

**STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW**

Renc C. Hearn,

Case Nos. 08-REM-04-0099  
08-INV-04-0100

*Appellant,*

v.

Cleveland State University,

*Appellee.*

**ORDER**

This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

After a thorough examination of the record and a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that the instant appeals be **DISMISSED** for lack of subject matter jurisdiction, because the evidence established that the Appellant was in the unclassified service pursuant to O.R.C. §§ 124.11 (A)(7)(a), 124.11 (A)(9) and 124.11 (A)(30), and because the doctrine of *estoppel* bars the Appellant from claiming the protections of the classified civil service.

Lumpe - Aye  
Sfalcin - Aye  
Tillery - Aye



  
\_\_\_\_\_  
J. Richard Lumpe, *Chairman*

**CERTIFICATION**

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitute ~~(the original)~~ a true copy of the original order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, October 22, 2010.

  
\_\_\_\_\_  
Michelle Hursey  
*Clerk*

**NOTE:** Please see the reverse side of this Order or the attachment to this Order for information regarding your appeal rights.

10/22/10MH

**STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW**

Rene C. Hearn,

*Appellant*

v.

Cleveland State University,

*Appellee*

Case No. 08-REM-04-0099

Case No. 08-INV-04-0100

January 22, 2010

Christopher R. Young

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This case came on for record hearing on June 5, 2009 and August 19, 2009 and concluded upon the Appellee, Cleveland State University's post hearing brief filed on October 30, 2009, and upon the Appellant's Brief in Support of Closing Argument filed on October 30, 2009. The Appellant, Rene C. Hearn, appeared at the record hearing and was represented by Merl H. Wayman, Attorney at Law. The Appellee, the Cleveland State University was present through its designee, Stuart C. Mendel, the Assistant Dean of the College of Urban Affairs and Co-Director for the Center for Nonprofit Policy and Practices, and was represented by Joseph N. Rosenthal and Komlavi Atsou, Assistant Attorneys General.

In the case at hand the Appellee has asserted that the Appellant was serving in an unclassified position at the University via Ohio Revised Code sections 124.11(A) (7) (a), 124.11(A) (9) and 124.11(A) (30), along with asserting the doctrines of *estoppel* and *waiver*. It should be noted that a previous status conference it was agreed by the parties that the investigation appeal numbered 2008-INV-04-0100 would consolidated with the above captioned appeal, as well.

Based upon the information contained in the record, I initially found that the Appellant was removed as an unclassified employee. This Board does not possess subject matter jurisdiction over the removal of an unclassified employee since Ohio Revised Code Section 124.03 limits this Board's jurisdiction to actions concerning classified employees.

Therefore, in order to determine if this Board does possess jurisdiction over the instant appeal, it is necessary to conduct a hearing to determine if the Appellant

was a classified or an unclassified employee at the time of the removal. If the Appellant is determined to be unclassified, then the appeal will be dismissed for lack of subject matter jurisdiction. If, however, the Appellant is determined to be a classified employee and the removal was not in accordance with Ohio Revised Code Section [124.34/123.321, *et seq.*], then it must be disaffirmed.

Case law has determined that an employee's actual job duties are the determinative factor of whether an employee is classified or unclassified. Further, whether or not an individual is serving in the capacity of a classified or unclassified position is a question of fact to be determined by this Board, pending the submission of evidence of the Appellant's job duties and/or tasks and evidence concerning the doctrines of *estoppel* and *waiver* at the record hearing. Furthermore, the hearing was held to determine whether or not the Appellant held an "administrative staff position" while considering whether the Appellee had the authority via specific statutory authority to set the compensation of the employee and/or whether the Appellant was placed in the unclassified service by holding a business manager's position.

Consequently, the sole issue presented at record hearing was to determine whether the Appellant, Rene C. Hearn, was indeed a classified or unclassified employee at the time of her removal. If the Appellant is determined by this Board to be an unclassified employee at the time of her removal, then her appeal must be dismissed as a matter of law since this Board lacks jurisdiction over appeals from unclassified employees. However, should the Appellant be found to have been serving in the classified service, her removal must be disaffirmed and she must be reinstated, as a matter of law, since no order is required by Ohio Revised Code Section 124.34 was ever filed in this case.

