

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

RACHEL L. LIVENGOOD,

Appellant,

v.

Case No. 11-REM-02-0039

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 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, as well as the supplementations of the record filed by the parties pursuant to the Full Board's instructions, the Board hereby adopts the Findings of the Administrative Law Judge but must modify the Recommendation of the Administrative Law Judge, for the reasons that follow.

This case presents the Board with a record that reflects a complex fact pattern. Unfortunately, the record contains reliable, probative, and substantial evidence that establishes that Appellant obtained her most recent position with Appellee, Ohio Department of Transportation (ODOT), by engaging in a widespread and inappropriate conflict of interest. The record also contains reliable, probative, and substantial evidence that ODOT failed to follow its own statutory requirements in removing Appellant from her most recently held position with ODOT, which was a position that fell within ODOT's specific Professional Service designation.

The assigned Administrative Law Judge's Report and Recommendation understandably focused on the question in this matter that was initially raised most vociferously by Appellee, namely, whether Appellant was serving in a probationary period at the time of her removal which, if true, would bar the Board from exercising jurisdiction over Appellant's removal. In her Report and Recommendation, the assigned Administrative Law Judge concluded that Appellant was serving in an ODOT Professional Service position at the time of her removal.

Positions that fall within the ODOT Professional Service are classified positions but also have characteristics and associated procedures that are unique to these positions. These include specific and unique procedures for evaluating and disciplining Professional Service employees and their associated right to appeal a disciplinary removal, but no other pertinent discipline, to this Board.

In this case, as noted, the assigned Administrative Law Judge found that Appellant was in a Professional Service position at the time of her removal. Further, the Administrative Law Judge found that, because the Professional Service's unique statutory and administrative requirements essentially supersede any other statutory requirements regarding the need to serve and complete a probationary period, ODOT was required to, but did not, follow those set statutory and administrative requirements. Accordingly, the Administrative Law Judge concluded that the Board had jurisdiction over the subject matter of Appellant's removal, that Appellant's removal was procedurally flawed, and that Appellant should be reinstated to her ODOT Professional Service position.

Yet, in the next to last paragraph of her Report and Recommendation, the Administrative Law Judge raises some troubling issues. Specifically, on Page 8 of same she writes:

The fact that Appellant Livengood voluntarily demoted herself from an unprotected unclassified position of Deputy Director 6 to a highly protected Career Professional service position of Human Capital Management Manager just after an election that determined there would be a change in the administration of the State does not go unnoticed. **She tried to manipulate the system just as Appellee tried to manipulate the system by placing her in a probationary period which does not exist for Career Professional service employees.** The law and its applicability exists for the benefit of employer and employee alike and the only way that just results will occur is if all parties follow the letter and intent of the law. (emphasis added)

As a result of the Administrative Law Judge raising this and other questions, the Full Board thereafter heard oral arguments and discussions from respective counsel. The Full Board then instructed the parties to file supplementations of the record providing substantial additional information, evidence, and detail. All of these submissions have been reviewed and considered and these key issues have been our focus.

Appellant was involved in the posting, interviewing, and selection process for a vacant Human Capital Management (HCM) Manager position that was designated as a Professional Service position. After she supervised this process, Appellant was involved in having herself appointed to this position.

As noted earlier, there is a serious question of a conflict of interest regarding the extent to which Appellant was involved with this selection process and regarding how she was able to directly and materially benefit from this selection process. As the record reflects, there are troubling questions that are raised regarding how Appellant managed this process and how this could possibly have happened.

Yet, the evidence is fairly clear and specific regarding the fate of the numerous "actual" applicants for this HCM Manager position. Indeed, it is clear from the record that none of these other candidates was given the same substantial advantages and preferential treatment that Appellant enjoyed and through which she was appointed.

In early November, 2010, Appellant was involved in placing herself in a classification and position in which she had never served (*i.e.* HCM Manager). Appellant had previously

served as a Labor Relations Officer (LRO) 3 where she had established her performance and competency over a lengthy period of time. **This was not true of the HCM Manager position.**

Further, Appellant most certainly did not exercise any “fallback rights” she might have had by ostensibly placing herself in the HCM Manager position. We say “ostensibly” because Appellant in essence never performed the functions of the HCM Manager position until January 2011, after the change of administration and very shortly before she was removed.

