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# HANDBOOK

## Ohio County Commissioners

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209 East State Street • Columbus, Ohio 43215-4309

Phone: 614-221-5627 • Fax: 614-221-6986 • [www.ccao.org](http://www.ccao.org)

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## CHAPTER 63

# CIVIL SERVICE AND EMPLOYMENT ISSUES

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### 63.01 INTRODUCTION

Article XV, Section 10 of the Ohio Constitution sets forth the basic principle of selection based on merit and fitness for all positions in the civil service of the State of Ohio, cities, and counties. That section provides:

"Appointments and promotions in the civil service of the state, counties, and cities must be made according to merit and fitness, to be ascertained as far as practicable by competitive examinations. Laws may be passed to enforce this provision."

Starting early in the 20<sup>th</sup> Century, the General Assembly has enacted civil service laws to implement this constitutional mandate. Most of the civil service statutes are found in ORC Chapter 124, with some county-specific provisions also found in Chapter 325. All employees of the county are civil service employees, as the Ohio Revised Code defines civil service to include:

"All offices and positions of trust and employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof." (ORC Section 124.01)

In addition to the provisions of the Revised Code, administrative rules containing civil service requirements applicable to counties are found in the administrative rules of the Ohio Department of Administrative Services (DAS) and the State Personnel Board of

Review (SPBR). Civil service laws and rules must be read carefully, because some apply to state employees only and others to counties as well. It is important, therefore, to read the sections of the Revised Code specific to counties in conjunction with ORC Chapter 124.

Sometimes county officials and employees assume that civil service laws and rules do not apply to county employees simply because they were not appointed following formal, civil service tests. This is incorrect. All county employees are in the civil service – most as classified (protected) employees, some as unclassified (at-will) employees. The mode of appointment is unimportant. With the exception of some counties in which DAS offered civil-service testing as part of a court-sanctioned consent decree, DAS has not widely offered civil service tests for county employees for decades, and following the enactment of civil service reform legislation in H.B. 187 in 2007, the state no longer has any responsibility for civil service testing in county government. That said, the principles of selection based on merit and fitness remain applicable as a matter of Ohio constitutional law and are now the responsibility of county appointing authorities. Fortunately, H.B. 187 included reforms for which CCAO had worked for years, including expanding the means of determining merit and fitness to include structured interviews and assessment centers, beyond traditional, pen-and-paper civil service examinations. What remains true, however, is that selection based on political or personal connections remains unlawful when it comes to classified employees.

This Chapter of the *Handbook* addresses many of the details of civil service law as it relates to county employees. It must be stressed, however, that ORC Chapter 124 was written primarily with employees of the State of Ohio in mind, and the law is thus often cumbersome for counties to administer, even after the much-needed reforms in H.B. 187. Some of CCAO's proposals to make the law even more streamlined and workable for counties were unfortunately stripped out of the bill just before final passage.

If employees are covered by a collective bargaining agreement, that agreement supersedes civil service law in all cases except for the conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and original appointments from the eligible lists (ORC Section 4117.08). See Chapter 65 – "Collective Bargaining." In short, all but the initial selection of employees can be changed through collective bargaining. This presents a major opportunity for county appointing authorities to shape local procedures that may be more workable for both employers and employees through the collective bargaining agreement.

## **63.02 AUTONOMY OF COUNTY ELECTED OFFICIALS (ORC 325.17)**

From the outset, it is important for county commissioners to understand that each county elected official is a completely autonomous appointing authority under Ohio law. The county commissioners only have authority and responsibility for hiring, rate of pay, promotions, reductions, terminations, lay-offs, and similar actions for employees of the board of county commissioners, not the employees of other county elected officials or

independent boards (such as the Board of Developmental Disabilities or the Drug and Alcohol and Mental Health Boards). The board of county commissioners does appropriate the funds for the cost of personnel services for each county office and agency, and that can certainly affect the pay of employees. There is no authority, however, for the county commissioners to directly establish compensation rates for employees of other elected officials. Nor do the county commissioners have any authority over the hiring, promotional, or termination decisions of other county appointing authorities. This can be a difficult issue when the public tends to see the board of county commissioners as being “in charge of the county.”

### **63.03 UNCLASSIFIED AND CLASSIFIED SERVICE (ORC 124.11)**

As noted above, all county employees are in the civil service and are divided into the classified (protected) and unclassified (exempt or at-will) service. The unclassified service is comprised of the following positions, which are not included in the classified service. Employees in the unclassified service are not required to be appointed through any civil service examination process. Unclassified employees also have no tenured or protected status and serve at the pleasure of their appointing authority. The following county unclassified positions are automatic:

1. All elected officials including those appointed to fill vacancies.
2. Board of election officers and employees.
3. The heads of all departments appointed by a board of county commissioners.
4. County or district licensing boards or commissions, boards of revision, and not more than five deputy county auditors.
5. Those employed by and directly responsible to an elected county official or a county administrator who hold a fiduciary or administrative relationship to the elected official(s) or county administrator. This does not apply to employees of a county job and family services department. A “fiduciary relationship” involves a position where the appointing authority places a special confidence and trust in the integrity and fidelity of the employee above what would be delegated to the average employee with knowledge of the proper procedures. An “administrative relationship” means a relationship where an employee has substantial authority to initiate discretionary action or in which the appointing authority must rely on the employee’s personal judgment and leadership abilities, again beyond what would be expected of the average employee. These rather vague formulations mean, in practice, that the employee in question has special authority to act in the stead of the commissioners or county administrator, or occupies a senior-level policy or management position. The fiduciary and administrative exemptions found in ORC Section 124.11(A)(9) are often called the “(A)(9) exemptions,” as distinguished from the “(A)(8) exemptions” discussed below. Note, however, that after H.B. 187 took effect in 2007, all department heads under the board of

county commissioners are unclassified, without the need to meet the requirements of the fiduciary or administrative exemptions.

With the exception of department heads, who are now all unclassified as a matter of statute, county commissioners and other county appointing authorities should be careful not to try to exempt too many employees as “fiduciary” or “administrative.” Only those positions where the employee has a high degree of trust, confidence, reliance, integrity, discretion, and fidelity above and beyond mere technical competence, and who may act in the place of the office holder, should be considered for exempt status. Exempt status under the (A)(9) exemptions is a question of fact based on actual duties and evidence, not labels applied by the employer, and unclassified status is ultimately to be determined by the State Personnel Board of Review and the courts, which tend to apply the exemptions narrowly.

6. Assistant county prosecuting attorneys.
7. Full-time physicians or dentists at mental health or developmental disabilities institutions, and physicians in residency at such institutions.
8. Non-citizens of the United States who are nurses and doctors licensed to practice in Ohio, or medical assistants employed in mental or chronic disease hospitals or institutions.
9. Alcohol, drug addiction, and mental health services board executive directors, deputy directors, program directors, and their secretaries.
10. County boards of developmental disabilities superintendents, and management employees.
11. Superintendents and management employees of county boards of developmental disabilities, as defined in ORC Section 5126.20.
12. Bailiffs, constables, official stenographers, and commissioners of courts of record only if the performance of such positions are impracticable to determine by competitive examination.
13. Physicians, nurses, and other employees appointed by a board of county hospital trustees.
14. Directors of county departments of job and family services as provided in ORC Section 329.02 and administrators appointed pursuant to ORC Section 329.021. Note: this covers only directors appointed after October 5, 1987. For administrators, unclassified appointments are based on population – five administrators for counties of 500,000 or more; four for counties of 250,000-

499,999; three for counties of 100,000-249,999; two for counties of 40,000-99,999; and one for counties of fewer than 40,000 people. Administrators who were already in the classified service at the time this provision was enacted (July 1, 2007) remain in the classified service until the position is vacated. Classified employees who are appointed to an unclassified administrator position may also have the right to return to their former, classified position in the event of termination. County commissioners and staff should carefully consult the statute and legal counsel in that case.

15. Director of county economic development created pursuant to ORC Section 307.07(A).
16. An executive director of a county transit system appointed under ORC Section 306.04(A).
17. The deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals or holding a fiduciary relation to their principals. This provision, in ORC Section 124.11(A)(28) has been little interpreted, and it is not clear how much it adds to the exemptions already provided in Section 124.11(A)(9).
18. Employees who receive intermittent or temporary appointments under ORC Section 124.30(B).
19. Employees appointed to administrative staff positions for which an appointing authority is given specific statutory authority to set compensation.
20. The county building inspector appointed pursuant to ORC Section 307.38.
21. The county home superintendent appointed pursuant to ORC Section 5155.03.
22. Employees placed into the unclassified service by another provision of the Revised Code (such as juvenile court employees, who all serve at the pleasure of the juvenile judge in that court's enabling statute, or employees of the county board of elections, who serve at that board's pleasure).

In addition to the exemptions given above, which are self-executing as a matter of law, county appointing authorities are given the following optional exemptions under ORC Section 124.11(A)(8):

1. Four clerical and administrative support employees for the board of county commissioners and one such employee for each county commissioner, and four clerical or administrative support employees for each elected official and each of the principal appointive executive officers, boards or commissions. As a practical matter, then, the board of county commissioners has four exemptions for the board as a whole, one more for each commissioner, and there is an argument

that there are four more for the county administrator, if one exists (as a “principal executive officer”). These exemptions are no longer filed with the Ohio Department of Administrative Services (DAS). Rather, ORC Section 124.12(B) provides that on the day an appointing authority appoints an employee to the unclassified service, the appointing authority will provide written information on the nature of the unclassified employee, *i.e.*, that the employee does not enjoy civil service protection and serves at the pleasure of the appointing authority. The appointing authority is then directed to provide written information describing the duties of the position within 30 days of the appointment. The failure to provide this notice or information to the employee does not change the employee’s unclassified status, however; in other words, it is not fatal to the exemption. It is clearly good practice to do so, however.

2. These exemptions do not take effect if not intentionally used, unlike the (A)(9) exemptions, which are a function of the duties and responsibilities assigned to the employee. These discretionary exemptions for administrative support and clerical employees are thus often referred to as the “personal” or “(A)(8) exemptions.” Unlike the law prior to the enactment of H.B. 187 in 2007, there is no time limit now on the exercise of personal exemptions. Note, however, that an appointing authority may not use one of the (A)(8) personal exemptions to exempt a previously classified employee without that employee’s consent. The appointing authority may designate the position as unclassified, but the previously classified incumbent in that position will remain classified until the position is vacated and a new employee is appointed with notice of the unclassified status.

The Attorney General has opined that absent a collective bargaining agreement, county commissioners and other county appointing authorities are without authority to enter into an employment contract which contains a specific term of employment with an individual serving in a position determined to be in the unclassified civil service pursuant to ORC Section 124.11 (OAG 96-040 and 91-011).

The classified service comprises all county employees not specifically included in the unclassified service. Employees in the classified service have tenure in employment and must be hired in accordance with civil service law, which requires appointments according to merit and fitness and in keeping with the provisions of ORC Chapter 124. See Section 63.08 of this *Handbook* for more information on civil service examinations for county employees.

It is important to consider the interface of civil service law and protections and collective bargaining, governed by ORC Chapter 4117. Before collective bargaining, county employment was governed largely by ORC Chapters 124 and 325 exclusively. Under the provisions of ORC Section 4117.10, however, a collective bargaining agreement supersedes civil service law when there is a conflict. ORC Section 4117.08(B) carves out some areas of law that are prohibited subjects of bargaining, and the contract may not address these areas: the conduct and grading of civil service examinations, the

establishment of eligible lists from the examinations, and original appointments from the eligible lists, generally interpreted as an employee's first appointment to an agency, office, or department. ORC Section 4117.10 also provides that laws regarding civil rights, affirmative action, unemployment compensation, workers' compensation, the retirement of public employees, residency, and disciplining employees convicted of a felony prevail over the conflicting terms of a collective bargaining agreement.

