

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

ANN FOUST,

Appellant,

v.

Case No. 10-REM-04-0103

BUTLER COUNTY AUDITOR,

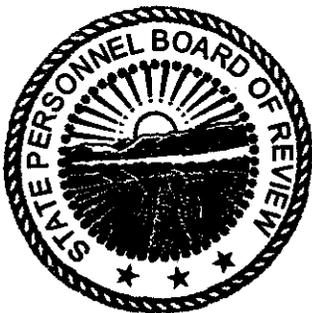
Appellee

ORDER

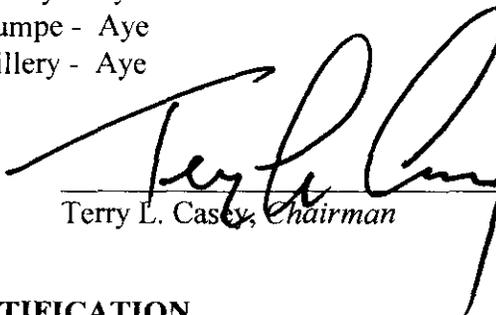
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including 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 is **DISMISSED** for lack of subject matter jurisdiction because the evidence establishes that the Appellant, as a Tax Accounting Specialist 2, was serving in the unclassified service pursuant to Ohio Revised Code Sections 124.11(A)(9) and 124.11(A)(28).



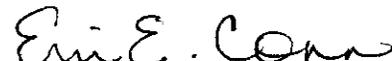
Casey - Aye
Lumpe - Aye
Tillery - Aye


Terry L. Casey, *Chairman*

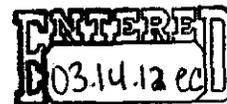
CERTIFICATION

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 constitutes ~~(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 14, 2012.


Eric E. Conn
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**

Ann Foust,

Case No. 10-REM-04-0103

Appellant

v.

January 12, 2012

Butler Co., Auditor,

Christopher R. Young

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on November 19, 2010 at 10:00 a.m. and concluded upon the submission of simultaneous post hearing briefs on January 20, 2011 and January 21, 2011. The Appellant, Ann Foust, appeared at the hearing, and was represented by Jon B. Allison, Attorney at Law. The Appellee, the Butler County Auditor, was present through its designee, Michael Tilton, Chief Deputy Auditor and was represented by Roger S. Gates, an Assistant County Prosecutor.

The Appellant was removed from her position as a Tax Accounting Specialist 2 effective April 13, 2010, via an Ohio Revised Code Section 124.34 Order of Removal but that, in addition, Appellee also asserted that the Appellant was removed as an unclassified employee pursuant to O.R.C. sections 124.11 (A) (9) and 124.11 (A) (28), along with also asserting at the record hearing that the employee was serving in the unclassified service of the state, as she was holding a partisan political office, as a member of the Butler County Republican Central Committee. Additionally, it should be noted that the Appellant timely filed her appeal to this Board on April 19, 2010, as this was stipulated so as to ensure the timely filing of the Appellant's appeal.

Further, it was agreed at the outset of the Appellant's removal hearing that the Appellant's removal although it was done in compliance with the procedural statutory safeguards provided under Ohio Revised Code Section 124.34 afforded to someone serving in the classified civil service, the Appellee now claims that the Appellant was serving in the unclassified service at the time of her removal. It was noted by the undersigned Administrative Law Judge that due to correspondence in

the file it has been alleged that the Appellant was removed as an unclassified employee under Ohio Revised Code Sections 124.11(A) (9) and 124.11 (A) (28). In addition, the Appellee also asserted that the Appellant should be considered unclassified under the doctrines of *waiver* and *estoppel*, as well. Thus, as was discussed prior to going on to the record hearing, the testimony and documentary evidence to be taken at the record hearing was to cover the scope and nature of the Appellant's job duties as a Tax Accounting Specialist 2, along with Appellee's assertions of the defenses of *waiver* and *estoppel*. The Appellee has asserted that the Appellant was serving at the time of her removal as an unclassified employee pursuant to the above noted Ohio Revised Code Sections in addition to removing her with cause. The Appellant has challenged this allegation and alleges she was improperly classified as an unclassified employee and thus, should have been afforded the statutory provisions of Ohio Revised Code Section 124.34 entitled to employees within the classified service of the state and have the record hearing on the merits, and not on her classified versus unclassified status.

Consequently, the sole issue presented at the November 19, 2010, record hearing was to determine whether the Appellant, Ann Foust, was indeed a classified or unclassified employee at the time of her removal. If the Appellant is to be 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 be have been serving in the classified service, her removal must be heard on its merits, as a matter of law, since an order as required by Ohio Revised Code Section 124.34 was filed in this case.

FINDINGS OF FACT

Appellee's first witness was Mr. Michael Tilton, Butler County Auditor's Chief Deputy. Mr. Tilton testified he had been employed for approximately 30 and a half years with the Auditor's office holding a number of positions, and most recently in 2004 he was promoted to the Real Estate Director's position and then in 2008 to the Chief Deputy Auditor's position, all while serving under five different County Auditors.