What is particularly interesting is that, instead of actually remaining in or taking the HCM Manager spot after achieving appointment to same, Appellant was placed or placed herself into a Temporary Working Level (TWL) as a Deputy Director (DD) 6, at basically the same pay and presumably the same duties that she had been performing in that classification for several years previously. As noted, Appellant continued in this DD 6 classification until January, 2011, continuing to enjoy a substantially higher pay than she was to have as an HCM Manager.

The Honorable John F. Bender of the Court of Common Pleas of Franklin County has recently declared that “The purpose of a probationary period is to demonstrate proficiency in performing a particular position with assigned job duties ...” (*Pawloski v. Ohio Department of Transportation* -- Case No. 11-CV-10-12801, Bender, J.; Decision and Entry electronically issued January 26, 2012, at p. 2). Further, the Honorable Charles A. Schneider of the Franklin County Court of Common Pleas has recently determined that an ODOT Professional Service employee must be afforded the rights set forth in the Revised Code and Ohio Administrative Code pertinent to the Professional Service before the employee may be removed. (See *Berning v. Ohio Department of Transportation* – Case No. 11-CVF-2398, Schneider, J.; Decision and Entry on Merits of Appeal entered August 3, 2011, at p. 6-7).

The pertinent HCM Manager position at issue was a Professional Service position. As such, **this HCM Manager position did not have a probationary period associated with it.** Therefore, by placing herself into a position where the incumbent employee would serve no probationary period, *Appellant deprived ODOT of the ability to evaluate Appellant’s proficiency in the HCM Manager position*; requiring ODOT instead to utilize the rather lengthy and procedurally detailed disciplinary process that is required for ODOT to discipline its Professional Service employees.

What, then, may we take away from this course of events? First, Appellant actively engineered her placement into a Professional Service position of HCM Manager. This was a position for which she had not demonstrated proficiency and for which she was conflicted out from accepting.

Thereafter, Appellant in essence stayed where she had been as a DD 6, continuing to exercise the authority of that classification and continuing to accept the pay associated with same. While in her TWL, Appellant remained as the supervisor of the employee who was now supposed to supervise Appellant in her new HCM Manager position.

By arranging this course of events, Appellant deprived all of the legitimate applicants for the HCM Manager position of any meaningful opportunity to be considered. Finally, by arranging this course of events, Appellant deprived ODOT of the opportunity to evaluate Appellant's proficiency for the HCM Manager position either before Appellant took that position or subsequently, absent ODOT's utilization of the rather complex and lengthy Professional Service evaluation and discipline process.

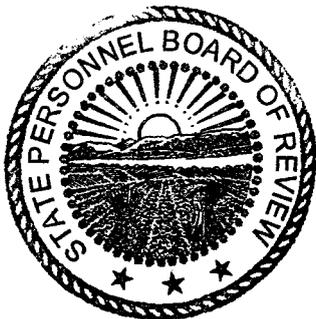
Thus, the Board's Administrative Law Judge is correct to conclude that Appellant would not have been required to serve a probationary period in the Professional Service HCM Manager position. The Administrative Law Judge is further correct that ODOT should have utilized its Professional Service evaluation and discipline process if it had an issue with Appellant.

However, the Full Board's further development of the record reveals that Appellant inappropriately gamed the system first to place herself into the HCM Manager position, then to place herself into a TWL as a DD6, and finally to assume the duties of an HCM Manager. These facts thus bar this Board from furthering Appellant's efforts, since she cannot come to this Board with clean hands after setting up and effectuating such an unacceptable and likely unethical scheme.

