, then the displaced employee shall be laid off.

(C) Time to exercise displacement rights. Employees shall notify their appointing authorities, in writing, of their intention to exercise their displacement rights within five days after receipt of notice of layoff or displacement.

(D) Displacement of employee with fewest retention points. Within the order of displacement set forth in this rule a laid-off employee exercising his displacement rights shall displace the employee with the fewest retention points. Employees shall only have the right to displace employees with fewer retention points in the order established in rule 123:1-41-07 of the Administrative Code.

(E) Displacement of certified employees. In no event shall a laid-off provisional employee have the right to displace a certified employee except as provided in paragraph (D) of rule 123:1-41-12 of the Administrative Code.

(F) Classifications with parenthetical subtitles. For purposes of displacement the parenthetical subtitles of a classification are deemed separate but equivalent classifications. Employees in positions with a parenthetical subtitle may displace into the classifications in the classification series with the equivalent or lower pay range(s). Employees in positions in a classification series that contains parenthetical subtitles may displace employees in positions with parenthetical subtitles.

Any displacement rights into or from positions with parenthetical subtitles are subject to the displacement provisions of this chapter.

(G) Displacement into positions with special qualifications. No employee shall displace an employee for whose position or classification there exists special minimum qualifications unless the employee desiring to displace another employee possesses the requisite minimum qualifications or bona fide occupational qualifications for the position or the classification. The special qualifications must be established by a position description for the position, by classification specification minimum qualifications statement, or by bona fide occupational qualifications for the positions or classification. The appointing authority shall be responsible for establishing the necessity of special qualifications for a position.

(H) Rate of pay for an employee following displacement. An employee exercising his displacement rights to a position or an employee displaced as a result of a layoff or abolishment shall be paid according to the pay range assigned to the classification into which the employee displaced or was displaced. The employee shall be assigned to a rate in the pay range assigned to the new classification which is equivalent or nearest to, but not exceeding, the rate the employee was paid in his prior classification. If the rate the employee was assigned in his prior classification exceeds the highest rate in the pay range assigned to the new classification the employee will be assigned the highest rate assigned to the new classification.

123:1-41-12 - Order of displacement

Laid-off employees displaced as a result of a layoff who have the right to displace shall exercise their displacement rights in the following order:

(A) Displacement within the classification. An employee who has the right to displace whose position is abolished and who is to be laid off may displace within his classification. If the employee exercises his right to displace within his classification, he shall displace the employee with the fewest retention points in that classification. The further rights of an employee whose position is abolished are established in rule 123:1-41-05 of the Administrative Code.

(B) Displacement within the classification series. An employee who is to be laid off or displaced as a result of a layoff may displace the employee with the fewest retention points in the next lower and then successively lower classifications in the classification series. This process shall continue, if necessary, until the employee with the fewest retention points in the lowest classification of the classification series has been reached and, if necessary, laid off.

(C) Displacement to a classification with same or similar duties. An employee who is to be laid off or who is displaced as a result of a layoff may displace the employee with the fewest retention points in a classification that has the same or similar duties and a lower or the equivalent pay range. Displacement rights are limited to those classifications that are designated as a similar classification or classifications in the list published by the director in rules 123:1-24-06 through 123:1-24-13 of the Administrative Code. The displacement rights of employees to the same or similar classification shall not apply to employees of the county offices except county welfare departments.

An employee exercising his right of displacement shall exercise his displacement rights first into the group of same or similar classifications with the highest pay range assignment. In no event shall an employee have the right to displace into a classification with a pay range assignment that has a higher pay range assignment than the laid-off or displaced employee's classification.

Where more than one classification in the list of same or similar classifications, as listed in rules 123:1-24-06 to 123:1-24-13 of the Administrative Code, have the same pay range assignment, the employee exercising his right of displacement shall displace the person with the fewest retention points in the group of the same or similar classifications.

(D) Displacement to a classification previously held. An employee who is to be laid-off or who is displaced as a result of a layoff shall have the right to displace the employee with the fewest retention points in the classification the laid-off or displaced employee held immediately prior to his current classification, provided the classification is lower or equivalent classification to the employee's current classification.

