[Cite as *Nowels v. Ohio Dept. of Health*, 2012-Ohio-1844.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

George Nowels,	:	
Appellant-Appellant,	:	
		No. 11AP-975
v.	:	(C.P.C. No. 11CVF-01-821)
Ohio Department of Health,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on April 26, 2012

McNees Wallace & Nurick LLC, *Samuel N. Lillard*, and *Anthony D. Dick*, for appellant.

Michael DeWine, Attorney General, and *Mahjabeen F. Qadir*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Appellant, George Nowels ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which affirmed the order of the State Personnel Board of Review ("SPBR") in favor of appellee, the Ohio Department of Health ("ODH"), on appellant's administrative appeal from ODH's abolishment of his position and his resultant layoff. For the following reasons, we reverse.

I. BACKGROUND

{¶ 2} Appellant was employed by ODH from September 1976 until November 2009 and had been based out of ODH's Toledo office since 1989. In 2002, appellant accepted the position of Management Analyst Supervisor I ("MAS1"), as the Syphilis Elimination Project Coordinator. In that position, which he held until November 20, 2009, appellant traveled throughout the state and was responsible for overseeing and coordinating syphilis elimination efforts. Appellant's salary, benefits, and travel expenses were fully funded by the federal government as part of a categorical grant from the Centers for Disease Control ("CDC").

{¶ 3} In 2009, Joseph Andrews, an ODH Labor Relations Administrator, Barb Bradley, the Bureau Chief for the ODH Bureau of Infectious Disease Control, and ODH's Human Resources Director, met to discuss concerns regarding travel costs associated with appellant's position. As an option for reducing those costs, Andrews suggested that ODH could transfer appellant's position to Columbus, as the majority of appellant's travel in 2009 was to Columbus. Andrews alternatively suggested that ODH could abolish appellant's position. Although Andrews was unaware of the federal funding for appellant's position, he testified that the source of appellant's funding would not have altered his advice.

{¶ 4} Bradley informed Jen Keagy, appellant's direct supervisor, that ODH was going to transfer appellant's position to Columbus, and, on June 5, 2009, Bradley and Keagy met with appellant. There is some dispute in the testimony with respect to this meeting. Appellant testified that he was unequivocally told that ODH was transferring his position to Columbus, and that he was to report to Columbus within 30 days. Keagy, on the other hand, testified that appellant was given the option of deciding whether to accept a transfer. Keagy stated that there was no mention of abolishing appellant's position during the discussions regarding a transfer.

{¶ 5} Appellant filed an appeal with SPBR, challenging the transfer of his position, but he nevertheless reported to work at ODH's Columbus office on July 13, 2009. The following afternoon, Bill Tiedemann, the Program Chief of the HIV/STD/AVH prevention program, ordered appellant back to ODH's Toledo office

because there had been no final order of transfer. SPBR subsequently dismissed appellant's appeal based upon lack of evidence that any transfer had occurred.

{¶ 6} In August 2009, ODH submitted its grant budget for calendar year 2010 to the CDC. The 2010 budget did not include funding for appellant's position. Keagy, who wrote the budget, did not include appellant's position because "we knew that that was a possibility that we were not going to have that position." (Tr. 119.) She stated, "if for whatever reason [the Ohio Department of Administrative Services ("DAS")] would not have approved the abolishment, we would have [written] the position back in and just adjusted the money accordingly." (Tr. 119.) While the total grant budget remained constant from 2009 to 2010, the 2010 budget included increased total funding for the syphilis elimination effort ("SEE") program as well as increased personnel costs attributed to the SEE program.

{¶ 7} In a letter dated October 28, 2009, the Director of Health, Alvin D. Jackson, M.D., requested DAS approval for the abolishment of appellant's position. Dr. Jackson notified DAS of his own approval of "a plan by senior management to reduce payroll expenses in the Bureau of Infectious Disease Control, Syphilis Elimination Effort (SEE) Program," which would result in the abolishment of appellant's position. Attached to Jackson's letter was ODH's Rationale for Job Abolishment ("Rationale"). The Rationale acknowledged that appellant's position was funded by the CDC, but stated that ODH sought to eliminate the position "as part of an overall reorganization for reasons of economy." The Rationale stated, in part, as follows:

> This * * * position is headquartered in the Toledo District Office, while the CDC has designated the City of Columbus and Franklin County as the SEE area of high morbidity for Ohio. As a result, the employee has incurred approximately $25,000.00 in reimbursable travel expenses since July 2007. Compounding that concern is the larger issue of unproductive work time from the employee having to travel three hours each way to and from the high morbidity area on a regular basis.
>
> Reviewing those concerns led management to analyze the overall allocation of human capital to meet statewide program objectives. After factoring out the

> significant amount of this position's unproductive travel time, management concluded that remaining STD program staff were trained, funded, properly classified and qualified to perform SEE functions in any part of the state; and based on their current program responsibilities and geographical regions, these staff can perform all the functions currently assigned to the [MAS1].

The Rationale also stated that the abolishment "will allow the HIV/STD/AVH Prevention Program to reduce salary, travel expense and other overhead."

{¶ 8} Attached to the Rationale was a table of estimated cost savings, which included purported savings of appellant's annual salary ($67,454.40), benefits ($21,585.41), indirect costs ($27,157.14), and travel expenses ($12,500). After accounting for estimated unemployment costs, ODH estimated a total annual cost savings of $119,596.40 as a result of the abolishment.

{¶ 9} On November 5, 2009, Keagy and Chris Keppler, a Labor Relations Officer, personally notified appellant that ODH was abolishing his position and laying him off. Keppler presented appellant with various documents, including a copy of ODH's Rationale and its supporting documentation. ODH laid off appellant, effective November 20, 2009, and abolished his position, effective November 21, 2009.

{¶ 10} Appellant appealed to SPBR. An Administrative Law Judge ("ALJ"), who conducted a hearing on September 14 and 15, 2010, issued a report and recommendation, recommending that SPBR affirm both the abolishment of appellant's position and appellant's layoff. The ALJ stated that ODH "demonstrated its compliance with the requirements and parameters established to abolish a position for reasons of economy" because it "did * * * capture and redirect * * * funds in regard to Appellant's salary and direct/indirect benefits and was able to capture and redirect at least a portion of travel expenses * * * [, thus] further[ing] its goal of providing more effective support for *and a concomitant increase in funding to* local health departments to address pertinent outbreaks and prevention." (Emphasis sic.) The ALJ also concluded that appellant failed to prove that ODH acted in bad faith. SPBR adopted the ALJ's report and recommendation on January 7, 2011.

{¶ 11} Appellant appealed to the Franklin County Court of Common Pleas, pursuant to R.C. 119.12, and that court affirmed SPBR's decision on October 20, 2011. The trial court found that SPBR's order was supported by reliable, probative, and substantial evidence and was in accordance with law. The court specifically found that ODH established that it abolished appellant's position for reasons of economy, in compliance with R.C. 124.321(D), where it "was able to find more effectual economic means of using the money entrusted to it to fulfill its mission." The trial court also found that SPBR's conclusion on the issue of bad faith was supported by the evidence and in accordance with the law. Appellant has now timely appealed to this court.

II. ASSIGNMENTS OF ERROR

{¶ 12} Appellant raises the following assignments of error:

> [I.] THE TRIAL COURT ERRED IN FINDING THAT THE ABOLISHMENT AT ISSUE COMPLIED WITH R.C. § 124.321.
>
> [II.] THE TRIAL COURT ERRED IN FAILING TO FIND THAT [ODH] HAD IMPERMISSIBLY MODIFIED ITS ABOLISHMENT RATIONALE AFTER-THE-FACT FROM ONE OF "REASONS OF ECONOMY" TO "EFFICIENCY OF OPERATION" IN DIRECT CONTRAVENTION OF OHIO SUPREME COURT PRECEDENT.
>
> [III.] THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE ABOLISHMENT OF [APPELLANT'S] POSITION WAS DONE IN BAD FAITH.

III. DISCUSSION

{¶ 13} In an administrative appeal, pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. In applying this standard, the trial court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980). On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.*, 63 Ohio St.3d 705, 707 (1992). In reviewing the court of common pleas' determination that the board's order was

supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Id*., citing *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261 (1988). On the question whether the board's order was in accordance with the law, however, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

A. First and Second Assignments of Error: R.C. 124.321

{¶ 14} Appellant's interrelated first and second assignments of error both concern ODH's compliance with R.C. 124.321, and we will address those assignments together. "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." R.C. 124.321(A). An appointing authority may determine whether a position should be abolished, and courts should not second-guess that determination as long as it is rational and made in good faith. R.C. 124.321(D)(3); *McAlpin v. Shirey*, 121 Ohio App.3d 68, 76 (1st Dist.1997). Before abolishing any state position, however, the appointing authority must file a statement of rationale and supporting documentation with DAS. R.C. 124.321(D)(3).

