

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

Dennis M. Evans,

*Appellant.*

v.

Case No. 09-REM-04-0238

Department of Job and Family Services,

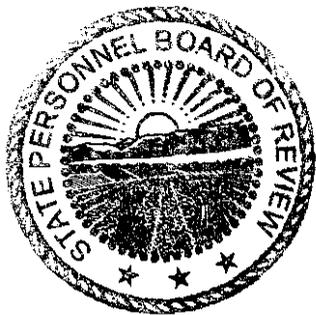
*Appellee.*

**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 over the parties, pursuant to O.R.C. §§ 124.03 and 124.11 (A)(9).



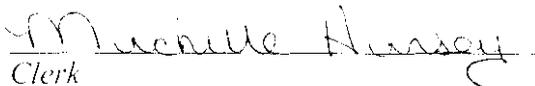
Casey - Aye  
Lumpe - Aye  
Tillery - Aye

  
Terry L. Casey, *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, March 1, 2011.

  
*Michelle Hussey*  
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**

Dennis M. Evans,

Case No. 09-REM-04-0238

*Appellant*

v.

January 5, 2011

Department of Job & Family Services,

Jeannette E. Gunn

*Appellee*

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause came on to be heard on August 3, 2010. Appellant was present at record hearing and was represented by Samuel N. Lillard, attorney at law. Appellee was present through its designee, Deputy Director of External Affairs Alison Battaglia, and was represented by Komlavi Atsou, Assistant Attorney General.

Appellant was removed from employment with Appellee. Appellee asserts that Appellant's position was unclassified pursuant to R.C. 124.11(A)(9), therefore, jurisdiction over the subject matter of the appeal was not established at the beginning of record hearing.

**STATEMENT OF THE CASE**

Appellant testified that he was removed from his Public Inquiries Officer 2 (PIO2) position by Appellee on April 21, 2009. He acknowledged that when he transferred into the Ohio Department of Job and Family Services (ODJFS) from the Ohio Department of Natural Resources (ODNR) in November 2000, he completed a form acknowledging that his PIO2 position was unclassified. Appellant noted that the form he completed indicated that he would have fall-back rights to a position in the classified service if he were asked to vacate his unclassified position or his position was abolished, but that he was not permitted to exercise any fallback rights following his termination.

Appellant agreed that he held a key position in Appellee's department of communications. He observed that he reported to and had direct access to the

deputy director, and that he also had direct access to the heads of ODJFS units to gather information as necessary. Appellant noted that one of his roles as a PIO2 was to provide counsel to the Deputy Director.

Appellant explained that as a PIO2 he served as a direct media contact for ODJFS and spoke to the media on behalf of the agency; he used his own independent judgment to assess media inquiries and either responded personally or identified the best person within the agency to respond. He indicated that he was responsible for framing the ODJFS message that went to the media and had discretion to determine the best way to communicate that message. Appellant testified that the agency relied on him to generate proactive and positive coverage of its activities. He confirmed that he coordinated press conferences and was one of several individuals who had appeared on television on behalf of the agency.

Appellant noted that although he had a great deal of discretion in his decision-making authority, he did not have complete autonomy and rarely made decisions without consulting someone else. He acknowledged that he had access to confidential information as a PIO2 and agreed that Appellee relied on him to maintain that confidentiality. Appellant noted that all ODJFS employees sign confidentiality agreements.

Appellant noted that he did not act on behalf of the Director of ODJFS at any time during his tenure, and did not have signature or budgetary authority. He stated that he did not represent ODJFS in meetings with outside agencies. Appellant confirmed that he used a state-issued Blackberry device to perform the duties of his position.

Appellant testified that he accepted a temporary assignment as Acting Deputy Director of the Office of Communications in July 2008 when his supervisor, Scarlet Boudier, took a leave of absence (Appellee's Exhibit M). He recalled that ODJFS was the subject of intense media coverage in October 2008, resulting from allegations that ODJFS personnel had accessed confidential files to search for personal information about "Joe the Plumber," an Ohio resident who gained attention during the 2008 presidential election. Appellant noted that the Ohio Inspector General conducted an investigation of the allegations, and that he provided testimony during the investigation (Appellant's Exhibit 11). He stated that his job duties changed following the investigation and he was instructed to turn over his responsibilities as lead spokesman and media contact on the issue to his co-worker Brian Harter, who also held a position classified as PIO2.

Appellant testified that after October 2008, Mr. Harter took the lead on more public issues and Appellant handled routine media requests to coordinate interviews with other individuals within the agency. He noted that he no longer served as the lead spokesperson for the agency and was rarely quoted by the media.

Appellant indicated that Ms. Boudier returned to the agency in November 2008; his temporary assignment ended at that time and he returned to his PIO2 position. He testified that the duties he performed after returning to his PIO2 position were much different in scope than those he had previously been assigned and continued to diminish until the date of his removal from employment. Appellant noted that when Ms. Boudier resigned her Deputy Director of the Office of Communications position shortly after returning, Mr. Harter was selected to serve as Acting Deputy Director until the position was permanently filled by Alison Battaglia in March 2009.