A laid-off or displaced employee may displace into a classification he previously held if:

- (1) The laid-off or displaced employee was certified in the previous classification;
- (2) The laid-off or displaced employee held a position in the previous classification within the five years preceding the date an employee was laid off or displaced; and

(3) The laid-off or displaced employee still meets the minimum qualifications of the previous classification.

(4) The laid-off or displaced employee shall have successfully completed his original probationary period. An employee shall be deemed to have successfully completed the original probationary period if he had not been probationarily removed.

If a position does not exist in that classification held by the employee immediately prior to his current classification or if a laid-off or displaced employee is prevented from displacing in a previously held classification because he does not meet the minimum qualifications of the previously held classification, then the employee may displace in the classification he next previously held, and in successive previously held classifications, subject to the provisions above.

(E) Displacement to another appointment type. Notwithstanding the provisions of this rule, an employee shall not be required to accept a position with a lesser appointment type until the employee has had the opportunity to exercise his displacement rights as provided in rule 123:1-41-11 of the Administrative Code.

(F) Displacement rights of employees of county offices. Employees of county offices, except county welfare departments, shall only have the displacement rights in the same classification and in their classification series. Employees of county welfare offices may also displace in classifications that are the same or similar and displace in classifications previously held.

(G) Displacement rights of an employee previously displaced. If, after an employee has exercised his displacement rights, the employee is to be laid off or displaced due to a subsequent layoff, the employee's displacement rights shall be in accordance with the classification from which he was first displaced provided, however, he has rights to reinstatement or reemployment in his previous classification. The employee's displacement rights from a previously held classification shall exist for a one-year period beginning with the date of the original layoff or displacement or until such time as the employee is removed from a layoff list.

123:1-41-13 - Layoff jurisdiction districts for state agencies, boards, commissions and independent institutions

(A) General. Each layoff jurisdiction is autonomous and layoff, displacement, reinstatement, and reemployment rights and procedures shall apply only within the jurisdiction affected by the layoff. The order of layoff as provided in rule 123:1-41-07 of the Administrative Code applies within each of the layoff jurisdictions.

For purposes of this chapter and section 124.326 of the Revised Code, an "independent institution" means an institution under the control of a managing officer or board of trustees with the power to appoint or remove employees as provided by statute.

(B) District layoff jurisdiction. The order of layoff will be followed on a district-wide basis within each state agency, board, commission, and independent institution for the following districts:

- (1) District 1 -- Defiance, Fulton, Henry, Paulding, Williams.
- (2) District 2 -- Erie, Lucas, Ottawa, Sandusky, Wood.
- (3) District 3 -- Crawford, Huron, Marion, Seneca, Wyandot.
- (4) District 4 -- Allen, Auglaize, Hancock, Hardin, Mercer, Putnam, Van Wert.
- (5) District 5 -- Champaign, Clark, Logan, Shelby.
- (6) District 6 -- Darke, Greene, Miami, Montgomery, Preble.
- (7) District 7 -- Delaware, Fairfield, Fayette, Franklin, Licking, Madison, Pickaway, Union.
- (8) District 8 -- Butler, Clermont, Clinton, Hamilton, Warren.
- (9) District 9 -- Adams, Brown, Gallia, Highland, Jackson, Lawrence, Pike, Ross, Scioto, Vinton.
- (10) District 10 -- Athens, Hocking, Meigs, Monroe, Morgan, Noble, Perry, Washington.

(11) District 11 -- Belmont, Carroll, Coshocton, Guernsey, Harrison, Holmes, Jefferson, Muskingum, Tuscarawas.

(12) District 12 -- Ashland, Knox, Morrow, Richland.

(13) District 13 -- Medina, Portage, Stark, Summit, Wayne.

(14) District 14 -- Ashtabula, Columbiana, Mahoning, Trumbull.

(15) District 15 -- Cuyahoga, Geauga, Lake, Lorain.

123:1-41-14 - Layoff jurisdictions for county offices

(A) General. Each county office is a layoff jurisdiction. Layoff, displacement, and reinstatement rights and procedures shall apply only within each county office affected by the layoff. The order of layoff as provided in rule 123:1-41-07 of the Administrative Code applies within each of the layoff jurisdictions.

(B) County layoff jurisdictions. Layoff jurisdictions for layoff, displacement, and reinstatement of employees of county offices shall be the employee's appointing authority. The order of layoff and reinstatement shall be followed within each county appointing authority.

123:1-41-15 - Layoff jurisdictions for state-supported colleges and universities -- Expired

123:1-41-16 - Reinstatement rights

(A) Creation of layoff lists for reinstatement. Each appointing authority which has laid-off employees shall prepare recall lists of the names of the employees laid off. The recall lists shall be compiled by the classifications in which the employees were laid off. The names of all laid-off and displaced certified employees shall appear on one list and the names of all laid-off and displaced provisional employees shall appear on a second list. The names shall be listed in descending retention point order in each appointment category. These lists shall be arranged by layoff jurisdiction and shall be in reverse order of the order of layoff as established in this chapter.

The recall lists shall contain the employee's name, type of appointment, retention points, and date of commencement of continuous service. In cases of identical retention point ratings, the order of recall shall be the reverse order of the layoff. Any ties of retention points shall be broken in accordance with the procedure established in rule 123:1-41-09 of the Administrative Code.

(B) Period of eligibility on layoff lists. An employee's name shall remain on the appropriate list for a period of one year from the date the employee was first laid off or displaced from his original classification. These recall lists shall be thereafter administered by the director. Recall lists shall be utilized by the appointing authority only within a layoff jurisdiction.

(C) Administration of recall lists for reinstatement. The administration of the recall lists for reinstatement shall comply with the following requirements:

(1) Vacancies that occur in classification series for which a recall list exists must be accepted or declined in writing by the first person on the certified recall list for that classification series before the next person on the recall list may be offered a vacancy.

(2) After the certified recall list for each appointing authority and any eligible list for that classification has been exhausted, the appointing authority provisional recall list shall be used for purposes of reinstatement as follows: vacancies occurring in the classification series, for which a recall list(s) exists, must be accepted or declined in writing by the first person on the provisional layoff list for that classification series for positions in classifications with pay ranges equivalent to or lower than the classification from which the employee was laid off or displaced from before the next person on the list may be considered for reinstatement.

(3) In no event shall any employee on the recall list be offered a position in a classification with a higher

pay range assignment or appointment category than that of the classification or appointment category from which the employee was laid off or displaced.

(D) Failure to exercise displacement rights. A laid-off or displaced employee who chooses not to exercise his option to displace shall only be entitled to reinstatement to the classification from which the employee was laid off or displaced.

(E) Prohibition of movement into classifications for which recall lists exists. In any layoff jurisdiction in which an appointing authority has any employee on a recall list, the appointing authority shall not hire, promote, or transfer into the classification or the classification series subject to the recall list except as provided in paragraph (C)(2) of this rule. An appointing authority may reassign or transfer employees within a classification and within the layoff jurisdiction districts for which a recall list exists unless the purpose of the reassignment or transfer is to circumvent a recall list. Transfers of employees may not be made into a layoff jurisdiction district if a recall list exists for that district.

(F) Probationary period. Any employee reinstated under this rule shall not serve a new probationary period when reinstated; except, any employee laid off or displaced while serving an original or promotional probationary period shall begin a new probationary period upon reinstatement.

123:1-41-17 - Reemployment rights

(A) General. Each laid-off or displaced employee, in addition to the reinstatement rights set forth in this chapter, shall have the right to reemployment with other agencies within the layoff jurisdiction. The right to reemployment is limited to the same classification from which the layoff or displacement initially occurred.

(B) Creation of recall lists for reemployment. The director shall create, by appointment type, a jurisdictional recall list for each classification by combining the recall lists of each appointing authority within a layoff jurisdiction but excluding the names of reduced employees. The name of a laid-off employee shall appear on a jurisdictional recall list for the classification and appointment category from which the employee was initially laid off or displaced. Names of all laid-off certified employees shall appear on a certified jurisdictional recall list and names of all laid-off provisional employees shall appear on a separate provisional jurisdictional recall list, both in descending retention point order.

In cases of identical retention point totals, those employees having the most "seniority," defined as the longest period of continuous state service, shall be placed on the list first, and if still unresolved, the director shall determine the order of names on the list.

An employee's name shall remain on the jurisdictional recall list for a period of one calendar year from the date the employee was first laid off or displaced from his original classification.