{¶ 15} R.C. 124.321(D), which governs the abolishment of a civil service position, provides, in pertinent part, as follows:

> (1) As used in this division, "abolishment" means the deletion of a position or positions from the organization or structure of an appointing authority.
>
> For purposes of this division, an appointing authority may abolish positions for any one or any combination 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.
>
> (2)(a) Reasons of economy permitting an appointing authority to abolish a position and to lay off the holder of that position under this division shall be determined at the time the appointing authority proposes to abolish the position. The reasons of economy shall be based on the appointing authority's estimated amount of savings with respect to salary, benefits, and other matters associated with

> the abolishment of the position, except that the reasons of economy associated with the position's abolishment instead may be based on the appointing authority's estimated amount of savings with respect to salary and benefits only, if:
>
> (i) Either the appointing authority's operating appropriation has been reduced by an executive or legislative action, or the appointing authority has a current or projected deficiency in funding to maintain current or projected levels of staffing and operations; and
>
> (ii) In the case of a position in the service of the state, it files a notice of the position's abolishment with the director of administrative services within one year of the occurrence of the applicable circumstance described in division (D)(2)(a)(i) of this section.

The parties' dispute here concerns ODH's compliance or non-compliance with the substantive, statutory requirements for abolishing appellant's position, and specifically the adequacy of ODH's Rationale.

{¶ 16} In an SPBR appeal, an appointing authority bears the burden of proving the sufficiency of its substantive reasons for abolishing a position. *Penrod v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 239, 2007-Ohio-1688, ¶ 18, citing *State ex rel. Bispeck v. Trumbull Cty. Bd. of Commrs.*, 37 Ohio St.3d 26, 28 (1988). In *Penrod* at ¶ 29, the Supreme Court of Ohio quoted this court's statement in *Fragassi v. Lorain Cty. Bd. of Commrs.*, 10th Dist. No. 94APE07-950 (Mar. 14, 1995), regarding the underlying purpose for requiring submission of a rationale to support a job abolishment. This court stated that the reasons for the requirement include the following: " '(1) to assure that the appointing authority analyzes the basis for abolishing a position, at least to the extent of being enabled to articulate that basis; (2) to place the appointing authority on record in that regard; and (3) to assist an affected employee in determining if there be any basis for an appeal.' " *Id.*, quoting *In re Appeal of Rawat*, 10th Dist. No. 83AP-980 (May 15, 1984). "[I]t is not unfair or overly burdensome to hold the appointing authority to a standard of articulating the actual reason or reasons for the abolishment in its statement of rationale." *Penrod* at ¶ 39. An employee has a right to expect fair treatment from the

appointing authority, which has a corresponding duty of candor to the employee. *Id*. at ¶ 40.

{¶ 17} In *Penrod*, DAS abolished Penrod's position in the State Architect's Office ("SAO") after DAS's allocation from the General Revenue Fund was cut by approximately 15 percent. The Director of DAS requested authorization from its Human Resources Division to abolish positions, including Penrod's, "to improve the efficient operation of the department." *Id*. at ¶ 3. The rationale regarding Penrod's position stated that, " '[w]ith recent reductions in the state budget, and with additional budget reductions planned for the next bi-ennium, the SAO must now address reorganizing our Interior Design Services (IDS) to efficiently accommodate available capital projects and capital funds.' " *Id*. at ¶ 5. It went on to state as follows:

> "With this reorganization, the need for a separate, individual supervisor [Penrod's position] is no longer needed. * * *
>
> As with any reorganization we must utilize our resources to their fullest potential. * * * By eliminating the separation of services between SAO and IDS, we will be able to provide our customers more efficient and thorough service."