The witness explained that in 2005 he was the Real Estate Director where he was responsible for managing the entire real estate department, including some 30 individuals, wherein he also managed the information technology functions of the

office, as he was responsible for year end rolls, tax calculations and supervising settlements. The witness described the year end roll that was done for personal property taxes, manufactured home taxes and real estate taxes of over \$6.9 billion in assessed evaluations in Butler County that was divided up among the individual taxing districts. Mr. Tilton testified that he then sent in his evaluations to the state for approval and then he had to balance that roll with the next year to make sure those adjustments were made properly and rolled correctly. The witness, when questioned, testified that this is not a process of just telling a computer to do something, but that it involved using a computer and going through it with an analytical review of the process. The witness gave an example of when a school district bond levy would pass or expire, the rates would either go up or down in that district and one would have to analyze the changes. Further, the witness explained that the year end process would usually start in November and ended in December, a two-month process with a lot a little steps and recalculations which need to be made.

Next, the witness explained that starting in 2006 Ms. Ann Foust started taking over the duties which he just described above. The witness testified that at that point Ms. Foust would communicate evaluations to the state as she would balance it, review it and say it's good before the tax bills would go in the mail, and before handing over \$400,000,000 plus calculated the tax collection dollars over to the Treasurer's office. When asked if she was sole one responsible for saying it was balanced, and all unpaid delinquencies had rolled correctly into the new tax year, answered in the affirmative. Mr. Tilton explained that Ms. Krause would then take the valuation abstract, the \$6.9 billion of total taxing district in Butler County to the auditor for his signature, wherein he signed off on the cover sheet for the value abstract. However, when questioned, the witness testified that there was no approval needed for the actual tax calculations.

Mr. Tilton testified that prior to 2005 he had responsibilities for some of the information technology functions of the office. Specifically, the witness testified that he interfaced with other agencies of the County on the auditor's computer system that was created by a company called Tyler CLT on its IAS, which stood for integrated assessment system. The witness testified that the software would track the individual parcels and valuations and make the maintenance inside the system, a duty which he performed prior to Ms. Faust coming on board. The witness then identified Appellee's Exhibit I as handwritten notes by Randy Gross who was the then Chief Deputy Auditor when Ms. Foust was offered a position at the auditor's

office dated December 15, 2005. Further, the witness testified that he was at that time the Real Estate Director, and that Mr. Gross had talked about when Ms. Foust was offered the job in order to relieve him of the duties which included, but were not limited to, balancing the end of year rolls, the tax calculations and various IT functions. Moreover, the witness explained that Ms. Foust was at the time before she was hired working for Tyler CLT and knew the software and that she had the expertise needed to have her come in and take over all the roles that he had previously been doing. Additionally, the witness explained that Ms. Foust had also worked at the Butler County Treasurer's office wherein she was also familiar with the IAS software system, as well. Along this line of questioning, the witness testified that Ms. Foust was going to take over all of the IAS support, issues regarding software, act as a lead person in the office who was the contact person because they didn't want every clerk calling Tyler CLT and that this duty transitioned from himself to Ms. Foust from the time she was hired through April 08, wherein she had taken over most of his responsibilities, on the IT side, of the year end rolls and the tax calculations. For clarification, the witness testified that by April 2008 Ms. Foust was doing the year end rolls, tax calculations, valuation reports, that went to the state and settlement reports, in addition to taking part in the settlement processes that were sometimes called advancements to taxing districts. The witness explained that an advancement could be requested by a taxing district wherein Ms. Foust would put together an apportionment sheet that would be taken straight to the auditor for his signature. The witness explained that in April 08 Roger Reynolds then became the new Butler County Auditor. Moreover, the witness explained that no one else would review that type of documentation before Ms. Foust had taken to the auditor. When questioned if you the auditor himself did any background analysis of that information Mr. Tilton testified to this in the negative. Additionally, the witness testified that dating back to 2005 with House Bill 66 the CAT tax or commercial activity tax was implemented wherein the state would send money directly to the auditors who would then distribute that money to the individual entities based on the reimbursement from the state. Again, the witness testified that after 2008 Ms. Foust took that duty over as well as a portion of the tax settlement duties which she performed.

The witness then identified Appellee's Exhibit J as a series of tax settlement documents that Ms. Foust prepared from 2008 through April 2010, who in turn would take them directly to Mr. Roger Reynolds for his signature.

Additionally, the witness identified Appellee's Exhibit K as a document indicating a job title for Ms. Foust at that time in 2007 as a Deputy Auditor -- Quality Control. The witness also identified Appellee's Exhibits E and F as a couple of performance evaluations for 2006 and 2007 that indicated her title as being Deputy Auditor. Next, the witness identified Appellee's Exhibit G as a performance evaluation in 2008 that indicated her title as being Butler County Auditor-Tax Accounting Specialist 2, a document that was prepared and signed by Ms. Foust on February 27, 2009. When questioned what happened between her two performance evaluations which caused her job title to change the witness explained that when Mr. Roger Reynolds came in as Auditor in April 2008 the office did not have any classification series at all, and at that point they tried to build a classification series for all the employees at the office. The witness then identified Appellee's Exhibit D as a classification specification of Tax Accounting Specialist 2 that he created, after having been given a template of classification specifications from Mr. Doug Duckett, who was an attorney and human resource person for Butler County at that time. The witness explained that under the civil service class line on the document explained that the position is "classified". However, the witness testified that at that time he did not have good knowledge of the classified/unclassified exempt/non-exempt positions at that time as they had never used them in the office since he had been there for 28 years. Further, the witness testified that before he could ever really put together a classification specifications for the office Mr. Duckett had left County employment, and these classifications were never finalized. The witness also identified Appellee's Exhibit A as an organizational chart for the real estate division, and was asked why he put Ms. Foust as a Tax Accounting Specialist 2, wherein he explained that her position was unique as it was a high-level position of responsibility of over \$400 million in taxes that had to be calculated and handed out in tax bills by the Treasurer's office once the Auditor's office had tabulated them. Mr. Tilton explained that Ms. Foust was the only one in the office performing these type of duties such as tax calculations and the end of year rolls. The witness then identified Appellee's Exhibit H as a performance evaluation four 2009 that indicated next to her title as Auditor's Office -- Real Estate -- Tax Accounting Specialist 2, (Classified) and noted the word "classified" was added to which he explained that Ms. Julie Joyce-Smith, Ms. Foust's supervisor at that time typed it in as that is a free format field on that document.

Additionally, with respect to Ms. Foust's duties the witness explained she would also send e-mails to all the offices that used the IAS system to stay out of the system (the auditor's office and the treasurer's office) when she began a particular

process followed up by a later e-mail stating when she is balanced or not, letting others know when to get back in or when it's okay to start the maintenance again. The witness testified that Ms. Foust did not have to check with him or anyone else at the agency when she made these decisions, as well. Again, the witness testified that Ms. Foust would take several reports, valuation reports and advancement reports to the auditor Mr. Roger Reynolds who would sign off on those documents as he had the faith that Ms. Foust was doing an accurate job when she presented those documents to him.

On cross-examination, after identifying Appellee's Exhibit A, Mr. Tilton explained that he answered directly to the Auditor, Mr. Roger Reynolds and that Ms. Julia Joyce-Smith, the Real Estate Director reported directly to him and that Ms. Foust reported directly to Ms. Julia Joyce-Smith, as the Tax Accounting Supervisor's position had been eliminated. Further, the witness after identifying Appellee's Exhibit C explained that the Auditor's leadership team was created for their website wherein it lists the department directors and management, which did not include Ms. Foust. The witness re-identified Appellee's Exhibit D as the classification specification for a Tax Accounting Specialist 2 and agreed that the essential function of the job was to maintain taxpayer records by performing various clerical and mathematical computations, but explained that this classification specification really didn't truly fit or encompass Ms. Foust's job duties. The witness then went over Appellee's Exhibits G and H explained that were the words "classified" contained in the documents when they were prepared did not generally reflect who was classified or unclassified, as it wasn't something considered at that time, as they were just trying to put some classification series together. When questioned if the Auditor would conduct regular meetings with his executive team Mr. Tilton explained that Ms. Foust would not attend any of those meetings. Upon further questioning, if he was aware of any communications between the Auditor and Ms. Foust, the witness answered in the affirmative, as he saw Ms. Foust often go into the Auditor's office to have various documents signed off on. Upon further questioning, the witness explained that Ms. Foust did not provide supervision to anyone at the Auditor's office, as well.

Appellee's next witness to the witness stand was Ms. Julie Joyce-Smith, the current Director of Real Estate for the Butler County Auditor, who has worked in the auditor's office for approximately the last 22 years. When questioned, the witness testified that regarding her duties, up until April 2010, she was the immediate supervisor of Ms. Foust. The witness then identified Appellee's Exhibit D as a

classification specification with the Butler County Auditor's office of a Tax Accounting Specialist 2, the position/job title which Ms. Foust held for approximately last two years. The witness noted that under the job responsibilities Ms. Foust would be under the general but minimal supervision of a Tax Accounting Supervisor/Real Estate Director. The witness testified that she was and still is both a Tax Accounting Supervisor and the Real Estate Director. When asked to describe what was meant by general, but minimal supervision, the witness testified that her supervision of Ms. Foust was for personnel issues, leave requests and making sure deadlines were met, things of that nature for a more cursory overview. The witness agreed, when questioned, that she has been Ms. Foust's supervisor dating back to 2005-6 through April 2010. The witness then reviewed Appellee's exhibits E through H and agreed that she prepared these performance reviews of Ms. Foust.

However, when questioned if she supervised the actual content of the work that Ms. Foust performed, the witness answered in the negative. The witness agreed that she knew generalizations what Ms. Foust would be working on, but not to any specific detail. When asked if she was involved with Ms. Foust's job duty and or responsibility involving year-end rollovers, tax calculations, preparations of valuation reports went to the state, settlement processes which she prepared reports for, answered in the negative, with the exception that the last settlement agreement that Ms. Foust had prepared in March 2010 was the only one that she had any input. Additionally, the witness testified that she did not supervise Ms. Foust with regards to her work surrounding advanced settlements, as well.

Upon further questioning, the witness testified that she worked her way up through the Real Estate Division in the Butler County auditor's office, all while holding a variety of jobs. The witness explained that she's probably done just about every specific job within the real estate division side of things on the Tax Accounting side of things, such as the day-to-day clerk processes, estate tax, tax abasement and tax exemptions, and that sort of thing.