Further, it should be noted that Ms. Hearn subsequent to her removal became employed at the University of Louisiana at Monroe, and that her salary was higher than her past salary at Cleveland State University.

### **FINDINGS OF FACT**

Ms. Rene C. Hearn held the position of the Budget Manager at the Maxine Goodman Levin College of Urban Affairs ("College") at Cleveland State University from March 1, 1999 to June 30, 2008. Prior to her appointment as Budget Manager, Ms. Hearn served as the interim budget manager from October 1998 to February

1999. Ms. Hearn also held the position of Grants Administrator in the Department of Management and Labor Relations dating back to January 1995. At all times during the employment of Ms. Hearn the evidence revealed she understood she was hired on a full-time temporary contract for one year periods of time and understood that her employment was contingent upon the availability of funds. Although Ms. Hearn understood that she was employed in the professional status, no one at the University ever told or explained to her whether her position was classified or unclassified at any time during her employment. Further, no Cleveland State University official ever asked Ms. Hearn to sign a document acknowledging her employment was indeed in the unclassified civil service, as no such evidence was introduced by the Appellee.

The testimonial and documentary evidence revealed that the job description of Ms. Hearn ( See Appellee's Exhibit 2) grouped her job duties as follows: managing the entire budget for the College; integrating all budget functions within the College; coordinating and administering the Urban University Program ("UUP") funds and state technical research grant budgets; supervising assigned staff by providing orientation, guidance, assistance and developmental training; overseeing workflow, schedules, projects and committee decisions; enhancing professional growth and development; and performing other functionally related duties as assigned. Ms. Hearn's job description did not have any corresponding percentage estimate of time spent performing each group of duties that was assigned in the position description.

As the Budget Manager, Ms. Hearn initially reported to Stuart Mendel, the Assistant Dean of the College of Urban Affairs, but that after Dean Mark Rosentraub began his employment in 2001, she reported to him until his employment ended in September 2007. Thereafter, the testimony revealed that Ms. Hearn then reported to Dr. Mendel until her employment ended in June 2008.

Ms. Hearn agreed that the duties listed in her job description accurately described the duties which she performed. As the Budget Manager, Ms. Hearn was delegated signature authority by the College Dean, Mark Rosentraub, at that time to approve transactions of less than \$1000. Also, the testimony revealed to facilitate the performance of Ms. Hearn's duties, the college allowed Ms. Hearn to create and run a parallel financial tracking system ("Access Data Base") to the general financial ledger operated by the Cleveland State University ("Peoplesoft"). The evidence was noted that all of the financial records of the College were kept on

the Access Data Base. Moreover, Ms. Hearn admitted she was the only employee within the College capable of operating and running reports off the Access Data Base. Associate Dean Wendy Kellogg also testified that signature authority was an important responsibility because it gave Ms. Hearn the authority to sign documents that involved receipt of expenditures and certifying information.

In July 2007, the College of Urban Affairs experienced a deficit of \$850,000.00. At around the same time, Ms. Hearn notified Dean Rosentraub that the deficit affected the college's ability to underwrite the salaries of the grant funded employees, and that the college may have to lay off staff. Further, during the same period, Dean Rosentraub had a difficult relationship with the University's Provost over concerns about the college budget. In October 2007, the Provost appointed a new Dean, Mr. Edward Hill to the College of Urban Affairs. The evidence revealed that at or about that same time Dean Hill removed the signature authority from Ms. Hearn over purchase requisitions, small order forms, and budget transfer requests.

However, Ms. Hearn admitted that her position description did not state that she needed to have a signature authority to perform her duties as a Budget Manager. The evidence revealed that after October 2007, Ms. Hearn no longer attended cabinet meetings, and once again Ms. Hearn agreed when questioned, that the attendance of cabinet meetings was not one of her described duties in her position description. The evidence revealed that other staff members were affected when Ms. Hearn lost her signature authority. Prior to October 2007, Mr. George Chromik, the Assistant Controller, interacted with Ms. Hearn approximately 95% of the time regarding grants, invoicing, journal entries and financial reporting. After October 2007, Mr. George Chromik testified that he began to have less contact with Ms. Hearn and more contact with Dr. Mendel and Ms. Faith Noble. Moreover, Mr. George Chromik testified he began to notice more financial transactions signed in submitted by Ms. Noble in late 2007 or early 2008.