Id. at ¶7-8. Despite an ALJ recommendation that it disaffirm the abolishment because the evidence indicated that DAS's true reason was one of economy, not of efficiency, SPBR affirmed the abolishment and held that DAS appropriately selected more than one rationale under R.C. 124.321 to support its action. The Franklin County Court of Common Pleas reversed, concluding that DAS failed to prove increased efficiency, and this court affirmed the reversal.

{¶ 18} The Supreme Court held that DAS's stated rationale for the abolishment of Penrod's position was "fundamentally deficient as a matter of law." *Id*. at ¶ 30. The court noted that DAS's "fleeting reference" to the budget in its rationale was insufficient to set forth an economy-based rationale. *Id*. at ¶ 31. The Supreme Court held that "[t]he ALJ rightly found that by not justifying the abolishment as being for reasons of economy in its statement of rationale at the time the abolishment occurred, DAS was foreclosed from asserting an after-the-fact economy rationale (or a rationale based on both efficiency and economy) after Penrod challenged the abolishment." *Id*. at ¶ 37. Thus,

Penrod clarified that an appointing authority may not alter its rationale after the fact, by pointing to facts that support the abolishment for a different reason than the reason or reasons submitted to DAS. The Supreme Court ultimately agreed with the trial court that SPBR's order was not supported by the evidence because DAS did not present sufficient evidence to support its stated efficiency rationale.

{¶ 19} Here, because ODH maintains that it abolished appellant's position for reasons of economy, as stated in its Rationale, it was required to establish those reasons before SPBR. Although appellant argues that ODH changed its rationale from the originally stated reasons of economy to an efficiency-based rationale, neither SPBR nor the trial court found that reasons of efficiency justified ODH's action; rather, both found that ODH met its burden of establishing reasons of economy. Thus, affirmance of the abolishment depends entirely on whether ODH established that it abolished appellant's position for reasons of economy.

{¶ 20} R.C. 124.321(D)(2)(a) generally states that "reasons of economy shall be based on the appointing authority's estimated amount of savings with respect to salary, benefits, and other matters associated with the abolishment of the position." The statute goes on to state an exception, whereby reasons of economy "*instead* may be based on the appointing authority's estimated amount of savings with respect to salary and benefits only, *if*" the appointing authority meets certain, additional requirements. (Emphasis added.) R.C. 124.321(D)(2)(a)(i) and (ii) set forth the additional requirements for abolishing a position based solely on a savings of salary and benefits. Both SPBR and the trial court held that subsections (i) and (ii) are inapplicable here because ODH asserted reasons of economy based upon estimated savings with respect to "salary, benefits, and other matters" related to appellant's position, namely appellant's travel expenses of approximately $12,500 per year.

{¶ 21} Appellant argues that SPBR and the trial court misconstrued R.C. 124.321(D)(2)(a) and maintains that sections (D)(2)(a)(i) and (ii) apply to all abolishments for reasons of economy, even if based on savings with respect to matters beyond salary and benefits. We disagree, based on the plain, statutory language and because appellant's reading effectively eradicates the exception written into the statute.

{¶ 22} Appellant argues that there is no sound policy reason for the General Assembly to have created additional protections for civil servants whose positions are abolished based upon savings of salary and benefits alone, as opposed to those whose positions are abolished based upon savings of salary, benefits, and other matters. As appellant aptly notes, however, an agency could argue that any job abolishment will save the specific salary and benefit expenditures applicable to the position. Were those amounts, alone, sufficient to establish reasons of economy, an appointing authority could successfully justify any job abolishment solely on that basis. Nevertheless, the General Assembly recognized that there are instances where a savings of salary and benefits alone is sufficient to justify abolishing a position, and R.C. 124.321(D)(2)(a)(i) and (ii) set forth those scenarios. Under R.C. 124.321(D)(2)(a)(i), the appointing authority must establish that its operating appropriation has been reduced by executive or legislative action or that it has a current or projected funding deficiency, and R.C. 124.321(D)(2)(a)(ii) limits the time in which the agency must act under those circumstances. The additional requirements protect employees by limiting an agency's ability to justify an abolishment based solely on a savings of salary and benefits. Where an appointing authority is not facing reduced appropriations or a budget deficiency, it must justify a job abolishment based on estimated savings beyond the position's salary and benefits. The requirement of additional justification affords a similar level of protection to the employee as the requirements in R.C. 124.321(D)(2)(a)(i) and (ii). Here, because ODH is claiming that it abolished appellant's position based on estimated savings of salary, benefits, and other matters, both SPBR and the trial court correctly determined that R.C. 124.321(D)(2)(a)(i) and (ii) are inapplicable.

{¶ 23} To justify abolishment of a position for reasons of economy, an appointing authority must establish an estimated "amount of savings." R.C. 124.321(D)(2)(a). ODH submitted to DAS an estimate of cost savings as a result of abolishing appellant's position, in which it estimated a total annual savings of approximately $120,000, based on no longer paying appellant's salary, direct and indirect benefits, and travel expenses, from the CDC grant. ODH claims that, by freeing up funds, previously directed to appellant's position, for other purposes, it realized a savings even though it was required to spend the funds received from the CDC to avoid having to return those funds.

Appellant, on the other hand, argues that ODH failed to prove that it would realize any savings because his salary, benefits, and travel expenses were completely funded by the CDC categorical grant, which did not decrease as a result of the job abolishment. Appellant contends that reallocation of CDC funds does not constitute a savings to ODH. Thus, the issue here resolves to whether ODH realized a savings, or, more specifically, whether the freeing up of funds that it would have spent on appellant's position for other uses constitutes a savings when ODH did not reduce its expenditures.

{¶ 24} The Revised Code does not define the word "savings" for purposes of R.C. 124.321(D)(2). We must, therefore, use its common, ordinary, and accepted meaning unless that meaning is contrary to clear legislative intent. *See Am. Fiber Sys., Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, ¶ 24; *Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 122 Ohio St.3d 557, 2009-Ohio-3628, ¶ 15. Interpretation of a statute is a matter of law that we review de novo. *DHSC, LLC v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 11AP-424, 2012-Ohio-1014, ¶ 13.

{¶ 25} *Webster's Encyclopedic Unabridged Dictionary* 1272 (1996) defines "saving," in pertinent part, as follows: "**-** *n.* **5.** economy in expenditure, outlay, use, etc. **6.** a reduction or lessening of expenditure or outlay: *a saving of 10 percent*. **7.** something that is saved. **8. savings,** sums of money saved by economy and laid away." (Emphasis sic.) "Economy" is defined, in part, as "thrifty management; frugality in the expenditure or consumption of money, materials, etc." *Webster's* at 452.

{¶ 26} While ODH argues that the abolishment of appellant's position resulted in a savings from waste, ODH has not identified any case law, nor has this court uncovered any Ohio case, in which a court has affirmed the abolishment of a position for reasons of economy absent evidence that the appointing authority realized an actual reduction in expenditures. To the contrary, in *Romeo v. Campbell*, 7th Dist. No. 89 C.A. 69 (Jan. 17, 1990), the court held that the city of Campbell could not establish that it was abolishing positions for reasons of economy where the city did not know whether the abolishments would result in substantial savings to the taxpayers. Based on the common, ordinary meaning of "savings," we conclude that the phrase "amount of savings," as used in R.C.

124.321(D)(2)(a), relates to a specific and calculable reduction in the appointing authority's expenditures.

{¶ 27} From 2009 to 2010, there was no reduction in the amount of the CDC grant that ODH received, and ODH did not reduce its expenditures by eliminating appellant's position. In both years, ODH received approximately $1.9 million from the CDC grant. The budget elaboration for the SEE program in 2009 listed total costs of $431,950, of which $108,642 represented personnel costs, including appellant's salary. ODH's revised 2010 budget elaboration for the SEE program, which did not include appellant's position, listed total costs of $443,862, of which $110,343 represented personnel costs. Although the 2010 budget reduced travel expenses for the SEE program by approximately $7,000, both the overall 2010 budget for the SEE program and the personnel costs attributed to that program increased from 2009. This is in direct contradiction to Dr. Jackson's letter to DAS, describing a plan to reduce payroll costs in the SEE program.

{¶ 28} Upon eliminating appellant's salary from the 2010 budget, ODH used SEE program funds to pay 20 percent of the salaries of five Human Services Program Consultants ("HSPCs"), who absorbed many of appellant's former duties. Previously, the HSPCs' salary had come entirely from the Comprehensive STD Prevention Systems ("CSPS") portion of the CDC grant. By paying a portion of the HSPCs' salaries from the SEE program budget in 2010, ODH freed up funds in the CSPS budget, and then used those funds to increase funding to local health departments. In 2010, ODH was able to increase funding to local health departments by approximately $126,000.