#### **63.04 APPOINTMENT OF EMPLOYEES; PERMANENT STATUS (ORC 124.26, 124.27 and 124.271)**

While Ohio law once made a distinction between "certified employees" (those appointed from an eligible list following a civil service examination) and "provisional employees" (those appointed directly without a civil service examination), that distinction was abolished in H.B. 187, which took effect on July 1, 2007. Now, an employee who has successfully completed the specified probationary period is a "permanent" employee, irrespective of the manner in which he or she was appointed.

#### **63.05 PROBATIONARY PERIOD (ORC 124.27)**

Every classified employee, whether certified or provisional, must serve a probationary period in which the employee establishes his or her suitability for long-term employment. This is true both for initial appointments and for promotions. For county employees this period is 180 calendar days. Longer probationary periods may be required only with the approval of DAS or under a collective bargaining agreement.

During the probationary period, the employer may remove an employee for failure to complete the probationary period successfully by notifying the employee, in writing, that he or she is being terminated for unsatisfactory service. An employee serving a promotional probationary period may be demoted for failure to complete the probationary period successfully, in which case he or she returns to the prior position held.

The employer alone determines whether or not the employee has completed probation successfully, and even classified employees serve at will during the probationary period. Terminated employees still may file discrimination charges, however, so it is always wise to document the reasons for the unsatisfactory performance through the probationary performance evaluation and other, appropriate documentation.

Time spent on leave of absence without pay is not counted as part of the probationary period. The probationary period is extended by the number of days of unpaid absence.

The appointing authority may extend the probationary period by up to 60 days, but only with the consent of both the employee and the Director of Administrative Services. This is one of the few areas in which ODAS still has a role in county employment. Any such extension must be consented to and approved before the expiration of the original

probationary period, and the extension cannot make the total probationary period longer than one year.

Part-time employees who work a portion of each normal working day also must serve a 180-day probationary period. Employees who work an irregular schedule or who work less than a normal work week have their probationary period calculated as follows:

1. 1,000 hours equals a 180-day probationary period.
2. 1,400 hours equals a 252-day probationary period.
3. 1,500 hours equals a 270-day probationary period.
4. 1,700 hours equals a 300-day probationary period.
5. 2,000 hours equals a 365-day probationary period.

### **63.06 COMPENSATION OF COUNTY EMPLOYEES (ORC 325.27)**

Under Ohio law, all elected officials specified in ORC Section 325.27 may hire, discharge and set the compensation of their employees. Resolutions or notices of appointment, rates of compensation, or notices of discharge must be filed with the county auditor in order to process payroll correctly.

The total amount of salaries within each office may not exceed the total appropriated for salaries for that office, but the commissioners have no direct authority over the salaries of employees of other elected officials in the county.

County employees are paid on a biweekly basis, with 26 pays in a normal year. Because the length of a year does not conform to exactly 26 periods of 14 days each, on rare occasion, a year will have 27 pays, and county appointing authorities will have to budget for the anomaly that an employee's pay appears to increase in that year when measured on an annual basis. Pay is formally set by the biweekly pay period, however, and this is simply an arithmetic adjustment that will have to be accounted for in the affected years.

The 27<sup>th</sup> pay period can create a budget problem for the county when this occurs. Some counties have established special revenue funds to accumulate money during the intervening years so that when the 27<sup>th</sup> pay period occurs, it is not such an impact on the current budget. This authority is granted to counties under ORC Section 5705.13(B). The law provides that the commissioners may adopt a resolution to establish a special revenue fund to accumulate revenue "for the payment of accumulated sick leave and vacation leave, and for payments in lieu of taking compensatory time off, upon the termination of employment or the retirement of officers and employees of the subdivision. The special revenue fund may also accumulate



resources for payment of salaries during any fiscal year when the number of pay periods exceeds the usual and customary number of pay periods.” Monies may be transferred to this fund from any other county fund without having to follow normal transfer provisions of law. If this fund is later terminated, the funds must be returned to the funds from which they originally came.

### **63.07 STANDARD WORK WEEK**

There is no statutory designation of what constitutes full-time employment for county employees. ORC Section 325.19 sets vacation benefits for county employees, and subsections (J)(1) and (2) of ORC Section 325.19 define full-time and part-time employees as:

1. Full-time employee means an employee whose regular hours of service for a county total 40 hours per week, or who renders any other standard of service accepted as full-time by an office, department, or agency of county service.
2. Part-time employee means an employee whose regular hours of service for a county total less than 40 hours per week, or who renders any other standard of service accepted as part-time by an office, department, or agency of county service, and whose hours of county service total at least 520 hours annually.

County work weeks vary from 40 hours a week to 35 hours or 37.5 hours. With budget-related work-week reductions and furloughs, the work week has been reduced even below these levels for some counties, at least on a temporary basis. It is a good idea to have a written policy established for all county offices concerning the definition of work weeks. Be careful when designating a standard work week, because if such a designation results in an increase in the number of hours that employees must work without a pro-rated increase in pay, it could be interpreted as a reduction in effective pay rates without individualized, disciplinary cause, in violation of ORC Section 124.34. Such a reduction can be appealed to the State Personnel Board of Review (SPBR), resulting in a substantial back-pay award.

The standard work week for county job and family services employees is 40 hours irrespective of the county policy. (ORC Sections 124.14(E)(1) and 124.18)

### **63.08 CIVIL SERVICE EXAMINATIONS (ORC 124.23 and ORC 124.26)**

The State of Ohio, through DAS, had ceased offering civil service testing for most county agencies long ago, and under the provisions of H.B. 187 enacted in 2007, the state has no responsibility for testing for county positions. Counties themselves must develop a system for selection according to merit and fitness, and employees should be appointed according to some kind of examination, which may be written, oral, or physical, or involve a demonstration of skill, or an evaluation of training and experiences. Tests may include structured interviews, assessment centers, work

simulations, examinations of knowledge, skills, and abilities, and any other acceptable testing methods.

Before the enactment of Chapter 4117 all county personnel operations were guided by ORC Chapters 124 and 325, but with the advent of collective bargaining, any labor contract in place supersedes civil service law in all cases except the conduct and grading of civil service examinations, establishment of eligible lists from the examinations, and original appointments from the eligible lists (ORC 4117.08). What this means practically is that a collective bargaining agreement can displace any requirement for promotional examinations, but not for initial appointment to county service.

Most counties fill positions in the classified service through widely posted announcements of vacancies (whether on a posting board, on-line, through advertisements, or some combination of these approaches), a review of applications, interview of the strongest candidates using a consistent body of questions (though individual, follow-up questions are certainly permissible), and some type of ranking or scoring of candidates. This is probably sufficient to constitute a “structured interview,” provided that the interview process is clearly delineated, applied consistently, and open to all interested candidates who are qualified for the position.

### **63.09 FAIR LABOR STANDARDS ACT (FLSA)**

In 1985, the United States Supreme Court ruled in *Garcia v. San Antonio Mass Transit Authority* that state and local government employees could constitutionally be covered by the provisions of the Fair Labor Standards Act of 1938 (FLSA), reversing an earlier decision in *National League of Cities v. Usery* that the Tenth Amendment prohibited application of the FLSA overtime and minimum wage requirements to state and local government employers. As a federal law, the FLSA supersedes all collective bargaining contracts and the Ohio Revised Code. The major provisions of the FLSA that affect counties are the minimum wage and overtime provisions and various reporting requirements of the law. Guidelines on the FLSA can be obtained from the U.S. Department of Labor (DOL), particularly at [www.dol.gov](http://www.dol.gov).

#### **General Rule**

With the exception of employees exempt pursuant to Section 7 and Section 13 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207, 213, or who are exempt under the so-called “white-collar exemptions,” county employees are entitled to overtime compensation at the rate of 1½ hours for each hour worked in excess of 40 hours in the designated work week. Each county sets the work week, which must be a period of seven consecutive days and generally is one of the two weeks in a biweekly pay period. The only exceptions to calculating overtime based on 40 hours worked in a seven-day period are:

1. Law enforcement employees, such as sheriff’s deputies and corrections officers.

2. Fire fighters (trained and engaged in fire suppression, not exclusively emergency medical services).
3. Health care employees employed in a county-owned hospital or residential health care facility, such as a county-owned nursing home or residential facility for persons with developmental disabilities. These exceptions are covered in further detail below.

Employees are entitled to be paid overtime at the time-and-a-half rate for hours worked over 40 in seven days, *not* for more than eight hours worked in a single day. (The sole exception is for health care employees in a county hospital or residential health-care facility who are paid under the “8-80” option, as outlined below.) A county may choose to pay overtime for all hours worked over eight in a day, either by policy or a collective bargaining agreement, but this is required by neither state nor federal wage and hour laws. Nor do such laws require any particular meal or other breaks. Breaks are a matter of local discretion and practice.

### **Alternative Work Periods**

Section 7(k) of the FLSA, adopted in 1986 after the Act was applied to state and local government employers, provides a partial exemption from overtime for police and fire employees. For law enforcement employees, typically limited to sheriff’s deputies, corrections officers who perform security functions, and probation officers trained as peace officers, the employer must compensate as overtime at the time-and-a-half rate all hours worked over 171 in a 28-day work period, or any proportionate period, down to 43 hours in a seven-day work period. For fire fighters, overtime does not kick in until the employee works more than 212 hours in a 28-day work period, or a proportionate amount for a shorter period, down to 53 hours in seven days.

For health care employees in a county hospital or residential care facility (such as a county home or facility for developmentally disabled individuals), the employer may elect to use an alternative method of calculating overtime. This allows the employer to pay overtime at time-and-a-half rates for all hours worked over 80 in 14 days *or* over eight hours in any one day. This is often called the “8-80 option.” This allows the employer to schedule an employee to work 48 hours in the first week of a pay period and 32 hours in the second week without incurring overtime, as long as the employee never works more than eight hours in any one day. Counties that have such facilities should examine the options carefully to determine which is more economical for the facility in question.

### **The “Regular Rate”**

If an appointing authority compensates an employee for overtime in cash, it must be paid at 1½ times the employee’s “regular rate” for all hours worked over 40 in the seven-day work week. The term “regular rate” is a very complex and confusing one, and has given rise to a great deal of litigation in recent years.

What falls in the “regular rate”? The key is that the “regular rate” is often not the same as the employee’s hourly rate. Adjustments in the hourly rate must be made to reflect:

1. On-call pay (including flat, per-day stipends);
  2. Salaries and salary increases. Particular care is needed if the increase is applied retroactively;
  3. Bonuses if the payment is non-discretionary.
    - a. May exclude purely discretionary bonuses, such as gifts not dependent on hours worked.
    - b. Both the fact of the payment and the amount of the payment must be totally in the employer’s discretion.
    - c. Nondiscretionary bonuses must be counted in the regular rate, over the period for which the bonus is calculated. **NOTE:** This means that you may have to go back and recalculate overtime already paid. Includes:
      - i. Payments pursuant to a promise, contract, or agreement, such as a collective bargaining agreement.
      - ii. Bonuses announced to employees to induce them to work more rapidly, steadily, or efficiently.
      - iii. Attendance bonuses.
      - iv. How are nondiscretionary bonuses paid in overtime?
        1. If the bonus is paid weekly, it is computed in the hourly rate for overtime.
        2. If a bonus is paid for a period of more than one work week, it must be apportioned over the relevant period, then additional overtime may be due based on that calculation, including recalculating past overtime for a bonus for work done in a preceding year, for example.
- The lesson of this is to avoid lump-sum bonuses whenever possible, or know and take into account the complications that result.
4. Shift differentials or premium pay for work on weekends or holidays.