Alison Battaglia testified that she is presently employed by Appellee as Deputy Director for External Affairs and has held that position since March 2009. She indicated that she is responsible for overseeing the Legislative, Performance and Evaluation, and Communication Departments. The witness recalled that Brian Harter held the position of Acting Deputy Director immediately prior to her acceptance of the position, and confirmed that Mr. Harter subsequently returned to his former position of PIO2. Ms. Battaglia stated that she directly supervised both Appellant and Mr. Harter.

The witness noted that the Communication Department plays a major role in the agency and is the sole "voice" of the agency. She indicated that the Department receives public information requests, answers media questions and communicates the agency's message proactively by preparing testimony, press releases, and other types of external communications.

Ms. Battaglia observed that when she began her employment in March 2009 she met individually with the members of her staff, including Appellant. She testified that Appellant never indicated to her that he was not performing PIO2 duties. The witness noted that she relied on Appellant to frame the agency message either by directly answering incoming questions or by consulting with her to develop strategy in responding to more complex issues. Ms. Battaglia stated that even when Appellant consulted with her on strategy, he still had the responsibility of executing the response.

The witness explained that an individual classified as a PIO2 would be responsible for framing and shaping the agency's message in response to media requests for information. She noted that the PIO2 might accomplish this either by developing the response themselves or by working with experts within the agency to respond. Ms. Battaglia explained that it is important for media questions to be answered in such a way that readers or listeners "get the whole picture" when a question is answered. She indicated that she would expect an individual classified as a PIO2 to possess a high level of diplomacy and integrity, with expert skills in communication and writing, as well as be able to understand at a high strategic level why a question had been asked and how best to represent the agency. Ms. Battaglia noted that it would also be appropriate for a PIO2 to perform necessary duties such as managing daily media clips. The witness recalled that Appellant performed all of these duties during the time she worked with him.

The witness testified that she trusted Appellant's decisions. She indicated that he served as spokesperson for the agency and worked with the press on a regular basis. Ms. Battaglia noted that if Appellant incorrectly communicated the official message of ODJFS the consequences to the agency could be devastating.

Ms. Battaglia confirmed that she made the decision to terminate Appellant and stated that she was simply looking for someone who was a better fit for her team.

Ms. Khrista King testified that she is currently employed by Appellee and that in her current position she is responsible for ordering cell phones for employees. She confirmed that when he was employed by Appellee, Appellant had a state-issued Blackberry. The witness observed that employees may be issued a Blackberry device if their job duties merit one and a Deputy Director determines that it is necessary.

### **FINDINGS OF FACT**

Based upon the testimony presented and evidence admitted at record hearing, I make the following findings of fact:

Prior to the termination of his employment on April 21, 2009, Appellant was employed by Appellee in a position classified as Public Inquiries Officer 2 (PIO2) in

its Department of Communications. The Department of Communications receives public information requests, answers media questions and communicates the agency's message by preparing testimony, press releases, and other types of external communications.

Appellant transferred into the PIO2 position in November 2000 from a position with the Ohio Department of Natural Resources (ODNR). When he accepted the PIO2 position with Appellee, Appellant completed a form stating that the position was unclassified and that he would have fall-back rights to a position in the classified service if he were asked to vacate the PIO2 position or if his position was abolished.

Appellant reported to the Deputy Director of the Office of Communications. He had direct access to the Deputy Director and to the heads of other ODJFS units to gather information as needed. Appellant provided counsel to the Deputy Director.

Appellant served as a direct media contact for ODJFS and spoke to the media on behalf of the agency. He used his own independent judgment to assess media inquiries and either respond personally or identify the best person within the agency to respond. Appellant coordinated press conferences and was one of several individuals who appeared on television on behalf of the agency.

Appellant was responsible for framing the ODJFS message that went to the media and had discretion to determine the best way to communicate that message. Appellee relied on Appellant to generate proactive and positive coverage of its activities.

Appellant had a great deal of discretion in his decision-making authority, but did not have complete autonomy. Appellant did not act on behalf of the Director of ODJFS at any time during his tenure, and did not have signature or budgetary authority. He did not represent ODJFS in meetings with outside agencies.

Appellant worked in a temporary work level as Acting Deputy Director from July 2008 until November 2008, and then returned to his PIO2 position. After returning to his PIO2 position, Appellant continued to handle incoming media requests and coordinated interviews with agency experts, but no longer served as Appellee's lead spokesperson. Shortly thereafter, Ms. Boudier resigned and Brian Harter, who was also classified as a PIO2, was placed in a temporary work level as

Acting Deputy Director until the position was permanently filled by Alison Battaglia in March 2009.

### CONCLUSIONS OF LAW

Civil service employment in the State of Ohio is divided into the classified and unclassified services; the division between these two types of public employment is outlined in R.C. 124.11(A), which describes a variety of positions in the public sector which are placed in the unclassified service. In this instance, Appellee asserts that Appellant's position fell within the unclassified service pursuant to R.C. 124.11(A)(9). That section of the Ohio Revised Code exempts from the classified service:

(9) The deputies and assistants of state agencies authorized to act for and on behalf of the agency, or holding a fiduciary or administrative relation to that agency ...

