

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

Claudette R. Durham,

Appellant,

v.

Case No. 09-REM-01-0038

Marion County Prosecuting Attorney,

Appellee.

ORDER

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

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 appeal be **DISMISSED** for lack of jurisdiction pursuant to O.R.C. § 124.11 (A) (8).

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 8, 2009.



Clerk

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

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

Claudette R. Durham,

Case No. 09-REM-01-0038

Appellant

v.

September 9, 2009

Marion Co., Prosecuting Attorney,

Christopher R. Young

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on for consideration on September 9, 2009, upon the Appellee's motion to dismiss filed on August 24, 2009, and upon the Appellant's response to Appellee's motion to dismiss filed on September 3, 2009. The Appellee, the Marion County Prosecuting Attorney, moves this Board to dismiss this appeal for lack of jurisdiction stating that the Appellant, Claudette Durham, the Office Manager for the Prosecuting Attorney's office, was serving as an unclassified administrative and fiduciary employee pursuant to Ohio Revised Code section 124.11 (A) (9), and that her position was exempted from the classified civil service pursuant to Ohio Revised Code section 124.11 (A) (8). The Appellant, on the other hand, disagrees with the Appellee's motion to dismiss this appeal due to lack of jurisdiction as there are factual issues as to whether the Appellant was serving as a fiduciary and administrative employee. However, in the Appellant's response to the Appellee's motion to dismiss it was not contested whether the Appellant's position was exempted from the classified civil service pursuant to Ohio Revised Code section 124.11 (A) (8). Although, it should be noted that in the pleadings of the file it did contain the fact that the former Prosecuting Attorney, Jim Slagle, attempted to change the Ohio Revised Code section 124.11 (A) (8) exemptions during the incumbency of his office.

Notwithstanding the fact that the Appellee believes that the Appellant, Claudette Durham, was an unclassified fiduciary and administrative employee pursuant to Ohio Revised Code section 124.11 (A) (9), the sole issue before this Administrative Law Judge in determining the Appellee's motion to dismiss is whether the Appellant, Claudette Durham, was exempted from the classified civil service pursuant to Ohio Revised Code section 124.11 (A) (8).

For clarification, the Appellant, Claudette Durham, was hired into the position of Office Manager on June 23, 2008. Ms. Durham was hired by the former Prosecuting Attorney, Jim Slagle, due to the retirement of the former Office Manager, Debbie Moody. The evidence in the case file reveals that the Office Manager's position had been exempted from the classified civil service pursuant to Ohio Revised Code section 124.11 (A) (8) on January 20, 2005, at the beginning of Mr. Slagle's four year term. Further, the evidence revealed that the exemption was in effect at the time the Appellant was hired. Mr. Slagle's exemption was a continuation of his practice of exempting the Office Manager's position from the classified service at the beginning of his four-year term, as he had previously done this in his prior term. As such, Mr. Slagle considered the Office Manager's position to be unclassified.

The Appellee contends that the Appellant, Claudette Durham, was an unclassified employee because Mr. Slagle exempted the position of Office Manager pursuant to Ohio Revised Code section 124.11 (A) (8) at the beginning of his term, and prior to her hire. Pursuant to Ohio Revised Code section 124.11 (A) (8) elected officials are permitted to designate up to four employees which usually could hold classified positions, as unclassified employees.

Ohio Revised Code section 124.11 (A) (8) states:

The civil service of the state and the several counties, cities, civil service townships, city health districts, general health districts, and city school districts of the state shall be divided into the unclassified service and the classified service.

(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 examinations required by this chapter:

(8) Four clerical and administrative support employees for each of the elective state officers, four clerical and administrative support employees for each board of county commissioners and one such employee for each county commissioner, and **four clerical and administrative support**

employees for other elective officers and each of the principal appointive executive officers, boards, or commissions, except for civil service commissions, that are authorized to appoint such clerical and administrative support employees;

Ohio Administrative Code section 123:1-5-01(A) states the following:

(A) Designation of exemptions. Within sixty days after taking office, each elective officer and each principal appointive officer, board, commission, or body having the power of appointment to, or removal from, positions in the service of the state in any office, department, commission, board or institution, **shall designate to the director the positions for which exemption from the competitive classified service is claimed under the provisions of division (A)(8) of section 124.11 of the Revised Code.**

Thereafter, **no change in the designation of exemptions claimed under this provision shall be made during the incumbency of such officer,** board, or commission unless an agency reorganization occurs as a result of legislative action during the appointing officer's, board's or commission's term of office, the appointive officer, board, commission, or body shall file a statement of reasons for such proposed change satisfactory to the director of administrative services.

If exemptions have not been designated by the appointing officer, board, or commission as herein provided within sixty days after taking office, the exemptions previously designated and in effect under this provision shall be considered the exemptions claimed by such appointing authority and will continue to be in effect.

As indicated above Mr. Slagle exempted the Office Manager's position on January 20, 2005, prior to the Appellant's hire on June 23, 2008 into the Office Manager's position, due to the retirement of the former Office Manager, Debbie Moody. Further, the evidence revealed that Mr. Slagle's July 25, 2008, letter to the

Department of Administrative Services attempting to change his previous 124.11 (A) (8) exemption during his term of his office, after already having served for more than 60 days, would be deemed invalid, under the circumstances noted above. As a simple reading of the above statute and administrative rule reveals that in order to exercise the Ohio Revised Code section 124.11 (A) (8) exemption, an elected official must notify the Director of Administrative Services of exemptions within 60 days after taking office. (See O.A.C. section 123:1-5-01). Additionally, as noted in the above administrative rule, no change in the designation of exemptions claimed under this provision shall be made during the incumbency of such officer, unless a reorganization occurs as a result of a legislative action. As can be read from the above is noted Administrative Code provision, it explicitly prohibits designation actions made after 60 days of taking office.

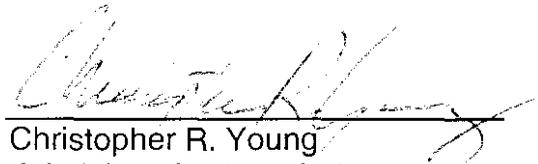
The evidence revealed that Mr. Slagle's incumbency did not end until January 5, 2009, when Mr. Yager took office. Further, the evidence did not reveal that any legislative reorganization occurred during Mr. Slagle's term in office, although Mr. Slagle attempted to change the designation pursuant to Ohio Revised Code section 124.11 (A) (8) during his incumbency. Mr. Slagle's attempt to change the designation during his incumbency was contrary to law and should be prohibited. Likewise, since the Office Manager's position was exempted as unclassified when the Appellant was hired, she was in fact an unclassified employee.

Further, the undersigned Administrative Law Judge concurs that while there is judicial precedent that a classified employee cannot be involuntarily unclassified through a Ohio Revised Code section 124.11 (A) (8) designation at the beginning of the elected official's term, those cases are inapplicable because the Appellant, in this case, was hired into an unclassified position. See Esselburne v. Ohio Department of Agriculture (1985), 29 Ohio App.3d 152. In the case Esselburne it limited the ability of an elected official to discharge a classified civil servant by re-designating his position as unclassified, does not apply to the present scenario. In the case at hand, the Office Manager's position had been exempted from the classified service for at least two terms prior to the Appellant's hire. As such, the Appellant was hired into an unclassified position, and that this Board lacks jurisdiction over her appeal.

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RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the Appellee's motion to dismiss be **GRANTED**, and that the instant appeal be **DISMISSED** for lack of jurisdiction pursuant to Ohio Revised Code section 124.11 (A) (8).



Christopher R. Young
Administrative Law Judge

CRY: