

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

Raymond Rogers,

Appellant,

v.

Case No. 10-REM-08-0207

Cuyahoga County Auditor,

Appellee.

ORDER

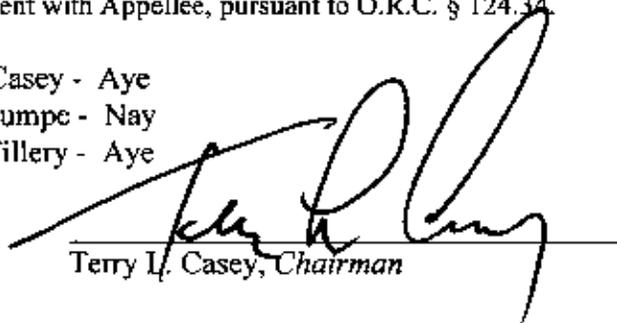
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the 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 **REMOVAL** be **DISAFFIRMED** and Appellant be reinstated to his employment with Appellee, pursuant to O.R.C. § 124.34.



Casey - Aye
Lumpe - Nay
Tillery - Aye

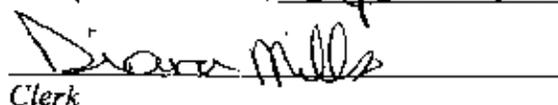


Terry L. Casey, *Chairman*

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, September 2, 2011.



Clerk

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


9/2/11

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

Lisa Rogers,

Case No. 10-REM-08-0206

Appellant,

and

Raymond Rogers,

Case No. 10-REM-08-0207

Appellant,

v.

July 12, 2011

Cuyahoga County Auditor,

Jeannette E. Gunn

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

Appellants Lisa Rogers and Raymond Rogers were removed from employment with Appellee on May 14, 2010, and June 17, 2010, respectively, and subsequently filed appeals with this Board. Appellee asserts that both Appellants were unclassified, "at-will employees" at the time of their removal from employment. Because Appellants' classified/unclassified status is a threshold issue impacting the jurisdiction of the Board to consider the merits of Appellants' removals, that status was the sole issue considered during a record hearing held on May 2, 2011.

Appellants were present at the record hearing and appeared *pro se*. Appellee was present through its designee, Employment Relations Manager Matthew Hawes, and was represented by Sara E. DeCaro, Assistant Prosecuting Attorney. Information contained in the record indicated, and the parties agreed, that Appellee provided no R.C. 124.34 Order of Removal to either Appellant at the time of their respective removals from employment.

STATEMENT OF THE CASE

Appellant Lisa Rogers testified that she was employed by Appellee from February 1, 1999, until May 14, 2010. She recalled that she responded to a newspaper advertisement for the position, applied and was hired; she did not take a civil service examination as part of the hiring process. Ms. Rogers noted that she was not in active work status on the date of her termination, but had been out of the office on workers compensation leave since October 5, 2009. She confirmed that she was still receiving workers compensation and temporary total disability benefits as of the date of record hearing.

Ms. Rogers indicated that she held the position of certified County Weights and Measures Inspector at the time of her removal and explained that her duties were to check scales and various other measuring and/or timing devices for accuracy. She noted that she had an assigned territory that she maintained.

Ms. Rogers confirmed that she received merit raises during the time she was employed by Appellee. She recalled that she came to Columbus for testing and recertification through the Department of Agriculture, and that after completing each training module she was able to request a raise due to her higher level of certification. Ms. Rogers stated that on some occasions, her raise was processed without her having to specifically request it. She indicated that at the time of her removal, her yearly salary was approximately \$48,000.

Ms. Rogers testified that she did not recall ever being provided with a personal copy of Appellee's policies and procedures, but did have access to and reviewed the copy that was kept in her department. She observed that the policies were constantly being updated and revised.

Mr. Don Tomaro testified that he has been employed by Appellee for approximately eight years and has held his current position of Director of the Weights and Measures Division for approximately two years. He confirmed that he knows Appellant Lisa Rogers and was her supervisor from 2009 until the date of her removal from employment.

The witness stated that Ms. Rogers was responsible for testing scales and other weighing and measuring devices for accuracy, inspecting pre-packaged products and handling complaints. Mr. Tomaro identified Appellee's Exhibit B as a

list of tasks typically performed by Weights and Measures Inspectors and confirmed that it accurately reflected Ms. Rogers' job duties.

Appellant Raymond Rogers testified that he was employed by Appellee from May 2002 until June 17, 2010. He stated that at the time of his removal he held the position of Principal Office Assistant and was assigned to organize the Microfiche room. Mr. Rogers noted that during his tenure with Appellee he held a number of different positions and worked in the Reproduction room, as the Map room manager, as a Board of Revision hearing officer, in the Hotel/Motel division and in the General Services division. He indicated that at the time of his removal, his yearly salary was approximately \$67,000.

Mr. Rogers recalled that he applied for his position with Appellee through a job posting he saw in the County Building and did not take a civil service examination as part of the hiring process. He confirmed that he received several merit pay raises during his tenure with Appellee. Mr. Rogers also confirmed that he received a policy and procedure handbook when he first accepted employment with Appellee and noted that he also had access to the revised handbook that was introduced in 2009.

Ms. Raquel Gregory testified that she is presently employed by the Cuyahoga County Fiscal Officer's department, which was formerly the Auditor's Office, as Director of General Services. She indicated that she has been employed by Appellee for approximately eighteen and one-half years. The witness confirmed that she knows Appellant Ray Rogers and supervised him when he was assigned to the General Services department in January 2010 as a Principal Office Assistant. She recalled that Mr. Rogers was one of the employees in her department who issued vendor licenses and dog licenses over the counter and through the mail. Ms. Gregory stated that the tasks outlined in Appellee's Exhibit E did not accurately reflect the duties performed by Principal Office Assistants in her department; she noted that a Principal Office Assistant would be delegated work by her and would perform "back of the house" work instead of counter work unless they were filling in when the office was short-staffed.

Ms. Virginia Sabetta testified that she is employed by the Cuyahoga County Fiscal Officer's department. She indicated that she has been employed by Appellee for approximately fourteen and one-half years, and that her current title is Principal Office Assistant. The witness stated that she is responsible for processing payroll

for the Fiscal Officer's employees and also performs some Human Resources duties, such as assisting with personnel matters and maintaining employee records.

Ms. Sabetta indicated that no competitive exams were administered to employees of the Auditor's Office and that she was not aware whether or not the Office functioned under any type of formal classification plan. She noted that she processed employee pay raises pursuant to notes she received from the Personnel Director listing the amount of increase to be paid (Appellee's Exhibits F and G). The witness explained that the notations "VOFR," "VOSM," and "VODR" stood for, respectively, "verbal order of Frank Russo (Auditor)," "verbal order of Sam Mohammed (Deputy Auditor)," and "verbal order of Destin Ramsey (Chief Operating Officer)."

Ms. Sabetta noted that Appellee's policies and procedure manual (Appellee's Exhibit J) provides in Section 1.0 that all employees of the Auditor's Office are considered unclassified at-will employees.

FINDINGS OF FACT

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

Appellant Lisa Rogers was employed by Appellee from February 1, 1999, until May 14, 2010, and held the position of Weights and Measures Inspector at the time of her removal from employment. Ms. Rogers was responsible for testing scales and various other measuring and/or timing devices for accuracy, inspecting pre-packaged products and handling complaints within her assigned territory.

Appellant Lisa Rogers received merit pay raises during the time she was employed by Appellee based upon her certification levels. She did not take a civil service examination as part of the hiring process for her position.

Appellant Raymond Rogers was employed by Appellee from May 2002 until June 17, 2010, and held the position of Principal Office Assistant at the time of his removal from employment. During the six-month period prior to his termination, Appellant was assigned to the General Services department; he was one of several employees who issued vendor licenses and dog licenses, and immediately prior to his removal was assigned the task of organizing the Microfiche room.

Appellant Raymond Rogers received merit pay raises during the time he was employed by Appellee. He did not take a civil service examination as part of the hiring process for his position.

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 did not specify which subsection of R.C. 124.11(A) exempted Appellants' positions. Upon a review of that section of the Revised Code, I conclude that there are several which potentially apply to Appellants' positions, specifically, R.C. 124.11(A)(8), (A)(9), (A)(28) and (A)(32).

R.C. 124.11(A)(8) exempts from the classified service:

(8) ... four clerical and administrative support employees for other elective [county] officers and each of the principal appointive executive officers, boards, or commissions, except for civil service commissions, that are authorized to appoint such clerical and administrative support employees

Ohio Administrative Code Section 123:1-5-01(A) provides that an elective officer is required to notify the Director of the Department of Administrative Services of the positions(s) he/she is claiming as exempted under R.C. 124.11(A)(8) within sixty days after taking office. Appellee provided this Board with no documentation to establish that either of the Appellants' positions were exempted in such a manner, therefore, I find that Appellants were not exempted from the classified civil service by operation of R.C. 124.11(A)(8).

R.C. 124.11(A)(9) exempts from the classified service:

(9) ... 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 determine by competitive examination ...

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.

Appellee provided no testimony or evidence at record hearing to establish that either Appellant was directly responsible to the Cuyahoga County Auditor or that either Appellant had a fiduciary or administrative relationship with the Auditor. While testimony demonstrated that neither Appellant took a civil service examination as part of their hiring process, no evidence or testimony was presented to establish that it was, in fact, impracticable to administer a competitive examination for either of their positions. Accordingly, I find that Appellee has failed to demonstrate that Appellants' positions were exempted from the classified civil service by operation of R.C. 124.11(A)(9).

R.C. 124.11(A)(28) exempts from the classified service:

(28) For ... counties ..., the deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals or holding a fiduciary relation to their principals

As noted above, Appellee provided no testimony or evidence at record hearing to establish that Appellants held a fiduciary relation to the Cuyahoga County Auditor. Appellee also failed to demonstrate that either Appellant was authorized to act for and in the place of the Auditor. Therefore, I find that Appellants were not exempted from the classified civil service by operation of R.C. 124.11(A)(28).

Finally, R.C. 124.11(A)(32) exempts from the classified service:

(32) Employees placed in the unclassified service by another section of the Revised Code.

Appellee failed to demonstrate at record hearing that any other section of the Revised Code placed Appellants' positions in the unclassified service. I find that Appellants' positions were not exempted from the classified civil service by operation of R.C. 124.11(A)(32).

Appellee failed to present this Board with sufficient testimony or evidence to establish that Appellants' positions fell within one of the exemptions created by R.C. 124.11(A), or that Appellants' positions were placed in the unclassified service by any other section of the Ohio Revised Code. Accordingly, I find that Appellants' positions fell within the classified civil service.

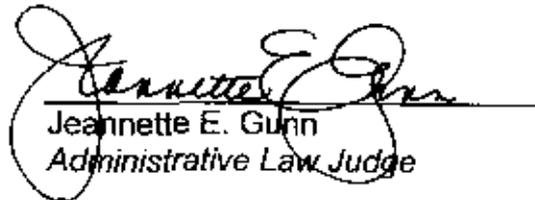
Appellee asserted in its post-hearing brief filed in SPBR Case No. 10-REM-08-0207, however, that the Appellant Raymond Rogers should be equitably estopped from claiming classified status because he accepted the benefits of an unclassified position; specifically, Appellee asserts that Appellant Raymond Rogers was appointed and thereafter promoted without competitive examination and that he received a significantly higher salary than that of a typical employee performing similar job duties. Appellee relies on the Supreme Court's holding in *Chubb v. Ohio Bur. of Workers' Comp.* (1998), 81 Ohio St.3d 275.

The court in *Chubb* held that if an employee "knowingly and voluntarily" accepts an appointment to an unclassified position and reaps other benefits such as

higher wages, then the employee has voluntarily relinquished the statutory rights and protections of civil service status. *Chubb, supra* at 278. In the instant matter, Appellee failed to demonstrate that the position occupied by Appellant Raymond Rogers at the time of his removal was unclassified. Although the 2009 personnel manual generally states that Appellee considered all of its employees to be "at-will," simply asserting that a position is unclassified is not enough to make it so; I note that the same section of the manual states that it does not constitute a contract of employment.

Appellee produced no documentation or testimony to establish that Mr. Rogers was aware at the time he accepted the position from which he was removed that Appellee considered the position to be in the unclassified service, or that Mr. Rogers voluntarily relinquished any statutory rights and protections to which he may have otherwise been entitled by accepting the position. Appellant Raymond Rogers does appear to have been paid a generous salary in relation to the nature and scope of the duties he was performing at the time of his removal, however, absent a knowing and voluntary relinquishment of his rights, I find that receipt of higher wages is not enough to estop Mr. Rogers from claiming the benefits of classified civil service.

As previously noted, Appellee provided no R.C. 124.34 Order of Removal to either Appellant. Therefore, because the positions occupied by Appellant Lisa Rogers and Appellant Raymond Rogers at the time of their removal were in the classified service, and because Appellee failed to comply with the applicable provisions of the Ohio Revised Code and Ohio Administrative Code in effectuating the removal of the Appellants, I respectfully **RECOMMEND** that the instant appeals, SPBR Case No. 10-REM-08-0206 and SPBR Case No. 10-REM-08-0207 be **DISAFFIRMED** and that Appellants be reinstated to their employment with Appellee.


Jeannette E. Gunn
Administrative Law Judge