5. Longevity pay.
6. Retroactive pay.

### **Exemptions from Overtime Eligibility**

Exemptions are defined in DOL regulations, and the most important are the traditional, “white-collar” exemptions. These include:

1. Executive employees. To qualify, the employee must:
  - a. Have a primary duty of managing the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof;
  - b. Customarily and regularly direct the work or two or more other employees (or the equivalent of two or more full-time employees); and
  - c. Have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees.

This exemption typically applies to department and division heads, provided they customarily supervise two or more full-time-equivalent employees. It may even apply to front-line supervisors if they oversee a defined subdivision or work unit and otherwise meet the standards of the test, including authority in the employment areas listed.

2. Administrative employees. An administrative employee is an employee who has a primary duty that:
  - a. Consists of the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
  - b. Includes the exercise of discretion and independent judgment with respect to matters of significance.

The administrative exemption is the most difficult to apply and has been the source of the most litigation in recent years. While independent judgment and discretion in matters of significance is critical, it is also critical that the position relate to the internal service of the employer’s operations, rather than the “production” of the office’s ultimate “product” or service. (Concepts from a more industrial age that are even harder to apply in a government setting.) These tend to be “staff” rather than “line” employees. Examples of administrative functions

include labor relations and personnel (human resources employees), payroll and finance (including budgeting and benefits management), records maintenance (but not file clerks), accounting and tax, marketing and advertising (as differentiated from direct sales), quality control, public relations (including customer relations and government relations), and legal and regulatory compliance. By specific DOL rule, inspectors, such as building, zoning, or health inspectors, are not covered by this exemption. Because of the difficulties and intricacies of this exemption, it is strongly advised to apply these exemptions carefully and conservatively, and to seek legal counsel in doing so.

3. Professional employees. Professional employees are exempt when their primary duty is the performance of work:
  - a. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (the “learned professional”); or
  - b. Requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor (the “creative professional”).

Occupations covered by this exemption include law (lawyers but not paralegals); medicine; accounting and accountants; actuarial computation; engineering; architecture; teaching; physical, chemical, and biological sciences; pharmacy; registered or certified medical technologists; registered nurses (but not LPNs); dental hygienists; and physician assistants, among others. This is not an exclusive list but includes those most likely to be employed in county government; for the longer list, see the regulation.

4. Elected officials and an immediate staff person who directly serves the elected official and who serves at the pleasure of that official. Note: This should be used sparingly, perhaps for one employee who would not otherwise be exempt from overtime, such as the elected official’s personal and confidential administrative assistant or secretary. This is not an exemption that can be broadly applied.
5. A highly compensated employee who earns at least \$100,000 on an annual basis and who performs at least one exempt duty from the executive, administrative, or professional exemptions.
6. “First responders,” defined as those whose primary duty is police or fire work. Under the DOL regulations, the white-collar exemptions “do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, parole or probation officers, park rangers, fire fighters, paramedics . . . and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime, or accident victims; preventing or detecting crimes. . . ; pursuing, restraining

and apprehending suspects. . . ; preparing investigative reports; or other similar work.” This exemption does not apply to officials in such fields whose primary duty is management of the agency, but those managers are usually exempt under other tests.

7. Computer professional exemption. A computer employee will be exempt if he or she earns at least \$27.63 per hour (or more than \$455 per week if paid on a salary or fee basis), and has a primary duty of:
  - a. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
  - b. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - c. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  - d. A combination of these duties, the performance of which requires the same level of skills.

The hourly and weekly pay rates under these tests are wildly disparate and make no sense when compared to each other, but this is what the regulations provide.

The determination of exemptions is a complex matter involving application of detailed DOL regulations to each employee’s duties, and many of the terms used above are the subject of additional, lengthy definitions within the regulations. Appointing authorities are advised to consult legal counsel when determining exempt status. Other than some of the professional exemptions listed above, there are no categorical exemptions, and each position must be looked at individually to determine its eligibility. Appointing authorities should endeavor to notify all employees exempt from overtime coverage of their exempt status either on the job posting or before the employee starts to work. Exemption from eligibility for overtime compensation is a function of the employee’s duties, however, and is not dependent upon such notification. Still, a common understanding on this matter both enhances morale and reduces the likelihood of litigation.

Exempt employees are not entitled by law to any compensation for overtime, whether in cash or compensatory time off.

### **Salary Basis Test**

In order to be exempt under the FLSA, employees must not only meet one of the above

tests but also be paid on a *salary basis*. The **salary basis test** basically requires that an exempt employee be paid a predetermined amount that “is not subject to reduction because of variations in the quality or quantity of the work performed.” Violation of this test generally destroys exempt status, potentially for all employees in the affected classification, irrespective of the duties performed. The only broad exemption to this requirement is doctors, attorneys, teachers, and computer programmers (who qualify for the special professional exemption) and “highly compensated employees” (discussed above).

The salary-basis test means that if the employee works any hours during the work week, pay cannot be deducted unless it meets one of the exceptions set out in the regulations. This can pose problems, of course, when applied to public employees, where standards of public accountability come into play.

Courts have now ruled that requiring a public employee to use accrued leave, such as sick leave, vacation leave, or the like, does not constitute a salary deduction that would destroy exempt status. The employee still draws full pay for the period; thus, no problems are presented under the test. This is true even for absences of only an hour or two – the status of such deductions were unclear under conflicting federal court decisions for several years. Deductions may be made for absences of a day or more for personal leave, sickness, or disability. In any case, the regulations allow for deductions for absences of a day or more for personal reasons, other than sickness or accident. When the employer has a plan or policy of providing compensation for loss of salary due to sickness or disability (*i.e.*, a sick leave plan, as all counties have as a matter of state law), the employer may make deductions for absences of a day or more if the employee has exhausted his or her leave allowance.

### **What about partial-day absences?**

After a 1990 decision of the 9<sup>th</sup> Circuit Court of Appeals in *Abshire v. County of Kern* held that deductions for absences of less than a day violated the salary-basis test, the Department of Labor adopted a special regulation for public employers only. Docking pay for absences of less than a day is now permitted where an employee “is paid pursuant to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability,” and the employee accrues sick leave or other leave, and the employee must be placed on unpaid leave for absences less than one workday for illness or injury or other personal reasons, and accrued leave is not used because:

1. Permission for leave has not been sought or has been denied;
2. Accrued leave has been exhausted; or
3. The employee chooses to use leave without pay.

Public employers in Ohio should all fit this test because state law and local civil service



ordinances generally impose such a standard of public accountability. It may be problematic, however, if some exempt employees are permitted to be absent during the work without docking while others are not.

Exempt employees do not earn either overtime or compensatory time off (“comp time”), unless the appointing authority adopts a policy providing otherwise, or the employees are covered by a collective bargaining agreement so providing. Because exempt employees are paid a biweekly salary on the basis of the nature and responsibility of the position held, the actual hours of work of exempt employees may be subject to adjustment with the approval of the appointing authority. In order to meet the standards of public accountability noted above, if an appointing authority wants to allow exempt employees to work more flexible schedules, it is wise to ensure that records are kept showing that the exempt employee’s hours worked and hours of authorized leave in a calendar year at least equal or exceed the standard hours of work per year upon which the employee’s salary is based.

### **What are “hours worked”?**

The FLSA only requires payment of overtime for “hours worked” over 40 in a seven-day work period. Under the FLSA, only hours actually worked in a pay period count toward overtime eligibility, not any form of paid leave such as vacation, holidays, sick leave, or compensatory time off used. An appointing authority may choose to count some or all of such leave hours used by policy or collective bargaining agreement, but this is not required by federal or state law.

Hours worked also do not include:

1. Meal periods where the employee is not required to perform any duties. It is important to understand that an employee must by policy and actual practice be released from and perform no duties for the employer during the meal break. An employee who eats lunch at her desk and continues to take telephone calls or respond to e-mails as they arise must be paid for the meal time, even if the employer did not request or formally authorize the practice. An employer who becomes aware of it must stop it by directing the employee to cease the practice, and enforcing the directive. The same is true of early arrivals or late stay-overs – “hours worked” includes all work time the employer requests or knows about, but fails to stop, whether or not requested or “authorized.”
2. Travel time to and from the employee’s home;
3. Time spent overnight while traveling on county business;
4. Sleep time for safety employees where the shift is longer than twenty-four (24) hours; and

5. On-call or stand-by time where the employee is merely required to leave information as to where he or she can be reached or wear a paging device.

### **What about county employees who work less than 40-hour weeks?**

The FLSA only concerns itself with hours of work in excess of 40 hours in a seven-day work period. If a county has a work week of less than 40 hours, such as 37.5 or 35 hours per week, FLSA overtime at the time-and-a-half rate does not occur until the employee works more than 40 hours in that week. "Overtime" worked by nonexempt employees up to but not over 40 hours in a week can be compensated at an hour-for-hour rate, either in cash or "compensatory time off," and if the appointing authority wishes, the "comp time" hours for this "gap time" can be kept separately from other compensatory time off for purpose of the 240- or 480-hour limits under the FLSA.

### **What records must an employer keep under the FLSA?**

Employees (other than those exempt from overtime compensation) must record their actual hours worked each day. Practically speaking, this should include actual start and stop times for each work day and the amount of meal time taken, either through time cards, a traditional time clock, or through an electronic timekeeping system, such as swipe cards. The times recorded each day should be accurate and list actual arrival and departure times (e.g., 7:58 a.m.), though for payroll purposes the appointing authority may round the time to the nearest increment used in the timekeeping system in that office or department (e.g., some electronic timekeeping systems keep time in one-tenth of an hour increments), provided the increment is no more than a quarter-hour. Appointing authorities may use automatic time recording systems, such as time clocks or swipe cards that record data in a computerized form. Under no circumstances should an employee record hours worked that are not correct, or fail to record time worked, and an employee who submits an incorrect record of time worked may be subject to discipline or discharge for falsification of records, and the appointing authority's policies should so provide. Where time clocks or electronic timekeeping systems are available, employees should be explicitly required to use the time clock or electronic system. Policies should also provide that employees who record false time for another employee, such as "clocking in" on that employee's time record, time card, or sign-in sheet, or who misrepresent their own work times in order to claim pay for time not worked, are subject to discipline, including discharge, for a fraudulent act. Employees who have claimed pay for hours not actually worked may be subject to criminal investigation and prosecution.

All records of hours worked should be kept for at least three years in the event of a DOL audit or enforcement action.

### **Overtime compensation.**

Employees who have worked more than 40 hours in a seven-day work period (as defined by the employer) have to be compensated at the time-and-a-half rate. That

needs to be in cash (meaning, in the employee's paycheck) unless the public employer and employee have a prior understanding or agreement that the work will be compensated in compensatory time off, which is also at a time-and-a-half rate (an hour and a half for each hour worked over 40). A prior understanding or agreement can be in a individual understanding with employee (best reduced to writing and signed by the employee), or in a broad policy set forth in a collective bargaining agreement or a policy issued to all covered employees.

The decision whether to pay cash or grant compensatory time off depends on both the employer's preferences and budgetary considerations. Compensatory time off is not "free." It must be kept on the books, accounted for under GAAP principles, and paid in full if the employee separates from employment, including transferring to another appointing authority, even within the same county. Employees must be permitted to use their compensatory time off when requested, unless granting the time off would cause an "undue hardship" to the employer, and under federal court decisions applicable to Ohio, the mere fact that granting the employee the preferred day off will generate more overtime for other employees is not "undue hardship" justifying a refusal of the request.

Under federal law, employees may accrue compensatory time off, for hours worked in excess of 40 hours, to a maximum amount of:

1. 480 hours for employees engaged in public safety, emergency response, or seasonal work; or
2. 240 hours for all other employees.

The Appointing Authority may, however, set a lower limit for accrual of compensatory time off, given that 240 hours is six weeks off for a 40-hour-per-week employee.

Under federal law, overtime worked in excess of the regular work week but not over 40 hours is not to be counted toward the accrual limits set out above. As an administrative matter, however, the appointing authority may wish to prohibit the accrual of any compensatory time off in excess of these limits, regardless of whether it represents compensation for work more or less than 40 hours in a work week. Otherwise, two banks of "comp time" must be kept, which is administratively cumbersome.

Overtime worked in excess of 40 hours in any work week, once the employee's accrual limits have been reached, must be paid in cash at the rate of 1½ times the employee's regular rate of pay. Compensatory time off is not an option at that point, until the employee's "comp time" balance falls back below the applicable limit.

Note that unless a collective bargaining agreement provides otherwise, an appointing authority may, at any time, choose to convert a portion or all of the employee's balance of compensatory time off to cash, at the employee's regular rate of pay at the time of the conversion. The employer may also require an employee to use compensatory time off that has been banked. Employers may *not*, however, adopt "use it or lose it" rules when

it comes to compensatory time off. Employers may adopt a rule providing that if compensatory time off is not used within a certain period of time, it may be converted to cash. Any such policy would have to be negotiated with the union where employees are covered by a bargaining unit.

Upon termination of employment, the employee shall be paid for unused compensatory time at a rate which is the higher of:

1. The final regular rate of pay received by the employee; or
2. The average regular rate received by the employee during the last three years of employment.

### **Damages**

Because the FLSA provides for “liquidated damages” (essentially doubling any back pay award, which is already at the time-and-a-half rate for any overtime worked but not paid, plus the winning employee’s attorney’s fees, small infractions can become very costly. The statute of limitations is two years, but three years for a “willful violation,” which is easy to establish. Let’s take an employee who starts work 15 minutes early each day and stays late by the same amount. The employer knows about the early arrivals and late stay-overs but says nothing; after all, this is a “good employee going above and beyond the call of duty.”

Let’s assume the employee earns \$17.00 per hour, and works 47 weeks out of the year. The employee thus works 117.5 hours uncompensated each year. Paid at \$17.00 per hour at time-and-a-half rates, this comes to \$2,996.25 per year, likely for three years of back pay, or \$8,988.75. But liquidated damages will be awarded, so this now grows to \$17,977.50, plus of course, the employee’s attorney’s fees, which could easily come to \$40,000 or \$50,000 or more for a case that goes all the way to trial.

It is a lot of money for 15 minutes extra at the beginning and end of each work day. And if the practice affects multiple employees, the cost can become even higher.

And if the employer’s violation relates to the failure to pay overtime based on the FLSA “regular rate,” which may be significantly higher than the employee’s stated hourly rate, applied across a broad class of employees, the potential liability under these formulas can become staggering. For all these reasons, it is important for county appointing authorities to review compensation practices carefully, consult with the county prosecutor or other, authorized legal counsel, and take care to comply with the FLSA’s complex requirements.

### **State Law (ORC 4111.03)**

County appointing authorities are also covered by state overtime requirements set forth in ORC Section 4111.03. That provision largely tracks the provisions of the FLSA at

this point, with the exception that compensatory time off must be used within 180 days of its being earned. County appointing authorities are permitted to adopt an alternative policy that overrides the state law provisions of ORC Section 4111.03(C) so that employees do not have to use compensatory time off within 180 days of earning it. This applies to all county appointing authorities other than a county department of job and family services, but even there, this policy can be voided through a collective bargaining agreement. Many county appointing authorities so choose to avoid the administrative difficulties in tracking a new, 180-day “clock” for each time an employee earns compensatory time off. Running a new clock each time an employee earns overtime can be an administrative nightmare.

### **63.10 DISCIPLINARY ACTIONS (ORC 124.34)**

All classified county employees enjoy “tenure,” or legal protection, during “good behavior and efficient service” once they have successfully completed the probationary period. This means that the employee has a protected, property right in continued employment unless the appointing authority has grounds under ORC Section 124.34 or another provision of the Revised Code to remove the employee for misconduct, or the employee’s job is eliminated under the layoff or job abolishment provisions of civil service law and regulations.

If an employee feels that a disciplinary action is not warranted under the standards of ORC Section 124.34, he or she may appeal a removal, reduction in pay or position, or suspension of more than 24 hours for overtime non-exempt employees (over 40 hours for exempt employees) to the State Personnel Board of Review, a three-member board appointed by the Governor. If the employee is covered by a union contract providing for final and binding arbitration of disciplinary actions, then the employee must pursue that avenue, and the SPBR has no jurisdiction. The sections of this *Handbook* dealing with discipline will primarily address procedures before the SPBR, but many of the fundamental principles are the same in both venues. Generally speaking, county appointing authorities will need to show just cause for the disciplinary action, thorough documentation of corrective action taken, and that an approach of progressive discipline has been followed, which will be addressed in greater detail below. In addition to the substantive grounds required by ORC Section 124.34 and the just-cause provisions of union contracts, counties must follow legal procedures when taking such disciplinary actions or they may find that the SPBR or arbitrator will reinstate the employee with full back pay. This Section will outline the essential steps that must be followed, but it is vital to consult legal counsel, whether the county prosecutor or other, approved counsel. Appointing authorities may also wish to consult the rules of the SPBR, found in Chapter 124 of the Ohio Administrative Code.

Discipline, of course, covers a wide spectrum of actions designed to correct problems in an employee’s performance. The goal is to address problems early and effectively, salvaging the employee’s job when possible by restoring good performance, and when that is not possible, eventually removing the employee from employment through the principles of progressive discipline. Typically, discipline starts informally with coaching

and evaluations, but if this does not address the problem successfully, discipline then progresses to verbal warnings, written reprimands, short and longer-term suspensions, and eventually discharge. Progressive discipline is not a rigid ladder of steps, however; some offenses are serious enough that removal may be warranted for the first offense. In any event, it is essential to follow procedures, to treat similar offenses consistently with due consideration of the employee's individual record of service, and to keep very careful documentation of every step taken along the way. It is often said that the three most important aspects of discipline in the public sector are "documentation, documentation, and documentation." The importance of building a solid file of disciplinary action, starting with the first coaching sessions and evaluations, cannot be overemphasized. The file should contain the basic personnel file materials, probationary evaluations, and records of any oral warnings or corrective interviews that have been held. All written disciplinary actions should be properly noted and dated. A sequence of events should be established in the folder so that a dismissal does not appear to be unsubstantiated or abrupt. Through building a careful and well-documented case, it is very possible to discharge a classified employee whose performance has continued to be unsatisfactory, and to sustain that discharge before the SPBR or an arbitrator. It is a common – but false – myth that "it is impossible to fire a county employee under civil service (or a union contract)."

### **63.11 TYPES OF DISCIPLINARY ACTION (ORC 124.34)**

Following are four major types of disciplinary actions:

1. Removal (the civil service term for discharge or firing an employee).
2. Suspension without pay, or a less common "working suspension," where the employee continues to work and draw pay during the "suspension," but the suspension has the same force under progressive discipline as a more conventional suspension without pay. Suspensions of 24 hours or less are not appealable to the State Personnel Board of Review (40 hours or less for overtime-exempt employees).
3. Reduction in pay (where the pay rate is reduced without changing the employee's classification).
4. Reduction in position (commonly referred to as a demotion). Note: a reduction in position can be found even if the rate of pay has not changed, if substantial duties of the employee's classification have been taken away.

Each of these types of disciplinary actions is defined very specifically by the SPBR and ODAS regulations, and these definitions should be reviewed.

## **63.12 CAUSES FOR DISCIPLINARY ACTIONS (ORC 124.34)**

The statutory grounds for any of these actions are specified in ORC Section 124.34. These grounds are:

1. Incompetence.
2. Inefficiency.
3. Dishonesty.
4. Drunkenness.
5. Immoral conduct.
6. Insubordination.
7. Discourteous treatment of the public.
8. Neglect of duty (including but not limited to absence without leave).
9. Violation of any policy or work rule of the appointing authority
10. Violation of ORC Sections 124.01-124.64.
11. Violation of the rules of the director of DAS, or any other failure of good behavior.
12. Any other acts of misfeasance, malfeasance, or nonfeasance in office. These terms have specific legal meaning, and appointing authorities should carefully consult with the advice of the county prosecutor or other, authorized legal counsel.
13. A finding by the Ohio Ethics Commission that an employee has violated ORC Section 102.06, 2921.42, or 2921.43 may be grounds for dismissal, as is the failure to file an Ohio Ethics Commission statement, required by Section 102.02, where applicable.
14. A conviction of a felony is a separate basis to remove, suspend, or reduce/demote an employee, even if the employee has already been disciplined for the same conduct that is the basis of the felony conviction. A removal or other disciplinary action based on conviction of a felony cannot be appealed to the SPBR. If the employee has been reinstated as a result of an appeal to the SPBR, a felony conviction during the pendency of the appeal is a basis for further disciplinary action upon the employee's reinstatement. A

person convicted of a felony immediately forfeits the person's status as a classified employee in any public employment on and after the date of the conviction for the felony. If an employee is removed as a result of being convicted of a felony or is subsequently convicted of a felony that involves the same conduct that was the basis for the removal, the employee is barred from receiving any compensation after the removal notwithstanding any modification or disaffirmance of the removal, unless the conviction for the felony is itself subsequently reversed or annulled. If an employee is removed from his or her job as a result of a felony conviction and is later re-employed in public service, that employee will not have any prior service count towards vacation accrual.

As used in this Division of ORC Section 124.34, "felony" means any of the following:

- a. A felony that is an offense of violence as defined in ORC Section 2901.01;
- b. A felony that is a felony drug abuse offense as defined in ORC Section 2925.01;
- c. A felony under the laws of this or any other state or the United States that is a crime of moral turpitude;
- d. A felony involving dishonesty, fraud, or theft;
- e. A felony that is a violation of ORC Sections 2921.05, 2921.32, or 2921.42.

One of more of the legal bases set forth in ORC Section 124.34 must be cited in every action of removal, suspension, or reduction of a classified employee not covered by a union contract.

For employees in a bargaining unit, the appointing authority must review the disciplinary procedures set forth in that contract and follow them, for the SPBR has no jurisdiction over the disciplinary appeals of employees if the contract provides for final and binding arbitration of disciplinary actions. It is common (but not universal) for contracts to provide that employees may be disciplined for "just cause," a legal test that incorporates many of the same principles of progressive discipline. It is important to review disciplinary action of bargaining-unit employees with the county prosecutor or other, authorized legal counsel to ensure that the disciplinary action can be successfully defended under the contract language in any subsequent grievance or arbitration proceeding.