When questioned about the settlement process which she is now handling, the witness testified that she would not characterize this process as a clerical position. The witness testified that the settlement process consists of extracting and extrapolating the data before you and comparing it to previous years, all while looking at the current situation, the economy and whether people are paying or not paying, all while looking at the big picture or overview to feel comfortable about the data being processed. With regards to being involved with individual tax bills and or

tax bills for parcels or property, the witness testified that she still personally takes care of this, but usually handles the angry calls were people that can't be helped by a clerk. Hence, the witness testified the clerks or the Tax Accounting Specialist 1s are much more involved with individual tax bill level answering individual questions or taking a day-to-day phone calls and/or the general calls, but they don't really have the technical expertise or skill to really get in depth and research an issue, as to why something may be wrong. Along this line of questioning, the witness explained that when these types of questions arise, such as being able to explain why the tax rate went up and/or why this levy was passed or not, and an increase came into effect, this is where those questions would then go to someone like Ms. Foust to answer. The witness explained Ms. Foust could go in and look at the tax rate sheets that have been provided to the auditor's office from the Ohio Department of Taxation, and perhaps compare previous years and see the trends to answer the question.

When questioned if Ms. Foust had problems regarding her job functions during the last couple of years on whether she would come to her for guidance, answered that it depended on a couple of things. First, the witness testified it was a systems related question or an IAS system related question she would specifically come to herself. However, the witness testified that she had a more specific technical question regarding settlement tax rates, or those types of things she would not necessarily come to me, but to Mr. Tilton.

When questioned if there were things that she was aware of that Ms. Foust would specifically take to Mr. Reynolds as the County Auditor, answered in the affirmative. The witness testified that Ms. Foust would take abstracts for signatures, the settlements for signatures and the advances, all which had to be signed off directly by the Auditor. Further, the witness testified that Ms. Foust also had a job function of the quality control in that Ms. Foust was able to utilize the reporting functionality of the IAS system to take a big picture look at the data to run reports, to run sequal scripts and/or create sequal scripts to find perhaps problems, wherein she would answer this directly to Mr. Tilton or Mr. Roger Reynolds, the County Auditor. The witness explained that Ms. Foust would have that responsibility to try to find those types of anomalies and or to ensure that the office didn't have those types of problems. The witness explained that she did not provide any assistance to Ms. Foust regarding her quality control type of duties.

Ms. Joyce-Smith then identified Appellee's Exhibit H wherein it was noted on the performance review of Mr. Foust the title was noted as Auditors Office-Real Estate-Tax Accounting Specialist 2 (Classified) and attested that she did in fact prepare this document. However, upon questioning the witness testified that the program which she was running had an auto populate field which automatically grabs what it thinks you are trying to type. The witness explained that she had previously been preparing Tax Accounting Specialist 1s documents and that it automatically populated the term "classified" when she changed the Tax Accounting Specialist 1 to a Tax Accounting Specialist 2, but failed to changed the classified to unclassified. When asked if she had ever had specific discussions with Ms. Foust whether she was a classified or unclassified employee testified that she had discussed this point. The witness testified that she specifically could not recall the exact date that that conversation took place but, that she knew the issue had come up because of Ms. Foust's participation on the Republican Central Committee. The witness explained that they had researched this exact issue, participating in partisan politics to other individuals, so she knew it was discussed at least a very cursory way at some point with Ms. Foust. The witness explained that in casual conversation in the break room it was discussed whether Mr. Reynolds was going to get the Republican endorsement. Further, the witness explained Mr. Reynolds challenged Ms. Kay Rogers, the prior Butler County auditor, and that that conversation took place prior to Ms. Rogers's departure from her position, as she resigned and Mr. Reynolds was then appointed to fill the vacancy by the County Central Committee. Specifically, with regards to the discussion that she had with Ms. Foust regarding her classified versus unclassified status in the context of her involvement with the Republican Party, the witness recalled that in order to be serving in a position with the County, she would have to be unclassified employee, as classified employees cannot hold a partisan political office, such as being on the Republican Central Committee. Furthermore, when questioned, the witness explained that to the best of her knowledge Ms. Foust continued to serve on the Republican Central Committee.

The witness then identified Appellee's Exhibit D, as a document she recalled that Mr. Tilton prepared for Ms. Foust wherein it was noted that the civil service class was noted as "classified". When asked whether there was any discussion about it saying classified on the document, the witness testified that she could not recall. When questioned, did this change anything about the way Ms. Foust performed her job duties, answered in the negative. Moreover, when asked if she

had any knowledge of Ms. Foust getting out of politics or out of the central committee position after her becoming aware that she was shown as a classified employee testified she could not recall that, as well.

On cross-examination, the witness identified Appellee's Exhibit B, as a cover page from the Butler County Auditor Personnel Policy Manual revised October 9, 2009 wherein she noted that Ms. Foust appeared to have written, "Ann- job is classified nonexempt and JS is unclassified exempt", and could not recall any conversations taking place between Ms. Foust and her in this context. Next, the witness identified Appellee's Exhibit D, and noted that there is a Question (?) mark written next to the word exempt on the FLSA status, but had no recollection of writing it on the form or who did so, as well. With regards to the evaluation forms Appellee's Exhibits E through H that states at the top "Butler County Auditor Performance Reviews/Support Staff/Non Exempt" answered these were the forms which she used to evaluate Ms. Foust, and although there was an "Exempt" form she did not use this because Ms. Foust was not a supervisor. As such, the witness testified that it was her understanding at that time that a supervisor would be evaluated by filling out an "exempt evaluation form" and a non-supervisor would be evaluated by filling out a "non-exempt evaluation form".

The Appellant's counsel began his case-in-chief by calling the Appellant, Ms. Ann Foust, to the witness stand. When questioned, the witness identified Appellee's Exhibit A as organizational chart for the Tax Accounting Division of the Real Estate Division of the Auditor's Office. The witness testified that she saw this document shortly after the current Auditor took office in April 2008 after some reorganization had taken place which lists of her position as a Tax Accounting Specialist 2. It was noted by the undersigned that Ms. Foust was the only person in the division who held the position of a Tax Accounting Specialist 2, while most of the other employees were noted as Tax Accounting Specialist 1s. The witness then identified Appellee's Exhibit D, as a job description that she received, as the description was created on or around April 2008, and that Ms. Julie Joyce-Smith gave this to her. When questioned whether Ms. Smith had any discussions with her regarding a job description the witness testified in the negative. However, the witness did recall that Ms. Smith had put a question mark next to the FLSA status, as she saw her place this mark on the same.

When referring back to Appellee's Exhibit A, the witness when questioned testified that she as a Tax Accounting Specialist 2 reported to Ms. Julie Joyce-

Smith, the Real Estate Director. Further, the witness testified that it was her understanding that Ms. Joyce-Smith in turn reported to Mike Tilton, and that Mr. Tilton reported up to the Auditor, Mr. Roger Reynolds. When questioned, the witness testified that she didn't know why she was not put in a supervisory position, but explained that she didn't supervising anybody as the reason why she was not. The witness then identified Appellee's Exhibit B as the cover page of the Auditor's Personnel Policy Manual that was handed out in October 2009, which they all were asked to read it and sign it and that we had received it and read the contents. The witness explained that the writing in the lower left-hand corner of said document was hers, and explained that she noted her job was classified nonexempt after conversation she had with Ms. Joyce-Smith in November 2009. Upon further questioning, the witness explained that Ms. Joyce-Smith clarified to her that she was a classified employee at the time when she signed the documentations stating that she had read the above noted exhibit. The witness then identified Appellee's Exhibit H, as a performance review that was done in February of 2010 for the rating period of 2009, and noted that at the top it states "support staff non-exempt" and that under the division and title section it also states, "Auditor's Office, Real Estate Tax Accounting Specialist 2, Classified".

The next line of questioning then centered on her involvement with Mr. Roger Reynolds, as the County Auditor, as well as her level of communications with him. The witness testified that she did not communicate with Mr. Reynolds frequently, if at all, and that she could never recall if he had given her any assignments, as well. However, the witness explained that she would drop off documents for his signature, but that she would leave these with the secretary and/or executive assistant. Moreover, when questioned, the witness testified that she never had signed any waiver noting that her position was unclassified.

Next, the Appellant described her involvement and interactions with Mr. Mike Tilton, the Chief Deputy Auditor, as significant. The witness testified that there were a lot of e-mail exchanges with various questions that might come up on how to handle something, like how to run a script, or how to fix a script, as Mr. Tilton had a lot of technical knowledge, which she has more than a Tax Accounting Specialist 1 would have, but not that she was extremely technical. Again, the witness testified that she would get help from Mr. Tilton on executing some script runs or modifications of them to gather information out of the system, as well.

The witness was then questioned about when she was hired into her position at the Butler County Auditor's Office, as to exactly what she was going to do. The witness referred back to Appellee's Exhibit I and noted first and foremost that she was going to be the IAS support person as she had worked for the software company for approximately the last 6 years and had a pretty good knowledge of the system, and secondly acting as a liaison with Tyler CLT. The witness also noted that she was to also write custom system reports to free up Mr. Tilton to do other things, run edit reports and look at their data and fix it is necessary. When questioned as to her day-to-day activities the witness testified that she basically supported the Tax Accounting Specialist 1s help them do their job if they had questions about software, and also help train them so they could use the software to its full potential. When questioned whether she had more IT knowledge than a Tax Accounting Specialist 1, attested in the affirmative, although maybe not with the formal education sense. Moreover, the witness explained that she spent approximately 75% of her time supporting the Tax Accounting Specialist 1s while working at the office.

As to whether it was her understanding that she was brought in and/or hired into her position so as to take over some of Mr. Tilton's duties, she agreed that was exactly the case since his title at that time was IAS Support Coordinator. The witness was then questioned regarding Appellee's Exhibit J, an apportionment sheet for personal property, and explained that she did not create these documents and that most likely Ms. Janet Cole, as she did those types of things.

On cross examination, the witness upon questioning from Appellee's counsel regarding Appellee's Exhibit J, testified that she did in fact provide numbers to Ms. Cole, and that Ms. Cole placed the numbers in the report and that Ms. Cole ran the reports, and that Ms. Cole took those reports to Mr. Roger Reynolds, on at least the reports that say, "made for the 3rd 2009 Personal Property Reimbursement Distribution". However, the witness did state that with the reports regarding real estate taxes (apportionment sheets) that she was preparing those types of those reports, starting in February and March 2009, and continued to do them until she left. Further, the witness agreed when questioned, that she did take those reports (apportionment sheets) which also included settlement reports for the real estate distribution to Mr. Reynolds for his signature, or left them with his executive assistant for his signature. Upon further questioning, the witness also agreed after identifying Appellee's Exhibit S that she prepared advancements to the Auditor for

his signature. Furthermore, the witness agreed that she also handled year end rollovers, as well, a duty that she took over sometime in November 2006.