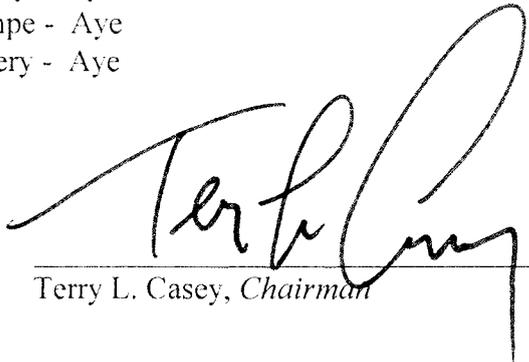
Appellant could have bid on the HCM Manager or other ODOT position in an arm's length transaction. If ODOT had considered her competent to pass the initial screening, then she and all other acceptable applicants could have gone through the ODOT selection process for same. Conversely, she could have stayed in her DD 6 position and could have awaited the determinations of the new administration. She did neither and tried to maximize her protections and pay, with little regard for potential conflict of interest issues or for the numerous legitimate applicants for the HCM Manager position.

Accordingly, this Board must dismiss the instant appeal because to do otherwise would only further Appellant's highly problematic and conflict-laden acts and omissions.

Wherefore, it is hereby **ORDERED** that the instant appeal **BE DISMISSED** for the reasons set forth in this Order, above.



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, February 17, 2012.



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**

Rachel L. Livengood

Case No. 11-REM-02-0039

Appellant

v.

July 19, 2011

Department of Transportation

Marcie M. Scholl

Appellee

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 March 14, 2011; Appellee's Response to the Questionnaire, filed on March 28, 2011; Appellee's Motion to Consolidate Appeals, filed on March 28, 2011; Reply of Appellant to Questionnaire, filed on April 25, 2011; Appellee's Motion to Dismiss, filed on June 24, 2011; Appellant's Memorandum Contra Appellant's Motion to Dismiss, filed on July 5, 2011; and Appellant's Corrected Memorandum Contra Appellee's Motion to Dismiss, filed on July 6, 2011.

Appellee's Motion to Consolidate Appeals is hereby **DENIED**.

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

1. Appellant Livengood was removed from her Career Professional position of Human Capital Management Manager, effective January 28, 2011.
2. Appellant Livengood was removed as a probationary employee. Appellee did not file a section 124.34 Order of Removal for Appellant Livengood with this Board nor with Appellant Livengood. She was given a letter dated January 28, 2011, notifying her that she was probationarily terminated.
3. Immediately prior to holding the position of Human Capital Management Manager, Appellant Livengood held the unclassified position of Deputy Director 6. She consented to a voluntary demotion to the classified Career

Professional position of Human Capital Management Manager on November 5, 2010.

4. Appellant Livengood began her most recent employment with Appellee on March 15, 1998, as an unclassified Labor Relations Officer 3, by means of a transfer from the Ohio Department of Administrative Services.
5. Senate Bill 229 became effective sometime in the latter part of 1998, and pursuant to that Bill, the category of "Career Professional" was created for Appellee. Appellee placed Appellant Livengood's position of Labor Relations Officer 3 into the Career Professional category effective November 16, 1998, thus changing her status from "unclassified" to that of classified "Career Professional". Appellee did not, however, require Appellant Livengood to serve a probationary period at that time.
6. Appellant Livengood remained in the Career Professional position of Labor Relations Officer 3 until June 24, 2007, when she was promoted to the unclassified position of Deputy Director 6.
7. Appellant Livengood's voluntary demotion from her unclassified Deputy Director 6 position to the classified Career Professional position of Human Capital Management Manager was effective November 7, 2010. On January 28, 2011, Appellee notified Appellant Livengood that she should have been placed into a probationary period upon her voluntary demotion and that Appellee was therefore placing her into a probationary period of one hundred eighty days (180) effective November 7, 2010.
8. Appellant Livengood was then probationarily removed effective January 28, 2011 for unsatisfactory performance.

CONCLUSIONS OF LAW

Appellee argues that this Board is without jurisdiction to hear this appeal because Appellant Livengood was designated as being in a probationary period at the time of her removal and this Board has no jurisdiction over probationary removals. Appellant Livengood argues that she was improperly removed from her position of Human Capital Management Manager because she was not removed for cause, was not served with an Ohio Revised Code section 124.34 Order and that

she was improperly placed into a probationary period. Appellant Livengood continues to argue that an employee can only be placed into a probationary period upon an original or promotional appointment and that her voluntary demotion to a Human Capital Management Manager was neither.