### **63.13 PRINCIPLES OF PROGRESSIVE DISCIPLINE**

As noted above, discipline of classified employees in the public sector, whether of bargaining-unit employees or those covered by civil service protections, is based on the



principles of progressive discipline. Progressive discipline requires that an employer use an escalating series of efforts to change unacceptable behavior patterns and correct poor performance before terminating an employee, although some offenses are so serious that termination may be warranted for a first offense. With the exception of such serious offenses, both the SPBR and labor arbitrators look to see if progressive discipline has been applied. Thus, if an appointing authority allows poor performance to continue without any corrective action and then suddenly terminates employment when the employer “can’t take it anymore,” neither the SPBR nor a labor arbitrator will likely uphold the termination. Waiting for the proverbial “straw that broke the camel’s back” before taking any action is not an effective strategy for the discipline of a classified employee. Instead, the appointing authority should show a progressive and escalating series of corrective actions over time, designed to improve the employee’s performance and making clear the consequences of failing to do so.

This does not apply to serious offenses that clearly warrant termination for even the first occurrence; progressive discipline is not a rigid ladder of steps. On the other hand, it is very inadvisable to give an employee written reprimand after written reprimand for the same kind of offense, as this does not clearly communicate to the employee the seriousness of the problem or the consequences if the misconduct continues. Three important concepts should be implemented in any discipline policy as follows:

1. It should be appropriate for the seriousness of the offense, and progress appropriately in light of the employee’s prior conduct.
2. It should be applied uniformly to all classified employees.
3. It should be applied consistently to all similarly situated employees so that penalties are predictable based on the offense and the employee’s own record.

The following is an example of a sequence of events that would show that a principle of progressive discipline had been used:

1. **ORAL WARNINGS.** For performance problems that are not egregious on their face, the appointing authority should start with an oral warning. Dates and records of verbal reprimands should be noted, perhaps in supervisory notes kept outside the personnel file.
2. **WRITTEN REPRIMAND.** Based on the nature of the offense, the appointing authority will then usually progress to one or more written reprimands, presented at a meeting with the employee. The meeting should include the employee, the immediate supervisor, the department head, and the employee’s union representative (if applicable). If the county has a human resources director, that person may also be there.

3. PRE-DISCIPLINARY HEARING. Under a ruling of the United States Supreme Court in *Cleveland Board of Education v. Loudermill*, public employers must offer any classified employee a pre-disciplinary hearing before any suspension, reduction in pay or position, or termination from employment. This is in addition to any post-termination remedy. The hearing or conference is neither elaborate nor formal, and procedures will be detailed in Section 63.14 of this *Handbook*.
4. SUSPENSIONS. A suspension is the next logical step. Suspensions of 24 hours or less cannot be appealed to the SPBR (or 40 hours or less for overtime-exempt employees). For bargaining-unit employees, the appointing authority will need to review the collective bargaining agreement to determine whether an employee can grieve short-term suspensions all the way to arbitration. Often, the first suspension is short, one to five days, and then a longer suspension may be imposed before discharge. As a matter of unwritten practice, the State Personnel Board of Review seems to like one appealable disciplinary action before discharge in most cases. The discipline need only be subject to appeal; the employee's failure to appeal is generally deemed to mean that the employee accepted the discipline. Of course, in the case of egregious misconduct, this does not apply.
5. REDUCTION. The appointing authority may reduce an employee in pay or position as an alternative to dismissal, often referred to as a "demotion." Reductions can be appealed to the SPBR. Using a reduction or demotion as a disciplinary remedy is advisable only when the nature of the offense makes clear that an employee would be more suitable for a lower-level position than the one the employee held at the time of the offense. A good example is an employee whose conduct makes clear that he or she is not a suitable supervisor; in that case, reduction to a line-level position may be appropriate, if other, lesser steps have not been successful in correcting the problem.
6. REMOVAL. Unless the misconduct is a flagrant offense, termination should be used as the culmination of a series of progressive, disciplinary steps that have not corrected the problem.

The appointing authority must take care not to take actions construed as "double jeopardy" for the same offense. For example, if a supervisor has already issued a written warning, higher-level managers who view the situation more seriously cannot then issue a suspension for the same offense; the employee has already been disciplined once. For this reason, the appointing authority should ensure that no discipline is issued until the employer is confident that it is at the appropriate level.

### **63.14 PRE-DISCIPLINARY HEARING**

In 1985, the US Supreme Court ruled that a public employee with a tenured, property right in continued employment, such as a classified county employee who has

completed the probationary period, cannot be removed from employment without some kind of pre-termination hearing providing notice and an opportunity for the employee to respond. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, the Court ruled that a pre-termination hearing was necessary even if the employer offered an elaborate, post-termination due-process hearing to challenge the termination, such as Ohio law provides through an appeal to the State Personnel Board of Review or final and binding arbitration under a labor agreement. Later federal and state court decisions expanded this right to any discipline in which a loss of pay is at issue, such as suspensions and reductions – but not written or oral reprimands with no loss of pay. *Carter v. Western Reserve Psychiatric Hospital*, 767 F.2d 270 (6<sup>th</sup> Cir. 1985). No pre-disciplinary hearing is required before placing an employee on administrative leave with pay (since no economic impact is involved), but such a hearing must be offered before placing an employee on administrative leave *without* pay, unless there are exigent circumstances or there has been an independent finding of probable cause, such as an arrest, indictment, or formal charges. *Gilbert v. Homar*, 520 U.S. 924 (1997).

Ohio courts have also held that an appointing authority's failure to hold a constitutionally compliant, pre-disciplinary hearing will be an independent basis to set aside any disciplinary action taken as a matter of law, irrespective of any evidence supporting the charges. *Fairley v. State Personnel Board of Review*, 29 Ohio App.3d 110 (1986) and *Local 4501, Communication Workers of America v. Ohio State University*, 49 Ohio St. 3d 1 (1990). In short, if the procedural rights are not granted, actual guilt will not matter.

When a full evidentiary hearing is available after the disciplinary action, however, courts have also been clear that the pre-disciplinary hearing or conference need not be elaborate. Instead, the *Loudermill* Court stated that this pre-disciplinary stage is intended only as an initial check against a mistaken decision (*i.e.*, to determine whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action). The pre-disciplinary hearing or conference must only include three elements:

1. Oral or written notice of the charges against the employee. (For obvious evidentiary reasons, written notice is far better.)
2. An explanation of the employer's evidence supporting the charges. Note that all that is required is an explanation of the evidence, which can be an oral or written summary. It is not required to produce witnesses or submit these witnesses to cross-examination.
3. An opportunity for the employee to respond to the charges before the decision is made. It is best to allow the employee and his or her representative (an attorney or union representative, when applicable) to present their response as they wish, including witnesses who wish to testify, but the employer can restrict irrelevant or duplicative evidence. The

employee cannot compel the employer to produce witnesses at this stage, and there is no right to subpoena.

Anything beyond this is a voluntary practice at a local level, unless incorporated into a collective bargaining agreement.

Some additional procedural issues to consider regarding pre-disciplinary hearings:

1. The hearing officer may be anyone in the agency who would be appropriate, and there is no constitutional requirement for a neutral, outside hearing officer conduct the proceeding, despite frequent claims from union representatives or employees' lawyers to the contrary. In fact, most commonly, the department head will hear the case directly, and the *Loudermill* Court pre-supposed that the employer or designee, not an outside hearing officer, will hear the case directly before making the decision. The only two classes of persons who should not preside over the hearing or conference are (a) the person who conducted the investigation of the charges, or (b) someone who is an actual fact-witness, *i.e.*, observed the offense in question. An appointing authority may choose to ask a neutral outsider to hear the case, but is not required to do so.
2. The employer should resist the urgings of the employee's attorney or union representative to turn the pre-disciplinary conference into a mini-trial. The Supreme Court made clear that nothing elaborate was required at this stage, and that this is a minimal opportunity to respond before the initial decision, with the more elaborate, full evidentiary hearing coming after the fact, either before the State Personnel Board of Review or a labor arbitrator under a union contract. For example, the employee does not have the right to insist that a stenographic or other record be made of the hearing. *Local 4501, Communication Workers of America v. Ohio State University*, 49 Ohio St. 3d 1 (1990). Nor does the employee have the right to confront and cross-examine witnesses at this stage. *Ohio Association of Public School Employees v. Lakewood City School District*, 68 Ohio St. 3d 175 (1994). While employees can present evidence on their own behalf, the employee has no right to pre-hearing discovery or to obtain every piece of evidence against the employee that may be in the employer's possession. *Kennedy v. Marion Correctional Institution*, 69 Ohio St. 3d 20 (1994). In short, there is no requirement for two, full-fledged "trials." For this reason, many public employers prefer the term "conference" to "hearing" for this procedure, to underscore its informal and less elaborate nature.
3. It is far better practice to give the employee notice of the charges in a written notice of the conference or hearing, and probably to give the employee at least two or three days' notice before the hearing so that he or she can secure representation, if desired. The notice should specify the date, time, and location of the conference, the written charges to be considered, the employee's right to representation (whether union or attorney), and warn the employee that failure to appear at the hearing will be deemed a waiver of the employee's right to respond

to the charges before the decision is made. Employers should always remember that the hearing is for the employee, not the employer – the point is to give the employee a chance to respond before the initial decision, for the employer presumably already knows the evidence supporting the disciplinary charges. An employee can thus waive the right to the hearing, either expressly or by failure to appear. If the employee brings an attorney to the hearing, it is best to explain to the attorney beforehand how the hearing will be conducted, and that this is not a full evidentiary hearing or mini-trial.

4. A note on representation: If the employee is in a bargaining unit, most unions take the position that because they are the “exclusive representative” under ORC Chapter 4117, the employee must use union representation or go unrepresented in any proceeding covered by the labor agreement, including a pre-disciplinary hearing, if the union contract so provides. Allowing the employee to bring a lawyer not approved by the union may result in an unfair labor practice charge for breach of that union’s status as the “exclusive representative.” This is clearer if the union contract contains a clear override of the provisions of ORC Section 9.84, which grants the right to counsel for employees who are the target of an internal investigation or hearing. Because the right to a pre-disciplinary hearing stems from the US Constitution and not a union contract, however, this principle is less clear in the case of a pre-disciplinary conference than a grievance hearing, for example. Consult the county prosecutor or authorized legal counsel if this question arises.
5. When the employee is represented by legal counsel or a union representative, the representative has no right to examine or cross-examine witnesses or the employer’s representative, unless the employer confers that right by practice, policy, or under a collective bargaining agreement. *Frumkin v. Board of Trustees, Kent State University*, 626 F. 2d 19 (6<sup>th</sup> Cir. 1980). Instead, the advocate’s role is that of an observer or person who presents the employee’s evidence or position in the hearing. Similarly, employers are not required to reschedule a pre-disciplinary conference around the schedule of a particular attorney, though reasonable requests for continuances or rescheduling should be granted. Such requests clearly designed to repeatedly delay the proceedings can be denied; the employee is entitled to *an* attorney (or union representative), not one particular representative who is seemingly never available.
6. A collective bargaining agreement may elaborate on the requirements for a pre-disciplinary conference or specify a more formal procedure. Such an agreement cannot waive the right to a pre-disciplinary hearing for all employees, however, because this right stems from the due process clause of the Fourteenth Amendment to the US Constitution, and that clearly cannot be superseded by a labor contract.
7. If the appointing authority does not hear the case directly, the hearing officer should prepare a written report to the appointing authority. The report may be

limited to determining facts, or may contain a recommendation on the level of discipline to be imposed, at the appointing authority's discretion. Because this report may become a key exhibit in a later, post-disciplinary hearing, the appointing authority should select a hearing officer who writes well and will make an effective witness under direct and cross-examination.

### **63.15 REQUIRED DISCIPLINE PROCEDURES (ORC 124.34)**

The pre-disciplinary hearing is required by the U.S. Supreme Court's interpretation of the Fourteenth Amendment to the US Constitution, but the disciplinary procedures in ORC Section 124.34 and the administrative rules of DAS and the SPBR must be followed as well. Consult your county prosecutor or other authorized, legal counsel before formal action is taken.

Although the removal order may be given in letter form, it is recommended that all counties obtain a supply of Form #ADM-4055 for this purpose or complete the on-line form found at <http://pbr.ohio.gov/pdf/124-34OrderFillin.pdf>. The printed forms may be obtained from DAS. A sample copy of this form is included at the end of this Chapter and is labeled Form 63-1. Because the paper form requires four identical copies and must be typed manually, the on-line form is far easier to use for most appointing authorities. Following are required procedures:

1. A formal order must be prepared for any removal, reduction, or suspension in excess of 24 hours (over 40 hours for overtime-exempt employees). It is not mandatory to use the removal order form provided by DAS, but it is strongly recommended. All three copies must have original signatures of the appointing authority. In the case of employees of the board of county commissioners, all three commissioners must sign as well as attaching a certified copy of the resolution approving the disciplinary action to each copy.
2. Statutory grounds for the action as listed in ORC Section 124.34 must be given. The employee's violation or misconduct should then be listed or described to support the statutory basis for the action.
3. Wherever possible, the exact time and place of specific acts should be given, together with the name of the persons involved. Where incompetence is charged, the standards of performance by which it is judged should be given. The information given in this portion of the form must be clearly stated in terms that the employee can understand, but that also would be meaningful in the event the disciplinary action is appealed to the SPBR. The employer will be required to prove the allegations set forth in the order with evidence, so they should be written with this in mind. If the employee has received previous warnings or suspensions concerning any of the behavior cited in the action or otherwise relevant to the case, the prior discipline should also be indicated on the form, not as grounds for the new discipline but as support for

- the penalty chosen and a demonstration that progressive discipline has been followed.
4. The effective date of the action must be specified. This may be the same date that the employee receives a copy of the order, or it may be later than that date – but it may never be earlier than that date. This should usually be the date the form is also filed with the SPBR.
  5. Note that the appointing authority needs to list the date that the notice of pre-disciplinary or separation hearing was given to the employee, the date it was held or waived, and the date the order was hand-delivered on the employee, if that was the method of service.
  6. The copy of the order which is given to the employee must be signed personally by the appointing authority. The courts have ruled that the decision involved in this type of action cannot be delegated to another person. Where there are dual appointing authorities, such as the county job and family services department and the board of county commissioners, or where the action of the immediate appointing authority is legally subject to approval by another, all should sign. Note that the Attorney General has ruled that the administrator of a county home is an independent appointing authority, and the administrator alone needs to sign for county home employees.
  7. The county commissioners must adopt and journalize a resolution removing, reducing, or suspending an employee who is under their jurisdiction, and a certified copy of the resolution must be attached to all copies of the order, including those served on the employee and the SPBR.
  8. No ORC Section 124.34 order is required for a suspension of 24 hours or less (or 40 hours or less, for an overtime-exempt employee), because such suspensions are not appealable to the SPBR. If the employee is under the jurisdiction of the board of county commissioners, however, the commission must still adopt a resolution approving the suspension, and some kind of notice of the suspension, including the commission resolution, should be served on the employee.
  9. In the case of probationary removals or demotions, no order is required to be filed with the SPBR, because probationary employees serve at will and have no appeal rights. The county commissioners should still act by resolution for employees under the jurisdiction of the board of county commissioners.
  10. A copy of the ORC Section 124.34 order must be served on the employee, either personally or by certified mail. Certified mail to the employee's last known address, even if unclaimed, constitutes valid service. If served by certified mail, be sure to keep the return receipt. But if the employee is in the work place, personal service is perfectly adequate.

11. The copy of the order marked "board of review's copy" (or just one of the copies printed, if completed on-line) must be filed with the SPBR at the same time that is served on the employee. The employee's time to appeal to the SPBR is "within 10 days after receipt of such order." County appointing authorities are no longer required to serve copies on DAS.
12. If an amended order is prepared, a new filing date and period for appeal will follow.
13. If an employee is covered by a collective bargaining agreement providing for final and binding arbitration of removals, reductions, and suspensions, then the employee's avenue of appeal lies with the grievance and arbitration procedure, and the State Personnel Board of Review has no jurisdiction. For that reason, the appointing authority is not required to complete an ORC Section 124.34 order or file it as described above for such bargaining-unit employees. Make sure to comply fully with any procedural requirements set forth in the collective bargaining agreement to avoid procedural problems in any grievance or arbitration hearing.

None of these provisions specifically apply to unclassified employees, who serve at the pleasure of their appointing authorities. Such an employee can be simply told, in effect, that his or her services are no longer needed. Nonetheless, because the decision could still be challenged in other forums, such as a discrimination charge before the Ohio Civil Rights Commission or an unemployment compensation claim, the appointing authority should notify the unclassified employee of dismissal in a written letter that sets forth the effective date of the action, and, if desired, a brief summary of the reasons (though reasons are not required). If there is any doubt about the employee's unclassified status (such as a fiduciary exemption under ORC Section 124.11(A)(9), then the employer should comply with all of the procedural requirements for a classified employee, such as offering a pre-disciplinary hearing and completing an ORC Section 124.34 order and filing it with the SPBR, while asserting in the order and the notice of the pre-disciplinary hearing that the appointing authority still considers the employee to be unclassified and at-will. That way, if the SPBR rules that the employee was, in fact, classified, the employer can still try to prove the grounds for removal or other discipline, because it has complied with all the necessary procedures owed to classified employees.

### **63.16 PROBATIONARY REMOVAL (ORC 124.34)**

A probationary employee may be removed for unsatisfactory probationary service as provided for in ORC Section 124.27 by giving the employee a letter advising that probationary employment is being terminated for unsatisfactory service and setting forth the reasons the service was unsatisfactory. The reasons need not be detailed; a simple explanation will suffice. The letter should be signed by the appointing authority and



should not be delegated to supervisors or department heads. The SPBR has no jurisdiction over probationary removals or demotions.

### **63.17 APPEALS (ORC 124.34)**

The employee may appeal an order of removal, a suspension of more than 24 hours (over 40 hours for an overtime-exempt employee), or a reduction. The appeal must be filed within 10 calendar days of the employee's receipt of the order. This appeal must be made in writing to the SPBR. If the employee fails to meet this time limit, the employer should file a motion to dismiss the appeal prior to the hearing.

When such an appeal is filed, the SPBR will notify the appointing authority, and at some point will set the case for hearing, either before the full board (rarely) or before a hearing officer called an administrative law judge (ALJ). An SPBR appeal hearing is much like a court trial, and many of the same rules of evidence apply. Hearsay evidence, for example, will generally not be admitted.

If the case is heard by an ALJ, the ALJ will issue a report and recommendation to the full Board, with copies to both parties. Either party may file objections to the report and recommendation before the full Board. In its decision following any objections, the SPBR may affirm, disaffirm, or modify the disciplinary action taken by the appointing authority. In the rare cases where the full Board hears the appeal directly, the Board will issue a final decision thereafter.

If an appointing authority removes an employee and cannot show compliance with the statutory requirements, or if the evidence is not sufficient to prove the charges, the SPBR will disaffirm the action and reinstate the employee to his or her job. This may entitle the employee to full back pay for the period in which he or she was off work. An alternative is that the SPBR may modify the action. For example, the SPBR may reduce a removal to a suspension if it believes that removal is too severe of a penalty for the offense. It may also modify a suspension to a lesser number of days, or overturn a removal or suspension altogether. Technical and procedural errors that result in reversal of terminations or suspensions will cost the county considerable money in back pay. In addition, an employee who has won reversal and reinstatement is difficult to discipline later, no matter how warranted, because there will always be a charge of "retaliation" for defeating the employer before the SPBR. For these reasons, it is vital to adhere to the civil service laws and rules, and to ensure that the appointing authority has a solid case for its decision. Acting prematurely or with inadequate documentation can backfire badly.

In the case of removal or reduction, either the employer or the employee may appeal the decision of the SPBR to the court of common pleas of the county in which the appointing authority is located.

### **63.18 AFFIRMATIVE ACTION PLANS (ORC 4112.04)**

Although there are various federal requirements and guidelines relating to equal employment opportunity and affirmative action, these are too complicated and fluid for inclusion in this *Handbook*. In addition, the US Supreme Court and federal courts have in recent years sharply restricted the use of race-conscious factors in employment selection in the absence of proven, past discrimination by that employer. Even if there has been a pattern of such discrimination, the means chosen to redress it must be narrowly tailored to avoid unwarranted impact on non-minority applicants or employees. For this reason, any county wanting to adopt an affirmative action plan should carefully review its parameters with the county prosecutor or other, authorized legal counsel to ensure that it is not creating liability for “reverse discrimination.”

Ohio does, however, require counties to file progress reports on affirmative action plans (AAP). The reports, which cover the demographic breakdown of the workforce, must be submitted not later than November 1 of each year. They are filed with the Ohio Civil Rights Commission (OCRC). The statute does not require any county to undertake an AAP, but to simply report progress if one has been undertaken by the county pursuant to the following possible requirements:

1. A conciliation agreement with the Ohio Civil Rights Commission.
2. An executive order of the Governor.
3. Any federal statute or rule.
4. An executive order of the President of the United States.

Technically, each county appointing authority should report separately unless there is a coordinated AAP that has been voluntarily agreed to by various county elected officials and other boards and commissions. Such countywide integration of an AAP would seem to make sense and reduce paper work.

The OCRC provides a very detailed set of forms for compliance with the law. The forms place an almost total emphasis on numerical goals, and unless the county has conducted a detailed analysis of the work force and found areas of underutilization of minorities and women it will be difficult to complete the forms from OCRC.

Process and procedural goals are also often part of an AAP. Although these elements of an AAP usually have no numerical dimension, they may be more important than raw statistics. Process and procedural goals relate to the entire county personnel process and include such specific elements as the development of a position classification and a pay plan; the improvement of a recruitment process, including access for underutilized minorities or women; or the development of a training program. All of these actions, over a period of time, should further equal employment opportunity. Many federal

programs require that county agencies that receive federal funds adopt a more formal policy or plan. If so, make sure that your office is in compliance.

### **63.19 LAYOFFS AND JOB ABOLISHMENT (ORC 124.321-124.327)**

Layoff is the involuntary separation of an employee due to lack of funds, lack of work, or a job abolishment. A job abolishment is defined as a layoff that will exceed one year, or the presumptive, permanent deletion of a position from the employer's table of organization. Layoffs and job abolishment are governed by statutory law and administrative rules, and the procedures underwent substantial revision under H.B. 187, the civil-service reform legislation that took effect in July 2007. Counties faced with budgetary problems may find layoffs or job abolishment as the only alternative, although the new furlough authority recently granted to counties provides another viable option for short term solutions. Appointing authorities may also use job abolishments when an agency has been re-organized or the nature of operations have changed, or when operations are being contracted out to private providers. A layoff or job abolishment of a classified county employee may be appealed to the SPBR (and perhaps under a union contract, where applicable), so both procedural and substantive compliance with the rules is essential.

To follow the proper layoff procedures in county government is at times quite difficult, because the process is complex and because the state classification plan that in theory binds all counties bears no relation to the reality on the ground in the vast majority of counties. If the county has a class plan different from the state plan – as nearly all do – it is only recognized legally if the county has filed it with the Secretary of State or has formally adopted it under a “county personnel department” created under the provisions of ORC Section 124.14(G). Most counties have done neither, and in the absence of such action, will be forced to defend a “de facto” classification plan, legal posture that is rife with opportunities for the SPBR to second-guess the employer's determinations on the proper order of layoff.

If employees are covered by a collective bargaining agreement, that agreement may set forth its own layoff and recall procedures, and if so, the collective bargaining agreement will prevail over civil service law and rules. Appointing authorities should carefully review these procedures to ensure compliance. Disputes about layoffs and job abolishments under a collective bargaining agreement will be subject to the grievance and arbitration procedure and not an appeal to the SPBR, unless the labor contract provides otherwise.

The following few sections of this Chapter will deal with civil service layoff and job abolishment procedures, and not those under a collective bargaining agreement, which will, of course, vary based on each agreement's terms.

Layoffs must be made on the basis of job classifications not preferences for individual employees or their performance. In addition, in determining the order of layoff, a retention point formula is used, which is a rough proxy for seniority, at least as

measured by years and months of continuous service. The following are some recommended steps to follow; however, this summary does not attempt to deal with all the legal intricacies of the law. In this area, especially, it is very important to review all steps with competent legal counsel, because any mistake may result in disaffirmance of the entire layoff, a very costly proposition for a county that does not have adequate funds to begin with. Ohio's layoff procedure basically:

1. Incorporates seniority as measured by time of continuous service to determine which employees will be laid off.
2. Provides displacement procedures for "bumping down" into lower classifications in the same classification series, or classifications held by the employee within the previous three years, provided that the employee remains qualified for the past job.
3. Establishes guidelines governing the recall to employment of laid off and reduced employees.

In order that there is ample time to conform with the requirements of the law, the following time sequence is offered as a guide. For more detailed information, county appointing authorities should consult a very helpful guideline prepared by DAS for layoffs in county offices:

<http://das.ohio.gov/LinkClick.aspx?fileticket=JYUZJ60dQGk%3d&tabid=130>

and for job abolishments:

<http://das.ohio.gov/LinkClick.aspx?fileticket=I1YdswEHf7Q%3d&tabid=130>

For the most part, the procedures for job abolishments are the same as for layoffs, with the distinction of the different grounds to be cited. County appointing authorities should be careful to review both the provisions of Chapter 123:1-41 of the Ohio Administrative Code (OAC) and the DAS job abolishment guidelines for county appointing authorities to make sure that correct procedures are followed in the case of job abolishments.

For layoffs, the following is a sequence of necessary steps:

1. **DETERMINATION OF NEED.** The appointing authority of a county office must first determine the need for a layoff based on lack of funds or a lack of work, expected to be for less than a year. In the case of a permanent job abolishment, it must be as a result of reorganization for efficient operation, for reasons of economy, or for lack of work, or a combination of these. County appointing authorities need no longer prepare a certification of financial need or a rationale statement to be filed with DAS. The county should, however, still prepare a rationale statement and supporting documentation, including an analysis of the lack of work over the preceding two years, and in the case of a lack of funds, projected revenues and projected expenditures, which should then result in, projected deficit. In the case of a job abolishment based on "reasons of

economy,” the employer will need to show that costs are reduced overall after the reorganization. The appointing authority will want to consider laid-off employee payouts (e.g., vacation, sick leave if applicable, compensatory time, unemployment costs, and early retirement plan payments) in determining the total deficit. The deficit should be equated into the number of positions to be laid off and how the action will produce the necessary savings. See the DAS guidelines for further details of the information required, both for layoffs and job abolishments.

2. **DETERMINE NUMBER OF CLASSES TO BE AFFECTED.** The appointing authority must decide in which specific classification or classifications the layoffs will occur and the number to be laid off as well as the effective date. In short, the first choice is in what classifications the layoffs will occur; the employer does not look at “seniority” in the workforce as a whole. The appointing authority must then calculate the retention points of each employee in the affected classifications (and lower classifications in the same classification series). This will determine who gets laid off within the affected classifications.
3. **CALCULATION OF RETENTION POINTS.** Retention points are calculated on the following basis:
  1. Each employee receives a base factor of 100 points.
  2. Each employee receives one point for each pay period of full-time continuous service.
  3. Each employee receives one half (0.5) point for each pay period of other than full-time continuous service.
  4. Total the employee’s base points and service points to obtain total retention points.

Evaluations no longer play any role in retention point calculations.

4. **PREPARATION OF RETENTION POINT LIST.** A retention point list for all employees potentially affected by a layoff (not only the classifications in which the layoffs directly occur but those in classifications potentially affected through the employee’s exercise of bumping rights) must be prepared. This should be done at least 20 days before the layoff.
  - a. Retention point lists are compiled in descending retention point order and grouped by classification, order of layoff, appointment type (full-time or part-time) and status (probationary or permanent) for each classification (OAC Section 123:1-41-07).

- b. The retention point list (a sample of which is included in the DAS Guidelines) includes columns containing the following information:
    - 1) Employee's full legal name.
    - 2) Position control number (omit if not using state-approved classification plan).
    - 3) Classification Number (ORC Section 124.14 and OAC Sections 123:1-7-17, 123:1-7-19, 123:1-7-27 and 123:1-8-02). Again, omit if not using state-approved classification plan.
    - 4) Classification title (ORC Section 124.14 and OAC Sections 123:1-7-17, 123:1-7-19, 123:1-7-27 and 123:1-8-02).
    - 5) Appointment type, which is now limited to four categories (full-time permanent, full-time probationary, part-time permanent, and part-time probationary). This is considerably simpler than the former rules.
    - 6) Date of continuous service (OAC Section 123:1-47-01 defines relevant breaks in service and impacts on continuous service).
    - 7) Total retention points.
  - c. It is recommended that the retention point list be at least double-spaced for ease of reading.
  - d. A star or asterisk must be placed by the name of the employee who is subject to layoff or job abolishment. Note: This designation should be prominent. This list must be posted, and given that it has the names of all employees who are in the classifications affected by the layoff or job abolishment, this list can induce panic if the employees actually to be laid off are not clearly denoted. Employees who are actually going to be laid off should be told prior to the posting of the list as well.
5. FILE DOCUMENTS. See the DAS guidelines for the records that the county office should retain, though note that DAS no longer has any role in verifying retention points or receiving statements of rationale. County appointing authorities still need to prepare these documents, however, in the event that the layoff or job abolishment is challenged before the SPBR.
  6. LAYOFF NOTICES. Each employee to be laid off must be given advance written notice by the appointing authority. The notice must be served on the employee at least 14 days before the layoff (if hand-delivered) or 17 days if delivered by certified mail, return-receipt requested. If hand-delivered, have the employee

sign for receipt of the notice, and retain any records of service, whether by hand or by certified mail. The notice must contain the following elements:

- a. The reason for layoff or displacement;
  - b. The effective date of the layoff or displacement;
  - c. The employee's accumulated retention points;
  - d. The right of the employee to appeal a layoff or displacement to the State Personnel Board of Review and that the appeal must be filed or postmarked within 10 calendar days after the employee is notified that he or she is to be laid off or displaced;
  - e. A statement advising the employee of the right to displace another employee (or that no displacement rights are available, if that is the case), and that the employee must exercise displacement rights within five calendar days of the date the employee is notified of the displacement or layoff;
  - f. A statement advising the employee of the right to reinstatement or reemployment if employees are recalled within one year of the layoff or job abolishment;
  - g. 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;
  - h. A statement that the employee is responsible for maintaining a current address with his or her appointing authority
  - i. A statement that the employee may have the option to convert accrued unused leave, if such opportunity to convert leave exists. For counties, this is limited to accrued vacation time and compensatory time off, unless the county has chosen to grant personal leave and allows for its conversion on separation, or has adopted a policy allowing for conversion of accrued sick leave for separations other than retirement after at least 10 years of service.
7. POST FIRST RETENTION POINT/LAYOFF LIST. At least 14 days prior to any layoff the appointing authority must prepare and post the retention point/layoff list in a conspicuous and public place accessible to affected employees. The list must contain the names, dates of appointment, types of appointment, status, classification, and retention points of all employees in the classification series and must indicate which employees will be laid off.

8. **POST SECOND LAYOFF LIST.** Employees who exercise their displacement rights must notify the appointing authority within five days after receiving the layoff notice. After compiling the list of employees exercising their displacement rights a second layoff list should be posted including all employees affected both by the layoff and displacement. This list is for recall and re-employment purposes.

Counties may also devise an alternative, “paper layoff” system where employees all exercise possible bumping rights before the layoffs actually take effect. See DAS rules and consult with legal counsel if the appointing authority wishes to use this option.

Within county offices the order of layoff is not countywide. The order of layoff is within each county appointing authority, not across those lines. Layoffs are done by classification series, a technical personnel term not well understood by counties that do not have a well developed classification plan. Layoffs in counties that do not have such plans are difficult to properly implement. The State Personnel Board of Review will allow a county appointing authority to prove the existence of a de facto classification plan, however. A classification series is basically a group of classifications with related duties that form a natural progression of both duties and possible promotional opportunities, such as Accounting Supervisor, then Account Clerk 2, then Account Clerk 1. After the appointing authority determines which classifications in a classification series will have layoffs, and what it considers to be its classification series, then a detailed sequence for layoffs within the series must be followed, starting with appointment types as listed below in Section 63.20 of this *Handbook*. Thereafter, layoffs are based on the employees’ retention points.

### **63.20 RETENTION POINTS (ORC 124.325)**

In those classifications where there is only a partial layoff, the method used to determine the order of layoff (other than category order) is by retention points. Retention points are calculated as set forth above, and are no longer verified by DAS prior to the layoff or job abolishment, so it is very important to calculate these carefully and have a second and even third set of eyes verify the calculations. Errors in retention point calculations can result in disaffirmance of the entire layoff, a very costly proposition.

If two or more employees have identical retention points, the tie is broken by using procedures in this order:

1. Employee with the most recent date of continuous service (without a break) must be laid off first.
2. The appointing authority must determine the employee to be laid off or displaced first.



If an employee is transferred from one appointing authority to another, or receives an appointment with another appointing authority, the length of service is deemed unbroken if no break in service of more than 30 days occurs.

### **63.21 ORDER OF LAYOFF (ORC 124.323)**

The order of layoff based on appointment categories within each classification are:

1. Part-time permanent employees who have not completed probation or six months of continuous service, whichever is longer.
2. Part-time permanent employees who have completed probation or six months of service, whichever is longer.
3. Full-time probationary employees who have not completed probation or six months of service, whichever is longer.
4. Full-time permanent employees who have completed their probationary period or six months of service, whichever is longer.

### **63.22 DISPLACEMENT ("BUMPING") RIGHTS (ORC 124.324)**

A "layoff jurisdiction" for layoff, displacement, and reinstatement rights in county offices is defined as appointing authority. That means that any layoff, displacement, or reinstatement cannot cross lines into another appointing authority. An employee has the right to displace another employee with fewer retention points in the following order:

1. Within the classification from which the employee was laid off.
2. Within the same classification series as the classification from which the employee was laid off.
3. Into a classification the employee previously held within three years from the date on which the employee was laid off, provided the employee still meets the minimum qualifications for the position. Note that this right to displace into previous classifications was limited to county job and family services employees before H.B. 187 took effect in July 2007, but now applies to all county employees.