(C) Administration of recall lists for reemployment. All jurisdictional recall lists shall be administered by the director in the following manner:

(1) Whenever a vacancy exists in any classification within a layoff jurisdiction in which layoffs have occurred, the director shall determine that the appointing authority's recall list for certified employees entitled to reinstatement to that classification has been exhausted before certifying any name from the certified jurisdictional recall list. A vacant position must be accepted or declined in writing by the first person on the certified jurisdictional recall list for that classification before the next person on the recall list may be considered for reemployment.

(2) Upon the exhaustion of the certified jurisdictional recall list, an appropriate eligible list shall be used to certify names to fill any other vacancies before utilizing either the appointing authority's provisional recall list or the jurisdictional provisional recall list. In filling remaining vacancies, the director shall determine that the appointing authority's recall list for provisional employees entitled to reinstatement to that classification has been exhausted before providing any name from the jurisdictional provisional recall list. A vacant position

must be accepted or declined in writing by the first person on the jurisdictional provisional recall list for that classification before the next person on that list may be considered for reemployment.

(D) Probationary period. Any employee reemployed under this rule shall not serve a probationary period when reemployed; except an employee laid off or displaced while serving an original or promotional probationary period shall begin a new probationary period.

123:1-41-18 - Notification of reinstatement or reemployment

(A) Notification of recall. Each employee recalled from layoff shall be notified of the offer of reinstatement or reemployment by certified letter. The notice of reinstatement shall contain a statement that refusal of reinstatement shall result in removal of such employee's name from the appointing authority's recall list. The notice of reemployment shall contain a statement that refusal of reemployment shall result in removal of such employee's name from the jurisdictional recall list. The notices of reinstatement or reemployment shall be in accordance with format prescribed by the director.

(B) Period for response. Each recalled employee shall be allowed ten calendar days from the date of receipt of the letter to return to work, and such time limit shall be explained to the employee in the notification of recall letter.

In the event of extenuating circumstances (e.g., illness, injury, absence from city or state or other good cause as determined by the director) preventing the employee from returning within the above time limit, the employer shall grant a reasonable extension, not to exceed sixty days.

In the absence of extenuating circumstances, an employee not accepting reinstatement or reemployment within ten days shall be deemed to have declined reinstatement or reemployment and the employee's name shall be removed from consideration for reinstatement or reemployment.

(C) Current address for purposes of reinstatement and reemployment. The employee shall be responsible for keeping a current address on file with his appointing authority. The appointing authority of state agencies, boards, or commissions and county welfare departments shall notify the director of any changes in address of employees on recall lists.

(D) Selection of counties for reinstatement or reemployment. When an employee is laid off or displaced, he may select the county or counties within the affected layoff jurisdiction in which he is willing to accept reemployment or reinstatement. If a laid-off or displaced employee designates no counties, the employee shall be placed on recall lists for reinstatement or reemployment in all of the counties within his layoff jurisdiction.

123:1-41-19 - Removal from recall lists

(A) Any employee accepting or declining reinstatement to the same classification and appointment type from which the layoff or displacement initially occurred shall be removed from both the reinstatement and jurisdictional reemployment recall lists; except that any employee declining reinstatement to a different appointment category than that from which he was laid off or displaced or declining reinstatement for reasons of hardship, as approved by the director shall not be removed from either recall lists.

(B) Any employee accepting reinstatement to a classification with a pay range lower than the classification from which the employee was laid off or displaced shall remain on the appointing authority's recall list for classifications in the classification series with pay ranges higher than the classification to which the employee was reinstated, up to and including the classification from which the employee was laid off.

(C) Any employee declining reinstatement to a classification with a pay range lower than the

classification from which the layoff or displacement initially occurred shall not be removed from either the appointing authority's recall list or the jurisdictional layoff list; except such employee shall thereafter only be offered reinstatement to a classification with a pay range higher than the classification declined, up to and including the classification from which the employee was laid off.

(D) Any employee on the jurisdictional recall list 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 jurisdictional layoff lists.

(E) Any employee on the jurisdictional recall list accepting or refusing reemployment in a lesser appointment category from which the layoff or displacement occurred shall be removed from the jurisdictional recall list for that appointment category and any below.

(F) If not removed under paragraphs (A) to (E) of this rule, the name of any laid-off or displaced employee shall be removed from the appointing authority's recall list and the jurisdictional recall list one calendar year after the employee was first laid off or displaced from his original classification. In the event any displaced employee is subsequently laid off or displaced, such employee's name shall be removed from the recall lists one calendar year after the subsequent layoff.

123:1-41-20 - Inspection of layoff lists

(A) Posting of layoff lists. At least fourteen days prior to any layoff the appointing authority shall prepare and post for inspection in a conspicuous and public place accessible to affected employees a list containing the names, dates of appointment, types of appointment, status, classification, and retention points of all employees in that classification series and shall indicate thereon which employees will be laid off.

(B) Availability of lists and rules. The appointing authority's layoff list and copies of the administrative rules regarding layoffs shall, upon request, be made available for inspection and copying to anyone during normal working hours. A reasonable charge for reproduction may be made.

123:1-41-21 - Layoff of employees on sick leave, leave without pay, or receiving disability leave benefits

(A) Employees receiving sick leave at time of layoff. Employees who are on sick leave at the time a layoff is effective shall be subject to layoff, under the provisions of this Chapter. The effective date of layoff or displacement of an employee may not be extended on the basis that an employee is on sick leave.

(B) Employees on leave of absence without pay at time of layoff. An employee who is on a leave of absence without pay under the provisions of rule 123:1-34-01 of the Administrative Code at the time a layoff is effective shall be subject to layoff under the provisions of this Chapter. The effective date of a layoff or of displacement for an employee may not be extended on the basis that an employee is on a leave of absence without pay.

(C) Employees receiving disability leave benefits at time of layoff. An employee who is receiving disability leave benefits under the provisions of Chapter 123:1-33 of the Administrative Code at the time a layoff is effective shall be subject to layoff under the provisions of this Chapter. An employee who is to be laid off while receiving disability leave benefits shall continue to receive disability leave benefits until the period of disability is over and the employee would otherwise be able to return to work. The receipt of disability leave benefits shall be subject to the provisions of Chapter 123:1-33 of the Administrative Code.

123:1-41-22 - Case conversion of accrued leave at layoff, and restoration of leave credit

(A) General. Any employee who is eligible for a cash conversion of their accumulated leave and who is

laid off shall have his accumulated balances of vacation, personal leave, and sick leave converted to a cash benefit according to the following:

(1) Sick leave and personal leave. Any accumulated unused balances of sick leave and personal leave shall be converted to cash in accordance with the rules established in Chapter 123:1-32 of the Administrative Code, and

(2) Any accumulated unused balance of vacation shall be converted to a cash payment at the time an employee is laid off.

Payment of any cash conversion made to employees paid by warrant of the auditor of state shall be made according to the provisions of Chapter 123:1-32 of the Administrative Code and the procedures established by the director.

(B) Reinstatement of leaves. Employee's leave balances may only be reinstated if the employee's layoff is disaffirmed by the state personnel board of review and the employee submits a reimbursement for the entire amount of the leave balance previously converted.

Other Contract Sections

ARTICLE 43 - DURATION

Section 43.02 - Preservation of Benefits

To the extent that State statutes, regulations or rules promulgated pursuant to Ohio Revised Code Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives.

Union's Position

- I. The plain and unambiguous language of the contract supports the inclusion of the five year rule in the contract.
- II. The language of Article 18 does not establish that the Union explicitly waived or forfeited rights provided by the Code.
- III. Alternatively, pursuant to Section 43.02, the five year rule is a benefit which shall continue and be determined by Revised Code Section 124.324(4) (page 8 of this opinion) and OAC Rule 123:1-41-12(D) (page 31 of this opinion).
- IV. The Employer has provided employees covered by the collective bargaining agreement use of the five year rule which indicates that the Union's reading of the contract is a reasonable one.

Employer's Position

- I. The Contractual Rights of Laid-Off Employee to Displace Other Employee is Substantively Different from the Statutory Rights of Laid-Off Employee to Displace Other Employees.
- II. The Clear Language of the Contract Precludes the Application of the Five Year Rule.
- III. State Law Precludes the Application of the Five Year Rule.
- IV. Awarding an Incorporation of the Five Year Rule Would be a Violation of the Arbitrator's Powers Under

the Contract.

V. The Mistaken Interpretation of the Application of the Five Years Rule in a Very Few Instances by State Agencies is Merely an Aberration from the State's Consistent Interpretation that the Five Year Rule Does Not Apply Under Article 18 of the Contract.

Discussion

Section 18 of the Contract is entitled "Layoffs." The presumption created by the Title is that all articles under 18 shall deal with Layoffs. Section 18.01 states that "layoff of employees covered by this Agreement shall be made pursuant to Ohio Revised Code Sections 124.321-327 and Administrative Rule 123:1-41-01 through 22, except for the modifications enumerated in this Article." This Article is completely different than the other 42 articles in this Contract. No other Article starts by stating that the particular subject matter is governed by the Code and the Administrative Rules. Article 18 mandates "shall" be made Pursuant to." Article 22 starts in somewhat similar manner when the Article begins with the statement that "The employer may use evaluations pursuant to OAC Chapter 123:1-29, except as modified by this Article." On its face, Article 22.01 allows (permits) but does not mandate that the Employer use performance evaluation forms from the code but only if not modified" by this Article". Article 18 is much stronger because the language is not the language of "permission" but that language of a mandate (shall). Moreover, Article 22 allows the employer to use the forms of the Code except as modified by the article. Article 22 uses a common contractual methodology, namely going from the general to the specific. Thus, the Employer may use the Code forms unless somewhere in Article 22 some specific item is forbidden.

The only other Article which refers deliberately in its opening to state law is Article 43 which addresses the preservation of benefits found in the Code if the Contract is silent on the issue at hand. All the other articles begin by stating substantive provisions of the Contract. Only Article 18 begins by saying that the substantive provisions shall be found elsewhere except for the modifications enumerated in the Article [18]. The presumption is that the parties knew what they were doing and chose their words carefully and with intentionality. In Article 18, the parties chose to start that Article in an entirely different way than almost all of the other articles. The job of an Arbitrator is to give the meaning the parties intended to their words. The Arbitrator can neither add nor subtract. In Article 18, the parties explicitly referred the reader to specific Code and Rule sections for the procedures and rules covering "layoff" unless in the rest of the Article [18] those Code or Rule sections were expressly modified. Therefore, to determine the substantive content of "layoffs," the Contract refers the reader to the ORC and the OAR. Sections .02 through .07 of Article 18 specifically and explicitly modify the procedures and rules found in the ORC and the OAR. Where the Contract modifies those rules and procedures, the Contract governs. Where the Contract does NOT modify those rules and procedures, the OAC and OAR still govern. In other words, Article 18, unlike other Articles in the Contract, makes documents other than the Contract the basis of substantive rules and only modifies those rules by the Contract enumerations.

Then the question becomes does the Contract specifically by explicit enumeration in Article 18 modify the "Five (5) Year Rule" found in ORA 123:1-41-12(D). Reading carefully, nothing in any of the Article 18 Sections .02 through .08 contradict, modify, or eliminate the Five Year Rule.

The State argues that Sections 18.02 through 18.05 create such a complete scheme of bumping procedures that by implication that ORC 124.324 and ORC 123:1-41-11 through 123:1-41-12 are completely superseded. However, in Article 18.01 those sections are not deleted but included. If the parties intended that Sections 18.02 through 18.05 should completely supersede the OAC and OAR sections, why did not the Contract drafters so state? Only one paragraph above in 18.01, the drafters precisely delineated certain sections; this Arbitrator cannot believe that had they intended to delete certain sections, they could not. Moreover, nowhere in 18.02 through 18.05 is any mention made of any time limitations on these rights. Thus, 18.02 through 18.05 are silent on this issue. Section 18.01 specifically says that to supersede the relevant ORC sections and OAR sections, the modification must be "enumerated in this article." The only way that 18.02 through 18.05 could eliminate the Five Year Rule would be to do so specifically.

The Arbitrator concludes that the "Five Year Rule" is not excluded or overcome by Article 18 and remains applicable where relevant under the Contract.

Rhonda R. Rivera
Arbitrator

June 24, 1992
Date