

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

Evert I. Gibson,

*Appellant.*

v.

Case No. 10-REM-02-0031

Stark County Board of Commissioners,

*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 a lack of subject matter jurisdiction, pursuant to O.R.C. § 124.11(A)(3)(b).

Lumpe - Aye  
Sfalcin - Aye  
Tillery - Not Participating



  
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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, May 17, 2010.

  
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*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**

Evert I. Gibson

Case No. 10-REM-02-0031

*Appellant*

v.

April 14, 2010

Stark County Board of Commissioners

*Appellee*

Marcie M. Scholl  
*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause comes on for consideration on April 14, 2010. Appellant Gibson filed a notice of appeal on February 1, 2010, of his removal from the position of Dog Warden. This Board issued a Procedural Order and Questionnaire to Appellee on February 5, 2010. Appellee responded to the Questionnaire on February 18, 2010 and indicated Appellant Gibson was removed as an unclassified employee pursuant to section 124.11(A)(9) of the Ohio Revised Code. Appellant Gibson filed a reply to Appellee's Response on March 1, 2010, contending that he was a classified employee at the time of his removal. On March 4, 2010, Appellee filed a Supplemental Response to the Questionnaire, adding that it was Appellee's position that Appellant Gibson's position was also unclassified pursuant to section 124.11(A)(3)(b) of the Ohio Revised Code. On March 23, 2010, Appellant Gibson filed a Notice of Supplemental Authority and on March 29, 2010, Appellee filed a Response to Appellant's Notice of Supplemental Authority.

Appellee argues that this Board is without jurisdiction to hear Appellant Gibson's appeal, as he was an unclassified employee at the time of his removal. Appellee is correct that this Board does not possess jurisdiction over unclassified employees, as section 124.03 of the Ohio Revised Code only grants to this Board jurisdiction over classified employees.

Appellee asserts that Appellant Gibson was unclassified pursuant to sections 124.11(A)(3)(b) and (9) of the Ohio Revised Code. Section 124.11(A)(9) of the Ohio Revised Code states that if an employee is a fiduciary or holds an administrative relationship to an elected county official or county administrator, then the employee is considered unclassified. Case law has long held that in order to determine if

those pre-requisites are met, a hearing on the duties of the employee must be held to ascertain if an administrative and/or fiduciary relationship is present.

With respect to section 124.11(A)(3)(b) of the Ohio Revised Code, the focus is different. That statute states 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 examinations required by this chapter:

(3)(a) The members of all boards and commissions, and heads of principal departments, boards, and commissions appointed by the governor or by and with the governor's consent;

**(b) The heads of all departments appointed by a board of county commissioners;** (Emphasis added).

Appellee argues that Appellant Gibson was the head of the Department of Animal Control for Stark County and as such, was unclassified pursuant to the above statute. Appellant argues that he was treated as a classified employee since he served a probationary period and he submitted several Opinions of the Attorney General holding that a county dog warden in is the classified service. Appellant Gibson did not dispute that as Dog Warden, he was head of the department of Animal Control.

Appellant Gibson's arguments are not persuasive. Case law has long held that it is not the designation the appointing authority places on an employee that determines one's status. It is either the duties performed or the existence of a statutory exemption. In the instant case, it is the existence of a statutory exemption that unclassifies Appellant Gibson's position. The Attorney General Opinions submitted by Appellant Gibson are dated from 1962, 1951 and 1932. While they do stand for the proposition that at the time the Opinions were rendered, the position of county dog warden was considered to be a classified position; however, as pointed out in Appellee's Response to Appellant's Supplemental Authority, there have been recent cases which have held that the position of county dog warden is an unclassified position. (See *Johnson v. Summit County*, 1998 WL 178573).

Appellant Gibson also argues that section 955.12 of the Ohio Revised Code makes the position of dog warden a "separate statutory position, and not a

subsidiary department of the Board of County Commissioners.” That statute states as follows:

The board of county commissioners shall appoint or employ a county dog warden and deputies in such number, for such periods of time, and at such compensation as the board considers necessary to enforce sections 955.01 to 955.27, 955.29 to 955.38, and 955.50 of the Revised Code.

In reading the statute, it gives a Board of County Commissioners that authority to “appoint or employ a county dog warden” to “enforce sections” of the Ohio Revised Code. Since the Board of County Commissioners is by virtue of this statute, the appointing authority of the county dog warden, it necessary follows that the dog warden works for the Board of County Commissioners. While Appellant Gibson’s argument is true that it is a statutory position, it is also true that another statute, namely section 124.11(A)(3)(b) of the Ohio Revised Code, unclassifies the position if it is a department head position. Appellee has stated in its Supplemental Response that Appellant Gibson was the Head of the Department of Animal Control for the Appellee and as such, was unclassified. Appellee’s argument is persuasive. Since there is a specific statutory exemption from the classified service for the position of county dog warden, there is no need for this Board to hold a hearing to determine if Appellant Gibson was a fiduciary or administrative employee pursuant to section 124.11(A)(9) of the Ohio Revised Code.

Therefore, I respectfully **RECOMMEND** that the instant appeal be **DISMISSED** for a lack of subject matter jurisdiction since Appellant Gibson’s position of county dog warden under the Appellee is an unclassified position pursuant to section 124.11(A)(3)(b) of the Ohio Revised Code.

  
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Marcie M. Scholl  
Administrative Law Judge