The next line of questioning centered on Ms. Foust's involvement in the Butler County Republican Central Committee, a partisan political office position, as a Committee member, starting in late 2007, a position that she agreed she held during her employment with the Butler County Auditor's Office.

CONCLUSIONS OF LAW

The determination of the Appellant's status as a classified or unclassified employee while employed by the Butler County Auditor's Office could mandate the outcome of this appeal. As was previously stated, the Appellant was removed as an unclassified employee pursuant to Ohio Revised Code sections 124.11 (A) (9) and 124.11 (A) (28), as well as under the doctrines of *estoppel* and *waiver*, in addition to being removed via an Ohio Revised Code section 124.34 Order of removal for cause. 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 this case would proceed to a second day of record hearing to consider the merits of the Appellant's removal, for the reasons listed on her removal order.

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 sections 124.11 (A) (9) and 124.11 (A) (28) 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 the unclassified service. The Appellee in this matter claims that the Appellant, Ann Foust, was employed in the unclassified service under the provisions of Ohio Revised Code sections 124.11 (A) (9) and 124.11 (A) (28).

Revised Code 124.11 (A) (9) Exemption

The Appellee has alleged that Appellant's position and job duties were fiduciary in nature as well as holding an administrative relationship to an elected county official and thus fell under the statutory exemption from the classified civil service found in Revised Code Section 124.11 (A) (9), which reads, in pertinent part:

* * * *

(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 acquired by this chapter:

* * * *

(9) The deputies and assistants of state agencies authorized to act for and on the behalf of the agency, or holding a fiduciary or administrative relation to that agency and those persons employed by and directly responsible to elected county officials or a county administrator and holding a fiduciary or administrative relationship to such elected county officials or county administrator, and the employees of such County officials whose fitness would be impracticable to determined by competitive examination...

* * * *

As can be seen from the express language within Ohio Revised Code Section 124.11 (A) (9), this provision addresses both state and county employees. It is noted that the state employees, under this provision are treated differently than county employees, as state employees fall under the purview of this provision in the event that they act for and in the place of a principal executive officer or hold a fiduciary relationship to such principal, while county employees may fall under the operation statute in the event that they are directly responsible to elected county official and hold a fiduciary or administrative relationship to such elected county official.

This Board defines "fiduciary relationship" in administrative rule 124-1-02 (I) of the Ohio Administrative Code. "Fiduciary relationship" is defined as follows:

... Generally means 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 or over and above technical competency requirements form 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.

This Board also defines "administrative relationship" in administrative rule 124-1-02 (C) of the Ohio Administrative Code. "Administrative relationship" is defined as follows:

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

Revised Code 124.11 (A) (28) Exemption

The Appellee has alleged that appellant's position and job duties were fiduciary in nature to an elected county official and thus fell under the statutory exemption from the classified civil service found in Revised Code Section 124.11 (A) (28), which reads, in pertinent part:

* * * *

(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 acquired by this chapter:

* * * *

(28) for cities, counties, civil service township, city health districts, general health districts, and city school districts, the deputies and assistants of elective or principal executive officers authorized to act for and in the place of the principals or holding a fiduciary relation to their principals.

* * * *

The case which set the standard for determining if a position is or is not fiduciary is the case of *Yarosh v. Becane*, 65 Ohio St. 2d 5 (1980). The standard articulated by that court was that it is the job duties of a particular appellant which determine if they are classified or unclassified, not necessarily the designation given to their position. Accordingly, I have also reviewed the following cases which are in the line of the judicial determinations rendered in connection with the question of the definition of "fiduciary relationship."

In re Termination of Employment (1974), 40 Ohio St. 2d 107; *Rarick v. Board of County Commissioners* (1980), 63 Ohio St. 2d 34; and, *State, ex rel. Charlton v. Corrigan* (1988), 36 Ohio St. 3d 68.

It should be noted that Ohio Revised Code section 124.11 (A) (28) exempts from the classified service "the deputies and assistance of [County] elective... officers authorized to act for and in the place of their principals or holding a fiduciary relation to their principals." The language noted for the county employees in the above noted revised code section is essentially identical to the first clause of the first sentence the Ohio revised code section 124.11 (A) (9) which is applicable only to employees of state agencies. Additionally, the term "deputy" generally refers to an employee who is authorized to act for and in the place of his principal, *State ex rel. Emmons v. Guckenberger* (1936), 131 Ohio St. 466, 469, the term "assistant" has been used in civil service context to refer to employee who functions as an agent through whom the duties and purposes the department are accomplished. *State, ex rel. Myers v. Blake* (1929), 121 Ohio St. 511,516. "The subordinate of one in an official position is necessarily an assistant, looking toward the accomplishment of a common object." As such, Ohio Revised Code section 124.11 (A) (9) contains express language stating "directly responsible to" requirement, and Ohio revised code section 124.11 (A) (28) does not. Therefore, any subordinate employee who was in a fiduciary relation to a county elected official is in the unclassified service pursuant to Ohio Revised Code section 124.11 (A) (28).

The evidence in this matter established the existence of a fiduciary relationship between County Auditor Roger Reynolds, a county elected officer, and the Appellant Ann Foust. The Appellant was originally employed in December 2005, by former County Auditor Kay Rogers primarily to take over certain duties which were then being performed by Mr. Mike Tilton, who was at that time functioning as the head of the Real Estate Division of the auditor's office. It should be noted that Mr. Tilton served as acting County Auditor following the resignation of former Auditor Kay Rogers effective March 3, 2008, until the appointment of Mr. Roger Reynolds to fill the vacancy created by Ms. Rogers' resignation became effective on April 15, 2008. Upon assuming office, Mr. Reynolds promoted Mr. Tilton to Chief Deputy Auditor and Mr. Tilton continued as chief deputy until his retirement effective December 31, 2010. The handwritten notes prepared by former Chief Deputy Auditor Mr. Randy Groves (see Appellee's exhibit I) indicate that, at the time of Ms. Foust's hiring her duties were to include: IAS support; liaison with Tyler CLT on reappraisal; write custom reports, QC reports (free Mike from things); and train staff on IAS. IAS is an acronym for integrated appraisal system, a software system used by the Auditor and performing real estate appraisals, preparing tax bills, calculating tax distributions, and performing numerous other functions related to the county tax system. The software is designed and supported by a vendor referred to as Tyler CLT. The Appellant had had extensive prior experience with the IAS system during her prior employment at the Butler County Treasurer's office (that also uses IAS software) and at Tyler CLT, her immediate past employer.

The evidence revealed that the Appellant was not required to take any sort of an examination prior to being hired, as County Auditor Rogers apparently concluded that, based upon the Appellant's experience with the IAS system, the Appellant possessed the experience and skill set necessary to perform the duties of a Tax Accounting Specialist 2. Mr. Tilton testified that the Appellant was hired because she had the knowledge that the office needed, which could relieve him of a variety of the duties which he was performing. The evidence also revealed that Auditor Rogers authorized the Appellant with a starting salary of \$48,500, with an increase to \$50,000 after completion of the first 120 days of employment. At the time of the Appellant's employment, the County Auditor did not maintain classification specifications, and the Appellant was provided with no notice of whether her position was in the classified or unclassified service.

After Roger Reynolds was appointed as County Auditor and 2008, Mr. Mike Tilton prepared classification specifications for various positions within the Auditor's office. Mr. Milton testified that when he prepared a classification specification for the position of a Tax Accounting Specialist 2 which was occupied only by the Appellant, he was not attempting to describe the duties actually assigned to, and perform by, the Appellant. Further, Mr. Tilton also testified that, at that time, he did not possess a clear understanding of the criteria for her position being in the unclassified service versus the classified service, along with indicating that the county's personnel director, Doug Duckett resigned about at the same time he was preparing the classification specifications and he did not have a good resource available to assist him in this task. Mr. Tilton explained that it was his understanding that a classification series was supposed to consist of an entry-level position, an intermediate position and a supervisor, and that only the supervisor could be unclassified. For this reason, Mr. Tilton testified that he designated a Tax Accounting Specialist 2 position as a classified position. However, Mr. Tilton admitted that he really did not prepare a classification specification for a position in the Real Estate Division which really fit a unique set of duties actually assigned to the position and performed by the Appellant.

Mr. Tilton further testified that he answered directly to the Auditor, Mr. Roger Reynolds and that Ms. Julia Joyce-Smith, the Real Estate Director reported directly to him and that Ms. Foust reported directly to Ms. Julia Joyce-Smith, as the Tax Accounting Supervisor's position had been eliminated. However, Mr. Tilton explained that Ms. Joyce -Smith had little, if any, understanding of the technical aspects of the work Ms. Foust was performing, and if she had any questions concerning the technical aspects of her duties , she would come see himself. Further, the evidence revealed that Ms. Foust would specifically take to Mr. Reynolds as the County Auditor, various take abstracts for signatures, the settlements for signatures and the advances, all which had to be signed off directly by the Auditor, outside of her immediate supervisor or even Mr. Tilton's supervision.

Ms. Foust agreed when referring to Appellee's Exhibit I that first and foremost that she was going to be the IAS support person as she had worked for the software company for approximately the last 6 years and had a pretty good knowledge of the system, and secondly acting as a liaison with Tyler CLT. Ms. Foust also agreed that she was to also write custom system reports to free up Mr. Tilton to do other things, run edit reports and look at their data and fix it is necessary. When questioned as to her day-to-day activities the witness testified that she basically supported the Tax Accounting Specialist 1s help them do their job, and if they had questions about software, and also help train them so they could use the software to its full potential.

The evidence revealed that the Appellant was also given the sole responsibility for performing the year-end closing process in IAS which required her to determine whether the tax collection information entered into the IAS system was balanced with the amount of taxes assessed and billed during the year. In performing this function, the Appellant had the ability to close access to the IAS system by all authorized users for the time necessary for her to perform her duties and to notify users when the access was restored. The evidence was clear that she exercised this function without direction or supervision by anyone within the auditor's office.

Moreover, the evidence revealed that the Appellant was also responsible for quality control functions to ensure that the IAS system was providing correct results concerning tax assessments, preparation of tax bills, allocation of collected taxes and tax distributions. Through the testimony of Mr. Mike Tilton it was revealed that the IAS software was designed to generate certain preprogrammed output for the use of the County auditor but that he, and eventually Ms. Foust had to analyze the IAS output to ensure that it was accurate. Again, Mr. Tilton explained that this was one of the primary reasons the Appellant was hired to take over the analytical responsibilities that were performed by him previously. With this understanding, County Auditor Rogers believed that Appellant's prior experience with the IAS system qualified the Appellant to perform her assigned duties, and that she could not simply rely on the accuracy of the output, but that she had to closely analyze that output to judge its accuracy.

Additionally, commencing in 2008, Ms. Foust was assigned responsibility for the tax settlement process. The entire tax settlement process anally involved the distribution of approximately \$450 million to the various taxing authorities within Butler County. Ms. Foust duties concerning the settlement process required her to prepare documents to be signed personally by the County Auditor Roger Reynolds which would control the allocation the distribution of collected tax funds to the various taxing authorities. Moreover, as part of her settlement responsibilities, Ms. Foust also was authorized to prepare documents to be signed by Auditor Reynolds which would authorize the advancement of tax money to taxing authorities prior to the final tax settlement with the relative taxing authority. The evidence was also clear that no one within the Auditor's office supervised the Appellant's preparation of settlement and advancement documentation, as she would take these directly to Auditor Reynolds.

The evidence in this matter establish that the actual duties assigned to and performed by Ms. Foust required the appointing authority to propose a special competence in trust and her abilities to perform the duties which could not have been delegated to an average employee with knowledge of the proper procedures. The Appellant's duties were highly subjective in nature and that she was primarily responsible for overseeing the proper distribution of approximately \$450,000,000 in tax revenues to taxing authorities within Butler County. The evidence revealed that the Appellant's performance of her duties required an advanced knowledge and understanding of the IAS software used by the real estate division of the Butler County Auditor's office, and of complicated analytical tools to detect errors in the documents produced by the IAS system. Auditor Reynolds relied heavily on Ms. Foust's proper performance of her duties and did not closely scrutinize settlement documents which the Appellant prepared and submitted directly to him for his signature. As such, Auditor Reynolds had to have faith and trust in the Appellant's honesty and judgment in the performance of her duties in the tax settlement process.

Therefore, for the above noted reasons, the Appellant's position was within the unclassified service pursuant to Ohio Revised Code section 124.11 (A) (28) and 124.11 (A) (9) as she was holding a fiduciary relationship with the Butler County Auditor's office, regardless of her position's job title and/or noted classified status.

If this Board rejects the above conclusion regarding the Appellant's position being in the unclassified service pursuant to Ohio Revised Code section 124.11 (A) (9) and 124.11 (A) (28), Appellee's assertions of the defenses of *estoppel* and *waiver*, however should not be considered. Case law has established that in an appeal pursuant to Ohio Revised Code 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 excepted an appointment to a position designated as an unclassified position, regardless of whether the employee's actual job duties fell in the classified status. *Chubb v. Ohio Bureau of Workers Compensation*, (1998) 81Ohio St. 3d 275. In the case at hand, the evidence and testimony revealed that the Appellant did not fill out any application or reviewed any job posting that indicated in any way that she was knowingly accepting an unclassified position when accepting her position within the Butler County Auditor's office.

As in the case of *Chubb*, the Butler County Auditor's office, like the BWC advanced the argument that Chubb/Foust should be estopped from claiming the protection of classified service because she knew that the position she held was unclassified and that she reaped the benefits of the unclassified position. The court in *Chubb* described the *estoppel* doctrine, as it relates to civil service disputes, as "a hybrid of the concept of *estoppel* and *waiver*" in that the doctrine should only apply when the employee knowingly and voluntarily relinquishes the protections of the classified service. Further, it was held in the *Chubb* court that a civil service employee, who knowingly and voluntarily: (1) accepts appointment to a position designated as unclassified, (2) accepts the benefits of that unclassified position, and (3) waives the protections of the classified service, cannot later claimed the benefits of the classified service, regardless of whether the employee's actual job duties fall within the classified service. Thus, as previously stated, the state may assert defenses of *waiver* and *estoppel* if the employee has accepted appointment to a position designated as unclassified and also has accepted the benefits of that unclassified position.

In the case at hand, the Butler County Auditor's office, asserted that since Ms. Foust was on the Central Committee of the Butler County Republican Party, a partisan political office throughout her employment with County Auditor Reynolds, an office which a county classified employee is prohibited to hold pursuant to Ohio revised code section 124.57(A), which can only held by an unclassified County employees, Ms. Foust should be a estopped from asserting her classified status. However, as can be seen by the case law stated above, employees must know that

the position that they are occupying is unclassified and accept the benefits of an unclassified position for the doctrines of *estoppel* and *waiver* to have full force and effect. In this case, it becomes clear that the *estoppel* and *waiver* doctrines are not appropriate defenses for the state, since the Appellant never knew that the position was considered an unclassified position or was made aware that the position was unclassified. Thus, this Board should reject the state's defenses of *estoppel* and *waiver* in this case at bar.

RECOMMENDATION

I respectfully **RECOMMEND** that the instant appeal be **DISMISSED** for lack of subject matter jurisdiction because the evidence establishes that the Appellant, Ms. Ann Foust, as a Tax Accounting Specialist 2, was serving in the unclassified service pursuant to Ohio Revised Code section 124.11 (A) (9) and 124.11 (A) (28).


Christopher R. Young
Administrative Law Judge