While Ms. Hearn believed that she could no longer take any action to affect the financial condition of the College or that she could no longer perform any of her job duties listed her position description, which was simply not the case. The evidence revealed that Dean Hill assigned Ms. Hearn to begin working on closing all open ended transactions and accounts on the Access Data Base because the College made the decision to switch to PeopleSoft, the general financial ledger of Cleveland State University. Ms. Hearn's supervisor Stuart Mendel testified that closing a grant account involved: making sure that all of the funds in the grant

account are expended in a manner that is appropriate and aligned with the original budget for the grant; making sure that a product was delivered; making sure that the University acknowledges there is nothing left in the grant account; and closing the account. This is what Ms. Hearn worked on primarily from late 2007 through April 2008. The testimony also revealed that Ms. Hearn continued to: assist faculty members to build their budgets; help faculty members, specifically Dr. Kellogg and Dr. Alexander, to develop their research proposals; explained to faculty members the rules governing specific accounts; provide historical information regarding accounts to faculty members; and send journal entries to George Chromik, Assistant Comptroller at Cleveland State University. Moreover, Mr. George Chromik testified that he continued to interact with Ms. Hearn on grant matters until this Hearn left the employment of Cleveland State University.

In addition to the above duties, the evidence revealed that Ms. Hearn assisted with the audit of the College which began in November 2007 and ended in April 2008. The audit was conducted by Judith A. Richards, Director of Department of Audits, and her team. The audit was retrospective rather than prospective in that it looked only to pass information. Thus, throughout the audit Ms. Richards and her team asked this Hearn to: provide the audit team with financial documents from the Access Data Base and explained those documents; perform reconciliations of grant, wash and general ledger accounts from 2005 to 2007; perform adjustments to journal entries; identify outstanding collectible accounts; perform cost analysis; and look at financial information from 2003 to 2007. Ms. Hearn testified that these duties listed above fell within her job description, as well. Ms. Hearn testified that on December 10, 2007, the audit team asked her to provide it with information regarding reconciliations for all the center accounts and their impact on the UUP account; procedures for reviewing transfers and the monthly process for determining the effort of each employee four centers; income and expense statement of the centers for year end 2004-2005, 2005- 2006, and 2006-2007 and identification of the total appropriation for each of the years; procedures for invoicing and tracking all receivables and review of account receivables from Office of Treasury Services; and tracking methods of interdepartmental sales. Additionally, Ms. Hearn testified that on December 17, 2007, the audit team requested that she answer questions regarding "the dollar amount of right off for 2007, 2006, 2007 and that she provide answers regarding whether a wash account from which the college money flew through was reconciled and how often." Again, the evidence revealed that Ms. Hearn admitted that these duties also fell within her job description. Furthermore, Ms. Hearn testified that in year 2008, she continued to input data into

the Access Data Base and to explain how the Access Data Base worked to the audit team. Ms. Richards testified that this type of information listed above that was requested from Ms. Hearn by the audit team could not have been provided by a person in the position of office coordinator or an office clerk. Ms. Richards explained the situation as follows: "we had a spider web of financial things going on at the same time, so it would take a very high level professional to be able to explain it and to do the reconciliations." Further, Ms. Richards testified that this information could basically only come from Ms. Hearn as she was the only person within the College who knew how the Access Data Base functioned. Moreover, Ms. Richards testified that Ms. Hearn did not complete all of the duties assigned to her by the audit team but estimated that if she had it would have taken Ms. Hearn three months full time to complete all the duties.

Prior to October 2007, Ms. Hearn supervised a budget coordinator and a budget clerk and that afterwards Ms. Hearn no longer supervised any staff, as they began reporting directly to Dr. Mendel, and were eventually laid off in December 2007. Further, the evidence revealed that prior to October 2007, Ms. Hearn attended monthly college budget meetings to advise the Dean about the overall college budget, fiscal management issues, allocation information and grant proposals for the faculty, along with attending quarterly University budget meetings with budget managers from other colleges. However, after Dean Hill removed her signature authority the evidence revealed that Ms. Hearn stopped attending both college and university budget meetings and Ms. Hearn was no longer responsible for providing advice to the Dean about the college budget.

Further, the evidence revealed that Ms. Hearn knew at the time of her initial appointment to the position of Budget Manager that her employment was pursuant to a full-time funds available contract and that her position fell within the professional staff classification. In addition, the evidence revealed that Ms. Hearn knew that Cleveland State University was under no obligation to renew her employment contract year-over-year. The testimony also revealed through Ms. Monroe that Cleveland State University is under no legal obligation to renew funds available contracts. Cleveland State University's Professional Personnel Policies and Procedures expressly provide that the termination of a professional staff employee, like Ms. Hearn, can come through nonrenewal of contract. The termination of Ms. Hearn's employment was done in accordance with her contract and Cleveland State University's Professional Personnel Policies and Procedures.

In terms of the Appellee's argument regarding *estoppel* and *waiver*, the evidence revealed that Ms. Hearn benefited from a market adjustment that raised her salary from \$40,000 to \$47,000 after Cleveland State University made a competing offer to this Hearn as a consequence of this Hearn's presentment to Cleveland State University of an offer from an outside employer back in 2000. Ms. Monroe testified that market adjustments are only available to professional staff, not classified employees. Ms. Hearn also benefited from an equity adjustment of \$240 as part of her contract beginning July 1, 2007 and ending June 30, 2008. Again, Ms. Monroe testified that equity adjustments are only available to professional staff, not classified employees. Finally, the testimony revealed that Ms. Hearn accrued vacation time at the unclassified employee's rate of 7.4 hours per pay period, a rate higher than that of classified employees. A classified employee with the same longevity as Ms. Hearn would have accrued vacation time at a rate of 4.6 hours per 80 hours work.

On April 3, 2008, Cleveland State University President Michael Schwartz notified Ms. Hearn, by letter, that she was being terminated effective July 1, 2008.

### **CONCLUSIONS OF LAW**

The determination of the Appellant's status as a classified or unclassified employee while employed by the Cleveland State University will mandate the outcome of this appeal. As was previously stated, the Appellant was removed as an unclassified employee pursuant to Ohio Revised Code Section 124.11(A) (7) (A), 124.11(A) (9), 124.11(A) (30) and under the doctrines of *estoppel* and *waiver*. The Appellee only recently raised the allegation of the Appellant's unclassified status pursuant to Ohio Revised Code Section 124.11(A) (9) in its closing brief. The burden is on the Appellee to prove, by a preponderance of the evidence that the Appellant was serving in the unclassified service at the time of her termination. If the Appellee meets this burden, then the case will be dismissed, as this Board has no subject matter jurisdiction over unclassified employees. If, however, the Appellee fails to meet its burden, then the Appellant must be reinstated as she was not removed in accordance with the procedures governing the removal of a classified employee.

The first issue which in itself may be dispositive of this appeal, is whether the Appellant was serving in the unclassified service of the state pursuant to Ohio

Revised Code Section 124.11(A)(7)(a) at the time of her removal.

Employment with the state of Ohio is divided into the classified and unclassified service. The division between these two groups of public employment is delineated in Ohio Revised Code Section 124.11(A) which describes a variety of positions within the public sector which are located within unclassified service. The Appellee in this matter claims that the Appellant, Rene C. Hearn, was employed in the unclassified service under the provisions of Ohio Revised Code Section 124.11(A) (7) (a) and specifically asserted that the Appellant was a “business manager” as noted under (A) (7) (a), as was determined by the governing body of a public school system, college or university. Consequently, the first issue presented in the instant appeal is whether or not the Appellant herein was in fact a business manager as contemplated by the above noted statute.

Pursuant to Ohio Revised Code Section 124.11(A) (7) (a) it reads as follows:

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examination required by this chapter:

(7)(a) All presidents, **business managers**, administrative officers, superintendents, assistant superintendents, principals, deans, assistant deans, instructors, teachers, and such employees as are engaged in educational or research duties connected with the public school system, colleges, and universities, **as determined by the governing body of the public school system, colleges, and universities;**

With respect to the options listed in Ohio Revised Code Section 124.11(A) (7) (a), I find that the testimony presented and evidence contained within the record indicated that the “business manager” option was potentially applicable in this case.