An employee exercising bumping rights can only displace another employee with fewer (not more) retention points. Probationary employees cannot displace permanent employees. A permanent employee may displace a probationary employee with the same or lower appointment type who has fewer retention points in a classification in his or her classification series. Employees with lower appointment types cannot displace

an employee with a higher appointment type (e.g., a part-time employee could not displace a full-time employee).

Employees must notify their appointing authority in writing of their intention to exercise displacement rights within five days after receipt of notice of layoff or displacement. No employee may displace another employee whose position requires special minimum qualifications, as listed in the employee's position description or classification specifications, unless the bumping employee possesses the required qualifications. The employee has appeal rights within 10 days from the date of the layoff notice.

#### **63.24 REINSTATEMENT RIGHTS (ORC 124.327)**

The county must maintain a recall list of employees who have been laid off. Each laid-off or displaced employee has the right to reinstatement and re-employment to the same classification within the same appointing authority. The order for reinstatement is the reverse order of layoff, and employees must be listed for the classification from which they were laid off or displaced and the lower classifications in that classifications series.

Employee reinstatement rights last one year from the date of layoff in the agency from which the employee was laid off. Appointing authorities are prohibited from promoting or hiring into the classification(s) of layoff until the recall list is exhausted or expires after one year. An employee declining reinstatement to the same appointment type and classification from which they were laid off or displaced must be removed from the reinstatement list. Any employee declining to exercise displacement rights is only offered reinstatement or re-employment in the classification from which the employee was displaced or laid off, not a lower classification or classification previously held. An employee who declines reinstatement to a lower classification in the same series is thereafter only entitled to be offered recall to higher classifications including the classification from which he or she was originally laid off or displaced. Any employee reinstated or re-employed under the above procedures is not required to serve a new probationary period, except that an employee laid off during a promotional or original probationary period must begin a new probationary period.

#### **63.25 RECALL**

Each employee recalled from layoff must be notified of the offer of reinstatement or re-employment by certified letter. The letter should include a statement that refusal of reinstatement will result in removal of the employee's name from the appointing authority's recall list. Each recalled employee must be allowed 10 calendar days from the date of receipt of the letter to return to work. The time limit must be explained to the employee in the notification letter. In the event of extenuating circumstances (e.g., illness, injury, absence from the area) preventing the employee to return to work within the time limit, an extension not to exceed 60 days will be granted. The employee is responsible for keeping a current address on file with the appointing authority.

Any employee accepting reinstatement to a classification with a lower pay range than the classification from which he or she was laid off or displaced will remain on the appointing authority's recall list for classifications with higher pay ranges up to and including their former classification. The employee will be removed from the layoff list for the lower appointment category and below. An employee on the recall list accepting or declining re-employment to the same classification and same appointment type from which he or she was laid off or displaced shall be removed from the layoff lists altogether.

### **63.26 COST SAVINGS OR FURLOUGH DAYS (ORC 124.393)**

For years, layoffs and job abolishments were the only ways in which a county appointing authority could reduce employment-related costs in times of lean or shrinking budgets. With the state and local governments facing serious budget shortfalls in the wake of the Great Recession that started in late 2008, the General Assembly approved in 2009 additional means for counties to cut costs in fiscal years 2010 and 2011, and beyond when the county meets certain standards.

Under ORC Section 124.393, a county appointing authority may establish a mandatory cost savings program applicable to employees exempt from collective bargaining. If such a program is approved, then each covered employee must participate through furloughs or "cost savings days" up to 80 hours, as determined by the appointing authority, in each of state fiscal years 2010 and 2011. (Note that the 80 hours applies to the state fiscal year, not the county's fiscal year.) The program may include, but is not limited to, a loss of pay or loss of holiday pay. The program may be administered differently among employees based on their classifications, appointment categories, or other relevant distinctions.

After June 30, 2011, a county appointing authority may implement mandatory cost savings or furlough that applies to its collective bargaining-exempt employees in the event of a fiscal emergency declared by the county. The law defines a fiscal emergency in this statute as follows:

1. Lack of funds as defined in ORC Section 124.321.
2. Reasons of economy as described in ORC Section 124.321.
3. A fiscal emergency declared by the Governor under ORC Section 126.05.

ORC Section 124.393 provides that each county appointing authority adopting such a program must issue guidelines concerning how the appointing authority will implement the cost savings program. CCAO has some guideline language available to help implement such programs that can be found at <http://www.ccao.org/LinkClick.aspx?link=Archives+MJ%2f2009+Furlough+Seminar+Handout.pdf&tabid=387&mid=1022&language=en-US> .

## **63.27 POLITICAL ACTIVITY (ORC 124.57)**

Employees in the classified service are prohibited from engaging in political activity. By interpretation of federal courts, the phrases "political activity" and "politics" refer to only to partisan campaigns, elections, or offices only (those campaigns affiliated with a political party), not those filled in a strictly non-partisan manner, such as ballot issues, some municipal elections, and most school board elections. Partisan activity includes campaigns or elections where party may not be identified on the ballot but parties nonetheless endorse candidates, such as selection through party nomination or primary, party endorsement, or inclusion on party sample ballots or other campaign literature. The following are examples of legally permissible activities for classified county employees:

1. Registration and voting.
2. Expression of oral or written opinions.
3. Voluntary financial contributions to political candidates or organizations.
4. Circulation of non-partisan petitions or petitions stating views on legislation.
5. Attendance at political rallies.
6. Sign nominating petitions in support of individuals.
7. Display of political materials at home or on private property.
8. Wearing political badges, buttons, and stickers, or display of stickers on private automobiles.
9. Serving as a precinct election official under ORC Section 3501.22.

The following are legally prohibited activities for classified county employees:

1. Candidacy for public office in a partisan election, or in a non-partisan general election if the nomination for candidacy was obtained in a partisan primary or through circulation of nominating petitions identified with a political party.
2. Filing petitions for candidacy in a partisan election.
3. Circulating nominating petitions for any candidate in a partisan election.
4. Serving in an appointed or elected office of a partisan political organization.

5. Accepting a party sponsored appointment to any office normally filled by a partisan election.
6. Campaigning by writing for publications, distributing political material, or writing or making speeches on behalf of a political candidate.
7. Soliciting, indirectly or directly, any assessment, contribution or subscription, either monetary or in-kind, for any political party or candidate.
8. Soliciting or actually selling political tickets.
9. Partisan activity at election polls or board of election such as serving as recorder, checker, watcher, challenger, judge or poll worker for any party or partisan committee; provided that employees may serve as a precinct election official as provided in ORC Section 3501.22.
10. Participating in partisan political caucuses or political action committees which support partisan activity.

A classified employee engaging in any of the above legally prohibited areas of political activities can be subject to removal. It is illegal to appoint, promote, reduce, suspend, layoff, discharge, harass, discipline, or coerce any other such officer or employee for giving, withholding, or refusing to support any political party.

The Attorney General ruled in 1991 that the terms of a collective bargaining agreement may provide that a classified employee may engage in partisan politics and that pursuant to ORC Section 4117.10(A), such terms will prevail over the provisions of ORC Section 124.57 (OAG 91-065).

Unclassified county employees are not legally prohibited from political activity unless prohibited by federal or state law. Serving in an elected or appointed position is prohibited as a conflict of interest when:

1. The position is subordinate to, or can check on the performance of a current classified or unclassified employee.
2. It is physically impossible to discharge duties of both positions.
3. The law prohibits the person from serving both positions.

If any person holding public office or employment is convicted of violating ORC Section 124.57, their position is rendered vacant (OAG 83-095).

## **ACKNOWLEDGEMENT**

The County Commissioners Association of Ohio expresses its gratitude to Douglas E. Duckett, Esq., Consultant and Trainer in Human Resources and Labor Relations, Duckett Consulting, who can be contacted at (513) 484-7216, [douglas@duckettconsulting.com](mailto:douglas@duckettconsulting.com) or [www.duckettconsulting.com](http://www.duckettconsulting.com).

Form 63-1

State of Ohio  
Department of Administrative Services

Order of Removal, Reduction, Suspension,  
Fine, Involuntary Disability Separation

M \_\_\_\_\_

This will notify you that you are;  removed;  suspended;  suspended (working);  fined;

involuntary disability separated;  reduced in pay, from your position of

\_\_\_\_\_ and/or reduced to new position of \_\_\_\_\_  
(if applicable)

effective \_\_\_\_\_  
(date)

The reason for this action is that you have been guilty of (List relevant R.C. 124.34 disciplinary offense(s)).  
(Section not applicable for involuntary disability separation.)

**Specifically:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notice of pre-disciplinary/separation hearing given to employee: \_\_\_\_\_  
(date)

Pre-disciplinary/separation hearing held or waived: \_\_\_\_\_  
(date)

Employee allowed to meet with employer:  Yes  No

Order hand-delivered to employee: \_\_\_\_\_  
(date, if hand-delivered)

If employee is suspended, list dates of suspension: \_\_\_\_\_

Signed at \_\_\_\_\_ Ohio, \_\_\_\_\_  
(city) (date)

Counter signature, if applicable

Signature of Appointing Authority

Counter signature, if applicable

Type Name and Title of Appointing Authority

Counter signature, if applicable

Type Department, Agency, or Institution

### **IMPORTANT INSTRUCTIONS TO THE APPOINTING AUTHORITY**

(1) Actual signature means that each Order served on the employee must contain the actual signature of the Appointing Authority. Appointing Authority means the actual appointing officer of the department or agency as well as any approving officer or board required by law. If the appointment of an employee requires the approval of a board or commission, then a certified copy of the resolution of such board or commission approving the action must accompany this Order unless the actual signatures of the members of the board or commission appear on the front of the Order served on the employee.

(2) The Appointing Authority must set forth in detail the particular acts and circumstances constituting the offense(s) charged. Evidence presented on appeal must be limited to that which relates to the charge(s) made; hence the Appointing Authority must set forth the charges(s) broadly enough to encompass all the evidence the Appointing Authority intends to offer. It is equally important that the Appointing Authority fully state the ground(s) for the action.

(3) The Appointing Authority MUST provide an original of the Order to the employee on or before the effective date. The date on which the Order is served is the date the Order is delivered to the employee by hand or to the employee's last known mailing address by certified United States mail, whichever occurs first.

### **IMPORTANT INSTRUCTIONS TO THE EMPLOYEE**

If you wish to appeal this action, then you must file your written appeal with the State Personnel Board of Review (SPBR) at 65 East State Street, 12<sup>th</sup> Floor, Columbus, Ohio 43215-4213. **Your appeal must actually be received and time-stamped by SPBR by the tenth calendar day from the date this Order was served.** For the purposes of your appeal, the date on which this Order is served is the date the Order is delivered to you by hand or to your last known mailing address, as maintained by your Appointing Authority, by certified United States mail, whichever occurs first. You may obtain SPBR's Administrative Rules by writing the above office or by telephoning SPBR at (614) 466-7046. You may also obtain the rules at SPBR's website at <http://pbr.ohio.gov>.

#### ***Example of deadline to file appeal:***

An employee is given a 40-hour suspension. The suspension is to begin on October 11 and run five working days through October 15. The employee is served with the forthcoming suspension Order on October 8. The employee has until October 18 to file a written appeal (ten days from the date the employee was served with the Order).

**Reminder:** If you are employed by a municipality or township that has a civil service commission, your appeal lies with that commission and not SPBR.

You may contact SPBR at (614) 466-7046 regarding the above information or regarding SPBR's jurisdiction or you may visit our website at <http://pbr.ohio.gov>.