

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Mark Spagnuolo,

Appellant,

Case No. 10-REM-11-0326

10-MIS-11-0327

v.

Department of Transportation,

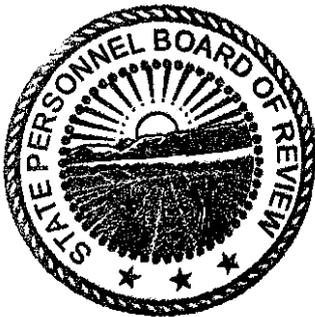
Appellee.

ORDER

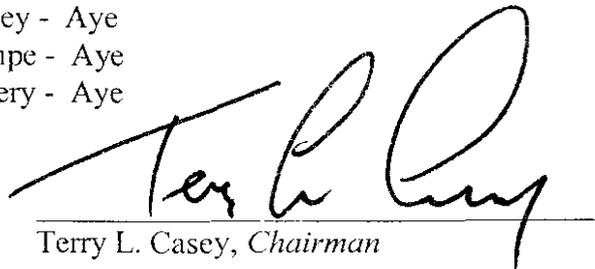
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Appellant's removal be **DISAFFIRMED**, pursuant to the Appellee's failure to comply with O.R.C. § 124.03 and 124.34.



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, June 2, 2011.


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**

Mark Spagnuolo

Appellant

v.

Department of Transportation

Appellee

Case Nos. 10-REM-11-0326
10-MIS-11-0327

April 25, 2011

Marcie M. Scholl
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on for consideration upon a Procedural Order and Questionnaire mailed to the parties on February 4, 2011; Appellee's Response to the Questionnaire, filed on February 17, 2011; Appellant's Motion to Disaffirm, filed on March 2, 2011; Appellee's Memorandum in Opposition to Appellant's Motion to Disaffirm, filed on March 14, 2011; this Board's Procedural Order and Questionnaire, issued on March 18, 2011; Appellee's Response to the Procedural Order and Questionnaire, filed on March 28, 2011; and Appellant's Reply to Appellee's Response to Procedural Order, filed on March 31, 2011.

After reviewing all of the above filings, I find the following facts:

1. Appellant Spagnuolo was removed from his position of Architect Administrator, effective November 20, 2010.
2. The position of Architect Administrator was designated as a Career Professional classification, pursuant to section 5501.20 of the Ohio Revised Code.
3. Appellant Spagnuolo was served with his Order of Removal on November 19, 2010.
4. Appellee did not file a copy of Appellant Spagnuolo's Order of Removal with this Board nor with the Department of Administrative Services.

CONCLUSIONS OF LAW

The designation of a position as a "Career Professional" is governed by section 5501.20 of the Ohio Revised Code. Paragraph (D) of that statute governs the appeal rights of a career professional employee. It states as follows:

(D) An employee in the career professional service may be suspended, demoted, or removed because of performance that hinders or restricts the fulfillment of the department's business plan or for disciplinary reasons under section 124.34 or 124.57 of the Revised Code. An employee in the career professional service may appeal only the employee's removal to the state personnel board of review. An employee in the career professional service may appeal a demotion or a suspension of more than three days pursuant to rules the director adopts in accordance with section 111.15 of the Revised Code.

As can be seen from reading that above paragraph, an employee in the career professional service can appeal his or her removal to this Board. Appeals to this Board are governed by sections 124.03 and 124.34 of the Ohio Revised Code. Paragraph (A)(1) of section 124.03 of the Ohio Revised Code states as follows, in pertinent part:

(A) The state personnel board of review shall exercise the following powers and perform the following duties:

(1) Hear appeals, as provided by law, of employees in the classified state service from final decisions of appointing authorities or the director of administrative services relative to reduction in pay or position, job abolishments, layoff, suspension, discharge, assignment or reassignment to a new or different position classification, or refusal of the director, or anybody authorized to perform the director's functions, to reassign an employee to another classification or to reclassify the employee's position with or without a job audit under division (D) of section 124.14 of the Revised Code. As used in this division, "discharge" includes disability separations.

The state personnel board of review may affirm, disaffirm, or modify the decisions of the appointing authorities or the director, as the case may be, and its decision is final. The decisions of the state personnel board of review shall be consistent with the applicable classification specifications.

The state personnel board of review shall not be deprived of jurisdiction to hear any appeal due to the failure of an appointing authority to file its decision with the board. **Any final decision of an appointing authority or of the director not filed in the manner provided in this chapter shall be disaffirmed.** (Emphasis added).

The above statute gives this Board the authority to hear appeals of classified employees in state service, of which an employee designated as a "Career Professional" is by definition. In looking at the emphasized language, an appointing authority must file its final decision with regards to actions taken upon employees, "in the manner provided in this chapter". The statute continues to state that the failure of an appointing authority to follow the mandated filing procedure will result in the appointing authority's action being disaffirmed.

The filing of an appointing authority's decision is governed by section 124.34 of the Ohio Revised Code. The pertinent part of that statute states as follows:

(B) In case of a reduction, a suspension of more than forty work hours in the case of an employee exempt from the payment of overtime compensation, a suspension of more than twenty-four work hours in the case of an employee required to be paid overtime compensation, a fine of more than forty hours' pay in the case of an employee exempt from the payment of overtime compensation, a fine of more than twenty-four hours' pay in the case of an employee required to be paid overtime compensation, or removal, except for the reduction or removal of a probationary employee, the appointing authority shall serve the employee with a copy of the order of reduction, fine, suspension, or removal, which order shall state the reasons for the action.

Within ten days following the date on which the order is served or, in the case of an employee in the career professional service of the department of transportation, within ten days following the

filing of a removal order, the employee, except as otherwise provided in this section, may file an appeal of the order in writing with the state personnel board of review or the commission.
(Emphasis added).

The above law specifically addresses the requirements to file an order with this Board in the case of an employee in the career professional service. The law mandates that the removal order of a career professional employee **MUST** be filed with this Board and that within ten (10) days of such filing with this Board, the career professional employee must file his or her appeal. The law is very clear. In fact, the law even differentiates between the order being served and the order being filed for a career professional employee. It also specifies that in the case of the career professional, is it only a removal order that must be filed with this Board since section 5501.20 of the Ohio Revised Code only provides for appeal to this Board by a career professional in the case of a removal. The first part of the sentence in the above emphasized portion of the statute does not restrict which type of order is being served, as that portion of the statute does not pertain to those employees serving as a career professional.

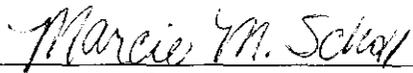
In reading sections 124.03 and 124.34 of the Ohio Revised Code together, this Board has no choice but to disaffirm the action of the Appellee in removing Appellant Spagnuolo since the Appellee did not meet the requirement of filing an Order of Removal for Appellant Spagnuolo as required by section 124.34 of the Ohio Revised Code.

Appellee argues that because section 124.34 of the Ohio Revised Code was amended in July 2007 to no longer require the filing of a section 124.34 Order with this Board, the language remaining in section 124.34 of the Ohio Revised Code should be ignored. While it is true that the amendment to the statute in 2007 did remove the requirement of appointing authorities to file an Order with this Board, the statute did not remove that requirement with regard to career professional employees. That language and requirement still remains in the statute and this Board cannot legislate to remove that language, nor can this Board ignore that language. The sentence remaining in the statute is very clear, without any ambiguity. It specifically sets out an exception with regard to those employees in the career professional service and it mandates that any order or removal of such employees must be filed with this Board. When the Legislature amended section 124.34 of the Ohio Revised Code in 2007, it could have removed such requirement with regard to the career professional employees, but it did not. The requirement

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remains and Appellee did not do what was required of it to effectuate the removal of Appellant Spagnuolo.

Therefore, I respectfully **RECOMMEND** that the removal of Appellant Spagnuolo be **DISAFFIRMED** pursuant to the Appellee's failure to comply with sections 124.03 and 124.34 of the Ohio Revised Code.



Marcie M. Scholl
Administrative Law Judge

:mms