Since the term “business manager” is not defined within the context of Ohio Revised Code Sections 124.11(A) (7) (a) and since case law has not directly addressed the issue of what constitutes an “business manager” under this code provision this Board should apply the ordinary meanings of the terms “business manager” to determine whether the Appellant held a business manager’s position pursuant to Ohio Revised Code Section 124.11(A) (7) (a).

The words "business managers" are not defined by Ohio Revised Code section 124.11 (A) (7) (a). Thus, in the case of *sub judice*, this board should apply the ordinary means of the terms "business managers." According to the case of *Czechowski v. University of Toledo*, Franklin App. No. 98AP-366, 1999 Ohio App. LEXIS 1137, at page 6, citing *Mutual Building and Investment Co. v. Efros* (1949), 152 Ohio St. 369, 89 N.E.2d 684 (holding that "in interpreting a statute, words are to be given their common, ordinary and generally accepted meaning.") In *Czechowski*, the court adopted the definition given to the words "business" and "manager" by the American Heritage Dictionary:

The American Heritage Dictionary (1979) at page 180, defines "business" as "commercial, industrial or professional dealings; the buying and selling of commodities or services." The dictionary, at page 792, further defines "manager" as "a person who manages a business or other enterprise," and defines "manage" as "to direct or control the use of; \*\*\*to exert control over; make submissive to one's authority, discipline or persuasion."

While Cleveland State University is not engaged in private industry, there is no dispute that it operates as a self-sustaining entity and is, in essence, a business. Also, there is no dispute that based on the definition of "business manager" provided by the American Heritage Dictionary and adopted by the *Czechowski* court, an employee who directs or exert control over commercial and/or professional dealings qualifies as a business manager.

As a Budget Manager, Ms. Hearn exerted total control over the College's internal Access Data Base, where all financial information of the College were kept during her employment with Cleveland State University, including for all intents and purposes the relevant period from October 2007 to June 30, 2008. In fact, Ms. Hearn testified that she created the Access Data Base and that she was the only employee within the College capable of operating in and explain how it functioned.

Moreover, Ohio Revised Code section 124.03 (A) (1) states in pertinent part:

In determining whether an employee is in the unclassified civil service, the state personnel board of review shall consider the ***inherent nature*** of the duties of the employee's classification

during the ***two-year period*** immediately preceding the appointing authority's appealable action relating to the employee.

In the case at bar, the evidence revealed that there was no doubt that the Appellant, Ms. Rene Hearn, was employed as a business manager from at least June 30, 2006 through October 2007, when by the Appellant's own admissions her job changed. The testimonial and documentary evidence revealed that the job description of Ms. Hearn ( See Appellee's Exhibit 2) grouped her job duties as follows: managing the entire budget for the College; integrating all budget functions within the College; coordinating and administering the Urban University Program ("UUP") funds and state technical research grant budgets; supervising assigned staff by providing orientation, guidance, assistance and developmental training; overseeing workflow, schedules, projects and committee decisions; enhancing professional growth and development; and performing other functionally related duties as assigned. Ms. Hearn's testimony was that her duties were that of a business manager up and until at least October 2007 when the new Dean took away her signature authority and asked that she no longer attend cabinet meetings. However, Ms. Hearn also understood that her position description as business manager did not state that she needed to have a signature authority or that she had to attend cabinet meetings to perform her duties as a budget manager, as well.

Thus, the undersigned concludes that the Appellee met its burden of showing that the Appellant was serving in the unclassified service pursuant to Ohio Revised Code Section 124.11(A) (7) (a), as she was a "business manager" as contemplated by the statute.

Further, it should be noted that the Appellee has also asserted that the Appellant was serving as an unclassified employee pursuant to Ohio Revised Code Section 124.11(A) (30). Ohio Revised Code Section 124.11(A) (30) reads as follows:

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examination required by this chapter:

(30) Employees appointed to administrative staff positions for which an appointing authority is given specific statutory authority

to set compensation.

With respect to the option listed in the Ohio Revised Code Section 124.11(A) (30), I find the testimony presented and evidence contained within the record indicated that the Appellee was simply asserting that Rene C. Hearn was appointed to an administrative staff position for which the appointing authority had specific authority to set its compensation. Again since the term “administrative staff” is not defined within the context of Ohio Revised Code Section 124.11(A) (30) and since case law has not directly addressed the issue of what constitutes an “administrative staff” under this code provision, this Board should apply the ordinary meaning of the term “administrative staff” to determine whether the Appellant held an administrative officer position pursuant to Ohio Revised Code Section 124.11(A) (30).

Webster’s Third New International Dictionary (Unabridged 1971) defines the term “administrative” as: “of, belonging to, proceeding from, or suited to administration or an administration: EXECUTIVE.” The term “officer” is defined as: “a *obs* one charged with a duty: AGENT” The term “staff” is defined as: “1: of, relating to, or constituting a staff (work) (officers) (personnel) 2: having an auxiliary or advisory relationship to the stated objective of an organization.”

The above definition indicated that an “administrative officer” would be an employee charged with duties involving the implementation of specific functions, programs, or goals of an organization. Thus, an “administrative officer” would be noted as an agent of the administration, which would have a significant level of authority to initiate action and would perform duties, the nature of which would require the organization to rely upon the employee’s personal judgment and leadership abilities.

With regard to the “administrative staff” exemption set forth in Ohio Revised Code Section 124.11(A) (30), it is noted that this exemption is applicable to employees appointed to administrative staff positions for which an appointing authority is given specific statutory authority to set compensation. While the evidence presented at the record hearing was devoid on how the organizational structure was set up by the Cleveland State University, the undersigned took administrative notice of the Appellee’s argument in its closing brief.

Again, the evidence revealed that the Appellant, Rene Hearn, had a wide variety of duties which included, but were not solely limited to, managing the entire budget for the College; integrating all budget functions within the College; coordinating and administering the Urban University Program ("UUP") funds and state technical research grant budgets; supervising assigned staff by providing orientation, guidance, assistance and developmental training; overseeing workflow, schedules, projects and committee decisions; enhancing professional growth and development; and performing other functionally related duties as assigned. As the Budget Manager, Ms. Hearn was delegated signature authority by the College Dean, Mark Rosentraub, at that time to approve transactions of less than \$1000. Also, the testimony revealed to facilitate the performance of Ms. Hearn's duties, the college allowed Ms. Hearn to create and run a parallel financial tracking system ("Access Data Base") to the general financial ledger operated by the Cleveland State University ("PeopleSoft"). The evidence was noted that all of the financial records of the College were kept on the Access Data Base. Moreover, Ms. Hearn admitted she was the only employee within the College capable of operating and running reports off the Access Data Base. Further, the evidence revealed that Ms. Hearn was the only person at the University who had full understanding of the Data Access Base, as well.

Ohio Revised Code section 124.01 (D) defines "appointing authority" as "the officer, commission, board, or body having the power of appointment to, or removal from, positions in the office, department, commission, board or institution." Ohio Revised Code section 3344.03 provides in relevant part as follows: "the board of trustees of Cleveland State University shall employ, fix the compensation of, and remove the president. and such number of professors, teachers and other employees as may be deemed necessary ...." Because Cleveland State University's Board of Trustees has the authority under Ohio Revised Code section 3344.03 to appoint employees to, and removed employees from, their position, the Board of Trustees is the appointing authority for Cleveland State University. As such, the Cleveland State University has met the second requirement as called for under Ohio Revised Code section 124.11 (A) (30). Additionally, since Ohio Revised Code section 124.11 (A) (30) calls for one to have been granted specific statutory authority to set the compensation of one's position, Ohio Revised Code section 3344.03 provides in relevant part: that " the Board of Trustees of Cleveland State University shall \*\*\* fixed the compensation of\*\*\* the president and such number of professors, teachers, and other employees it may be deemed necessary ..." As such, the Cleveland State University's Board of Trustees had been given specific

statutory authority to set the compensation for Hearn's position, thus meeting the last requirement of Ohio Revised Code section 124.11 (A) (30).

Therefore, I conclude that O.R.C. Section 124.11(A) (30) may be considered in this case, as the evidence supports the conclusion that the Appellant was a business manager at Cleveland State University. Further, an analysis of Appellant's job duties support the conclusion that the Appellant held an "administrative staff" position pursuant to Ohio Revised Code Section 124.11(A) (30). Specifically, the Appellant's job duties clearly demonstrated the Appellant's position allowed her such discretion in the performance of her duties with allowing her to exercise her personal judgment and leadership skills established that the Appellant also held an "administrative staff" position pursuant to Ohio Revised Code Section 124.11(A)(30).

Further, the Appellee has also asserted that the Appellant was an unclassified employee pursuant to Ohio Revised Code section 124.11 (A) (9) because she was in a fiduciary relationship with Cleveland State University which she held the position of business manager.

Ohio Revised Code section 124.11 (A) (9) states in pertinent part:

The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter: \* \* \*  
(9) the deputies and assistants of state agencies authorized to act for and on behalf of the agency, or holding a fiduciary or administrative relationship to that agency...

Case law has held that there is a fiduciary relationship between an employer and employee where the duties assigned to the employee require, "as essential qualifications over and above technical competency requirements, a high degree of trust, confidence, reliance, integrity and fidelity." *Hitchens v. Ohio Department of Transportation* (Oct.14, 1993), Franklin App. No. 93AP-315, 1993 Ohio App. LEXIS 5024, at page 9, citing *State ex rel. Charlton V, Corrigan* (1988), 36 Ohio St.3d 68, at syllabus.

In the case at bar, without reiterating all of the previous arguments presented to the Board the evidence revealed that the Appellant held a fiduciary relationship

with Cleveland State University when she was employed as a business manager, as she held significant responsibilities that were over above the technical competency of an average job in which the employer relied on her with a high degree of trust, confidence and integrity. Thus, the undersigned concludes that the Appellee met its burden of showing that the Appellant was serving in the unclassified service pursuant to Ohio Revised Code Section 124.11(A) (9).

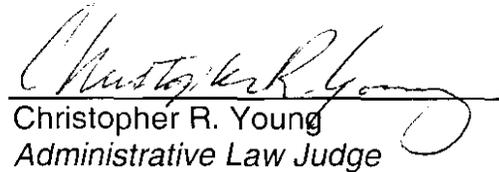
If the Board rejects the above conclusion regarding Appellant's position being in the unclassified service pursuant to O.R.C. Sections 124.11(A)(7)(a), 124,11(A)(9) and 124,11(A)(30), Appellee's assertion of the defenses of *estoppel* and *waiver* may be considered. Case law has established that in an appeal pursuant to O.R.C. section 124.34 by a terminated public employee who claims classified status, the state may assert the defenses of *waiver* and *estoppel* if the employee has accepted appointment to a position designated as an unclassified position regardless of whether the employee's actual job duties fall within the classified status. *Chubb v. Ohio Bureau of Workers Compensation*, (1998) 81 Ohio St. 3d 275.

In the case at hand, the doctrine of the defense of *waiver* should not be applied in this matter. The evidence and testimony revealed that the Appellant did not have knowledge that she was knowingly accepting an unclassified position when she was hired into the business manager's position in 1999, a position she held until her position was terminated in April 2008. The record is devoid of any evidence that the Appellant signed off on any paperwork acknowledging that she understood her position was unclassified, although she did know that it was a professional position renewable on a year-to-year basis. As a result, the undersigned rejects the notion that the Appellee can assert its defense of *waiver*.

With respect to the defense of *estoppel*, the testimony and evidence did reveal that this defense could be employed in this matter. The evidence did reveal that the Appellant did enjoy benefits that were only available to unclassified employees that included her being able to have a market adjustment raise of approximately \$7,000.00, equity adjustment pay, and a higher accrual rate of vacation time over and above classified employees. Accordingly, the doctrine of *estoppel* is applicable in this case to bar the Appellant from claiming the protections of employees employed in the classified civil service of the state.

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Therefore, I respectfully **RECOMMEND** that the instant appeal be **DISMISSED** for lack of subject matter jurisdiction because the evidence established that the Appellant, Rene C. Hearn, as a budget manager was in the unclassified service pursuant to Ohio Revised Code sections 124.11 (A) (7) (a), 124.11(A) (9) and 124.11(A) (30), and under the doctrine of *estoppel* which bars the Appellant from claiming the protections of the classified civil service.

  
Christopher R. Young  
Administrative Law Judge

CRY