Appellee counters that because Appellant Livengood never served a probationary period in any of her other positions with Appellee, she must be required to serve one in her last position, as it was her only original appointment to the classified service during her most recent tenure with Appellee. Appellant argues that her last position came about as a result of a voluntary demotion and as such, she is not required to serve a probationary period, as a voluntary demotion is neither a promotional nor an original appointment.

While it is true that section 124.27 of the Ohio Revised Code requires that all initial and promotional appointments are to include a probationary period, the issue is not whether or not Appellant Livengood was in an initial or promotional appointment as a Human Capital Management Manager. The relevant question is whether or not an employee in a classified position designated as a Career Professional service position can correctly serve a probationary period.

When Appellant Livengood began her second employment at Appellee in 1998, she transferred to the Appellee from another department in the state and she transferred into an unclassified position. Clearly, there is no dispute that as an unclassified employee serving at the pleasure of the appointing authority, there was no requirement, nor reason, for her to serve a probationary period at that point in time and, in fact, she did not.

The Career Professional service was created by the Legislature sometime in the latter part of 1998 by Am Sub S.B. 229. Shortly after its creation, Appellant Livengood was notified that effective November 16, 1998, she was being placed into the Career Professional service in her then current position of Labor Relations Officer 3. The only thing that changed at that time was her designation of "Career Professional" and her status change from "unclassified" to "classified Career Professional".

In reviewing the language creating the Career Professional Service, there is nothing in that language stating that a Career Professional must serve a probationary period. In fact, the language specifically states in Am Sub. S.B. 229, that:

Under the act, the tenure of an employee in the ODOT career professional service is subject to the law put in place by the act **and not the law otherwise governing the tenure of classified employees.** (Page 6 of 13, Am. Sub. S.B. 229). (Emphasis added).

Section 5501.20 of the Ohio Revised Code is the result of Am. Sub S.B. 229 and it governs the Career Professional service. Nowhere in that statute is the requirement for a Career Professional employee to serve a probationary period – in fact, the term “probationary period” is not mentioned anywhere in the entire statute. While it is undisputed that an employee in the Career Professional service is a classified employee, it is also axiomatic that the Career Professional service employee differs in certain aspects from a classified employee – otherwise if there were no differences, there would be no reason to even have the designation of Career Professional. One of the differences is found in section 5501.20(c) of the Ohio Revised Code. That paragraph states as follows:

(C) After an employee is appointed to a position in the career professional service, the employee’s direct supervisor shall provide the employee appointed to that position with a written performance action plan that describes the department’s expectations for that employee in fulfilling the mission, business objectives, and strategies stated in the department’s business plan. No sooner than four months after being appointed to a position in the career professional service, an employee appointed to that position shall receive a written performance review based on the employee’s fulfillment of the mission, business objectives, and strategies stated in the department’s business plan. After the initial performance review, the employee shall receive a written performance review at least once each year or as often as the director considers necessary. **The department shall give an employee whose performance is unsatisfactory an opportunity to improve performance for a period of at least six months, by means of a written corrective**

action plan, before the department takes any disciplinary action under this section or section 124.34 of the Revised Code. The department shall base its performance review forms on its business plan. (Emphasis added).

As can be seen from reading the above paragraph, the employee serving in the Career Professional service must be given an opportunity to improve his or her performance for a period of at least six months before any disciplinary action can be taken. It seems logical, then, that the reason no probationary period is mentioned or imposed on a Career Professional employee is because this statute, which is specific to a Career Professional employee only, imposes a written performance action plan and a review of that employee's performance within four months after being appointed. There is no such requirement on the rest of the classified employees, as the Career Professional employee is a different type of appointment, sort of a sub-set of classified employees.

In looking at paragraph (D) of section 5501.20 of the Ohio Revised Code, it does not even provide an option of removing a Career Professional employee in a probationary period, because a probationary period does not apply to such an employee. That paragraph states:

(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 sections 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. (Emphasis added).

As stated above, any performance related issues are not dealt with through a probationary period, as that term is not applicable to Career Professional employees, but instead, the performance of a Career Professional is tied back to the department's business plan and the performance review forms. If, after the mandatory six month period given to a Career Professional employee to improve expires and there is still no improvement in the employee's performance, then the

employee can be suspended, demoted or removed. Only the removal of a Career Professional employee is appealable to this Board.

With respect to the instant case, Appellant Livengood was serving in the Career Professional service position of Human Capital Management Manager at the time of her removal. She should not have been placed into a probationary period while in a Career Professional position, as there is nowhere in the Ohio Revised Code that states such probationary period is even applicable to a Career Professional position. It is also noted that Appellant Livengood did not serve a probationary period when she was first placed in the Career Professional service position of Labor Relations Officer 3. As stated before, there has to be some differences between a regular classified position and a classified Career Professional position. If they were subject to exactly all the same requirements, there would not be a need to even have a Career Professional designation in the first place. Therefore, Appellant Livengood's designation as a probationary employee in a Career Professional service position was wrong. The Appellee has not established any authority for placing Appellant Livengood into a probationary period while holding a Career Professional position.

Therefore, since she was not in a probationary period, she could only have been removed pursuant to not having satisfactory performance on her performance plan after a period of six months, or for disciplinary reasons found in section 124.34 of the Ohio Revised Code. It is undisputed that no Revised Code section 124.34 Order of Removal was filed with this Board, as required in section 124.34(B) of the Ohio Revised Code and no Order of removal was given to Appellant Livengood. Paragraph (B) of section 124.34 of the Ohio Revised Code specifically carves out an exception to the no filing requirement with this Board as it pertains to Career Professional employees. That paragraph states as follows, in pertinent part:

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. For purposes of this section, the date on which an order is served is the date of hand delivery of the order or the date of delivery of the order by certified United States mail, whichever occurs first. If an appeal is filed, the board or commission shall forthwith notify the appointing authority and

shall hear, or appoint a trial board to hear, the appeal within thirty days from and after its filing with the board or commission. The board, commission, or trial board may affirm, disaffirm, or modify the judgment of the appointing authority. However, in an appeal of a removal order based upon a violation of a last chance agreement, the board, commission, or trial board may only determine if the employee violated the agreement and thus affirm or disaffirm the judgment of the appointing authority. (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 applying section 124.34 of the Ohio Revised Code to the instant case, it is clear that this Board has no choice but to disaffirm the action of the Appellee in removing Appellant Livengood since the Appellee did not meet the requirement of filing an Order of Removal for Appellant Livengood as required by section 124.34 of the Ohio Revised Code.

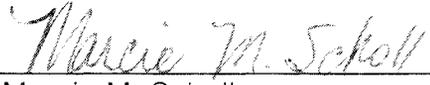
The argument that because section 124.34 of the Ohio Revised Code was amended in July 2007 to no longer require the filing of a section 124.34 Order with this Board, the language remaining in section 124.34 of the Ohio Revised Code should be ignored, is not persuasive. While it is true that the amendment 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

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

The fact that Appellant Livengood voluntarily demoted herself from an unprotected unclassified position of Deputy Director 6 to a highly protected Career Professional service position of Human Capital Management Manager just after an election that determined there would be a change in the administration of the State does not go unnoticed. She tried to manipulate the system just as Appellee tried to manipulate the system by placing her in a probationary period which does not exist for Career Professional service employees. The law and its applicability exists for the benefit of employer and employee alike and the only way that just results will occur is if all parties follow the letter and intent of the law.

Therefore, I respectfully **RECOMMEND** that the removal of Appellant Livengood be **DISAFFIRMED** pursuant to the Appellee's failure to comply with sections 124.34 and 5501.20 of the Ohio Revised Code.



Marcie M. Scholl
Administrative Law Judge

mms