{¶ 29} Keagy testified that, in the 2010 budget, ODH proposed to spend the same amount of money but, instead of funding appellant's position, it would increase expenditures to the local health departments. Keagy admitted, "[i]t's not that we're saving any money. It's just redistributing how that money is being spent * * * [and] enabling the program to be more effective, to redistribute dollars to local health departments." (Tr. 99-100, 113.) She agreed that "[t]he only change [was] how the state chose to apportion the money that it would expend." (Tr. 101.) Roger Suppes, ODH's Prevention Division Chief, similarly testified that "the way that we tend to look at

savings is -- is not necessarily about giving it back to the federal government or putting it in [an] account somewhere * * * it's redirecting the funds in what we believe to be a more effective use of the funds." (Tr. 191-92.) He agreed that ODH had changed its philosophy of how to use the federal funds; "In terms of the overall effectiveness of the program * * *, the needs had shifted over the years." (Tr. 193.) Both witnesses emphasized that reallocating funds led to increasing the effectiveness of the program.

{¶ 30} We conclude that ODH's determination that it would be more effective to spend the funds allocated to appellant's position in 2009 to increase funding to local health departments in 2010 does not demonstrate a savings under R.C. 124.321(D)(2)(a). Accordingly, while we express no opinion as to the soundness of ODH's determination, we agree with appellant that ODH failed to establish that it abolished his position for reasons of economy. To hold otherwise would so blur the line between reasons of economy and reasons of efficient operation that the categories would become virtually indistinguishable. For these reasons, we conclude that the trial court erred by determining that the abolishment of appellant's position complied with R.C. 124.321 and by affirming the SPBR order. We, therefore, sustain appellant's first assignment of error. Our determination that ODH did not establish reasons of economy moots consideration of appellant's second assignment of error, in which he argues that ODH impermissibly changed its rationale and attempted to establish reasons of efficiency for abolishing his position.

{¶ 31} Appellant's counsel acknowledges that, in the case of a reversal here, ODH may simply reapply to DAS for authorization to abolish appellant's position for reasons of efficiency. Nevertheless, despite our reservations concerning the efficiency of this process, we are constrained to apply the legislative scheme enacted by the General Assembly.

B. Third Assignment of Error: Bad Faith

{¶ 32} Appellant's third assignment of error asserts that the trial court erred by failing to find that ODH acted in bad faith when it abolished his position. Ohio Adm.Code 124-7-01(A) states that job abolishments shall be disaffirmed if the employee proves, by a preponderance of the evidence, that the appointing authority acted in bad

faith. The question of whether an act was taken in good faith or in bad faith is primarily a question of fact. *Cole v. Puritan Life Ins. Co.*, 1st Dist. No. C-75024 (Feb. 2, 1976), citing *Occidental Life Ins. Co. of California v. Bob LeRoy's Inc.*, 413 F.2d 819, 822 (5th Cir.1969). Thus, our review is confined to whether the trial court abused its discretion in affirming SPBR's determination that appellant failed to establish bad faith by a preponderance of the evidence. A preponderance of the evidence is that measure of proof that convinces the trier of fact that the existence of a fact is more likely than its non-existence. *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, ¶ 54.

{¶ 33} An appellant may establish bad faith by presenting appropriate evidence or inferences therefrom that a job abolishment was not made in good faith and was used as a subterfuge to subvert the purposes of the civil service system. *Ohio Dept. of Rehab. & Corr. v. Middlestead*, 10th Dist. No. 10AP-726, 2011-Ohio-2370, ¶ 20, citing *State ex rel. Gould v. Ohio Bur. of Emp. Servs.*, 28 Ohio App.3d 30, 32 (10th Dist.1985). The existence of bad faith does not require a finding that the employer acted with political or personal animus. *Middlestead* at ¶ 23, citing *Blinn v. Ohio Bur. of Emp. Servs.*, 29 Ohio App.3d 77 (10th Dist.1985), syllabus.

{¶ 34} In support of his bad-faith argument, appellant relies on the testimony of Nancy McClure, ODH's former HIV Prevention Program Manager, who retired effective June 30, 2009. McClure testified that she was present for weekly ODH management meetings in May and June 2009 that included discussions regarding the proposed transfer of appellant's position. McClure testified that she questioned the effect of transferring appellant's position from Toledo to Columbus, based on the CDC's approval of appellant's travel expenses in the budget. According to McClure, Tiedemann replied that maybe the transfer would force appellant to retire. McClure, however, was unaware of Tiedemann's level of involvement with respect to the ultimate decision of whether to transfer or abolish appellant's position.

{¶ 35} The ALJ concluded that appellant failed to demonstrate, by a preponderance of the evidence, either that ODH bore a personal animus toward him or that ODH abolished his position in order to subvert the civil service system. On appeal, the trial court acknowledged McClure's testimony, but also noted the absence of

contextual evidence regarding Tiedemann's alleged statement. The court stated that Tiedemann's statement "may have been an innocent ill-chosen offhand comment, or it may have been reflective of an awareness of an important but benign factor in [ODH's] determination of what direction to go in terms of relocating the office under consideration, or it may have been an unwitting revelation of malevolent purpose." The court nevertheless determined that, regardless of the context, SPBR's finding that the preponderance of the evidence did not support a claim of bad faith was in accord with the evidence and the law.

{¶ 36} Appellant asserts that Tiedemann's statement demonstrates that ODH acted in bad faith by targeting appellant personally for termination. Appellant also claims that the trial court erroneously imposed upon him an additional requirement of establishing Tiedemann's motivation in order to establish bad faith and that the falsity of ODH's purported economic savings demonstrates bad faith.

{¶ 37} In *Penrod* at ¶ 17, the Supreme Court stated, "[i]f an appointing authority uses a job abolishment as a pretense to target a specific employee for termination, the abolishment should not withstand scrutiny" because abolishment is directed at eliminating a position, not a specific employee. The statement attributed to Tiedemann, however, was not made in relation to the decision to abolish appellant's position, but, rather, in relation to the issue of transferring the position to Columbus. Additionally, McClure, the only witness who testified about an attempt to force appellant's retirement, herself retired prior to any decision to abolish appellant's position and was not involved in that determination. McClure was also unaware of Tiedemann's involvement with respect to the decision to transfer or abolish appellant's position, and there is no other evidence in the record that Tiedemann was involved in the ultimate decision. Accordingly, we discern no abuse of discretion in the trial court's determination that Tiedemann's statement did not establish bad faith by ODH.

{¶ 38} Next, we disagree with appellant's argument that the trial court required him to establish Tiedemann's precise motivation to demonstrate bad faith. Although the court did state that additional contextual elucidation may have been helpful and appropriate, it found that SPBR's determination was supported by the evidence actually

presented, as well as the law. Even assuming an improper motive behind Tiedemann's statement, the trial court could have determined that the record contained evidence upon which to affirm SPBR's determination that the preponderance of the evidence did not establish bad faith by ODH. We may not reweigh the evidence, but must consider only whether the trial court abused its discretion. In this regard, we hold that the trial court did not abuse its discretion.

{¶ 39} Finally, although we have sustained appellant's first assignment of error based on ODH's failure to establish reasons of economy for abolishing appellant's position, we do not agree with appellant that ODH's failure constitutes evidence of bad faith. Although we concluded that ODH's reallocation of funds to more effectively meet its objectives does not establish a savings, the record contains no evidence that the underlying reasons expressed by ODH regarding the abolishment of appellant's position, even though more aptly reasons of efficiency than reasons of economy, were not ODH's real reasons, and there is no evidence in the record that ODH intentionally or knowingly mischaracterized those reasons in its Rationale. Accordingly, we reject appellant's argument that the absence of actual cost savings to ODH demonstrates that ODH acted in bad faith. For these reasons, we overrule appellant's third assignment of error.

IV. CONCLUSION

{¶ 40} In conclusion, we sustain appellant's first assignment of error, thus rendering appellant's second assignment of error moot, and we overrule appellant's third assignment of error. For the reasons stated above, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court with instructions to vacate its previous order and to enter a new order vacating the order of SPBR and remanding this matter to SPBR with direction to disaffirm ODH's abolishment of appellant's position and appellant's layoff.

Judgment reversed;
cause remanded with instructions.

TYACK and DORRIAN, JJ., concur.