The terms "fiduciary relationship" and "administrative relationship" are not defined by the Revised Code, but are defined within the Administrative Code. O.A.C. 124-1-02 defines "fiduciary relationship" in subsection (I) as:

... a relationship where the appointing authority reposes a special confidence and trust in the integrity and fidelity of an employee to perform duties which could not be delegated to the average employee with knowledge of the proper procedures. These qualifications are over and above the technical competency requirements to perform the duties of the position. Whether one position occupies a fiduciary relationship to another is a question of fact to be determined by the board.

An "administrative relationship" is defined in subsection (C) as:

... a relationship where an employee has substantial authority to initiate discretionary action and/or in which the appointing authority must rely on the employee's personal judgment and leadership abilities. The average employee would not possess such qualities or be delegated such discretionary authority. Whether one position occupies an administrative relationship to another is a question of fact to be determined by the board.

Accordingly, this Board must consider whether Appellant acted for or on behalf of the agency, or whether the duties performed by Appellant placed him in either a fiduciary or an administrative relationship with the agency. Testimony presented at record hearing indicated that as a PIO2 Appellant used his own independent judgment to assess incoming media inquiries and either responded personally or designated an individual within the agency to respond. No testimony or evidence was presented to indicate that Appellant was required to seek approval or have his responses reviewed by a supervisor prior to communicating the agency's message to media representatives, although Appellant indicated that he discussed issues with his supervisor if he deemed it necessary. I find that Appellant acted on the agency's behalf, as referenced by R.C. 124.11(A)(9), by serving as a media spokesperson for Appellee in the capacity of his PIO2 position.

Although Appellant indicated that his job duties diminished upon returning to the PIO2 position at the conclusion of his temporary assignment, he testified that he continued to handle incoming media requests and coordinate interviews with agency experts, but was not as frequently quoted by the media. Appellant had substantial authority to initiate discretionary action and Appellee relied on his personal judgment in carrying out his job responsibilities. Accordingly, I find that Appellant held an administrative relationship with Appellee. O.A.C. 124-1-02(C).

Appellee argued that Appellant should be estopped from claiming that his position fell in the classified civil service. The Supreme Court discussed the application of the affirmative defenses of waiver and estoppel in *Chubb v. Ohio Bureau of Workers' Compensation (1998)*, 81 Ohio St. 2d and 3d 275, noting that the State may assert the defenses if an employee has accepted the benefits of an unclassified position, regardless of whether the employee's actual job duties fell within a classified status. The court in *Chubb* held that if a public employee has served in an unclassified position and has enjoyed the benefits of the unclassified service, then as a matter of equity and fairness, the employee should be precluded from claiming classified status in order to receive the statutory benefits afforded classified civil servants. If the employee knowingly and voluntarily accepted an appointment into an unclassified position and reaped other benefits, the employee has voluntarily relinquished the statutory rights and protections of civil service status.

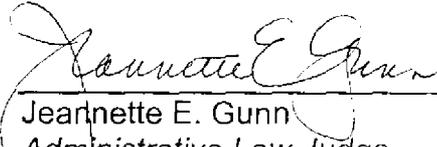
In the matter at hand, the parties agreed that Appellant acknowledged upon accepting the PIO2 position that it was considered unclassified. Appellee offered as evidence that Appellant had reaped the benefits of an unclassified position the fact

that Appellant was assigned a Blackberry device to be used in the performance of his job duties. Testimony established that Appellee's employees may be issued a Blackberry device if their job duties merit one and a Deputy Director determines that it is necessary; no evidence was offered to demonstrate that issuance of the work tool was limited to employees in the unclassified service. Accordingly, I find that Appellee's estoppel argument is insufficiently supported.

Finally, Appellant notes that although he was informed upon accepting the PIO2 position that he would have fall-back rights to a position in the classified service if he were removed from the PIO2 position or the position were abolished, he was not permitted to exercise those rights upon termination. SPBR has no jurisdiction to review an appointing authority's denial of fall-back rights. See, *State ex rel. Asti v. Ohio Dept. of Youth Services*, 2004-Ohio-6832; *State ex rel. Glasstetter v. Connelly*, 179 Ohio App.3d 196, 2008-Ohio-5755. Therefore, this Board may not make a determination as to whether or not Appellant should have been allowed to resume the classified position he held immediately prior to his acceptance of the PIO2 position with Appellee. I note, parenthetically, that R.C. 124.11(D) presently provides that an employee forfeits the right to resume a position in the classified service upon transfer to a different agency.

Based upon the foregoing analysis, I find that the position of Public Information Officer 2 occupied by Appellant was unclassified pursuant to the provisions of R.C. 124.11(A)(9). This Board does not possess subject matter jurisdiction over the removal of an unclassified employee since R.C. 124.03 limits this Board's jurisdiction to actions concerning classified employees.

Therefore, I respectfully **RECOMMEND** that the instant appeal be **DISMISSED** for lack of jurisdiction over the parties.

  
\_\_\_\_\_  
Jearnette E. Gunn  
Administrative Law Judge

JEG: