

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

SHONITA M. BLACK,

Appellant,

v.

Case No. 11-REM-05-0176

HAMILTON COUNTY PUBLIC DEFENDER COMMISSION,

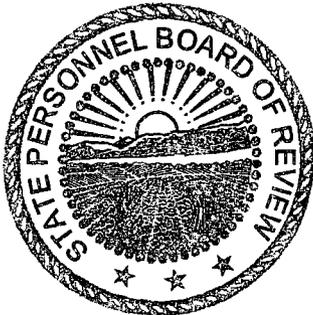
Appellee

ORDER

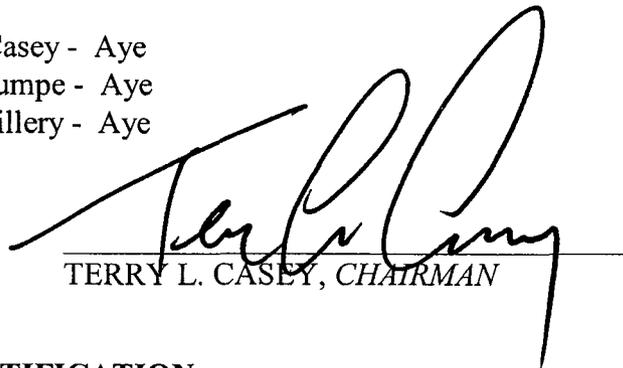
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the record and a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that the instant appeal be **DISMISSED** for lack of jurisdiction pursuant to O.R.C. § 124.11(A)(28).



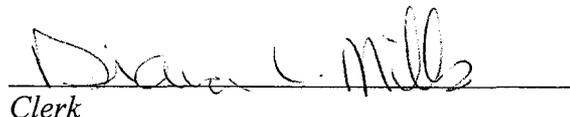
Casey - Aye
Lumpe - Aye
Tillery - Aye


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, November 2, 2012.


Clerk

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

11-0176

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

Shonita M. Black,

Case No. 11-REM-05-0176

Appellant

v.

September 21, 2012

Hamilton County Public
Defender Commission,

Appellee

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for consideration pursuant to Appellee's Motion to Dismiss, Appellant's Memorandum in Opposition to Appellee's Motion to Dismiss and Appellee's Reply to Appellant's Memorandum in Opposition. Appellant was removed from employment with Appellee; prior to her removal, Appellant held the position of Assistant Public Defender. Appellee asserts that Appellant's position was unclassified pursuant to R.C. 124.11(A)(28).

Case law has established that an employee's duties must be examined in order to determine whether an employee is unclassified. *State, ex rel. Charlton v. Corrigan* (1988), 36 Ohio St.3d 68. The record contains undisputed evidence regarding Appellant's job duties provided in support of the parties' filings; no additional evidentiary hearing was held.

Appellant reiterated in her Memorandum in Opposition an earlier claim that her removal was retaliatory in nature. That claim was the subject of a separate appeal, SPBR Case No. 11-WHB-05-0177, which was dismissed by this Board for failure to establish compliance with the reporting requirements of R.C. 124.341.

STATEMENT OF THE CASE AND FINDINGS OF FACT

In accordance with O.A.C. 124-11-07(A)(2), Appellee provided along with its Motion to Dismiss supporting affidavits based on personal knowledge, asserting that in the course of her employment Appellant was assigned to be an attorney guardian

ad litem, and was part of the dedicated guardian ad litem division of the Hamilton County Public Defender's Office. Appellant carried a caseload of thirty-five to forty cases in which she was appointed to act in the dual role of attorney and guardian ad litem for abused youth; she also acted as attorney for one social worker who served as guardian ad litem on a similar number of cases.

Appellant independently investigated the circumstances of each case, conducted visits with family and friends of the youths involved, and advocated on behalf of the youths to whose cases she was assigned. Appellant also performed the other functions of an attorney, including filing motions, presenting evidence, cross-examining witnesses and conducting legal research. In her role as attorney for a social worker, Appellant served as legal representative for the social worker's legal matters.

Appellant was not required to obtain the Public Defender's signature on court filings, and had complete discretion to handle all aspects of her cases from start to finish. Appellant had very little direct supervision and was responsible for making her own decisions on her cases. Her supervisor provided advice but did not review her decisions prior to their implementation. Appellant had independent authority to enter into plea agreements. She set her own work schedule and had access to highly confidential information. Appellant did not need prior permission to contact county officials or to attend legal education seminars.

In her Memorandum in Opposition, Appellant noted that no evidence was provided to establish that the Hamilton County Public Defender had personally completed the requisite training required to serve as a guardian ad litem; she confirmed, however, that she had maintained the necessary education requirements to do so. Appellant also asserted that Appellee's discipline, which was based in part on her failure to notify the division director that she was travelling out of state, negated the director's assertion that Appellant had the ability to arrange her own work hours. Finally, Appellant argued that her discipline for failing to timely submit a brief negated her supervisor's statement that he did not review Appellant's decisions prior to implementation.

Appellant's Memorandum in Opposition did not identify any other specifically disputed facts, as required by O.A.C. 124-11-07(A)(2). Accordingly, I find that the balance of the evidence regarding Appellant's job duties while employed by Appellee as an Assistant Public Defender is undisputed.

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 asserts that Appellant's position fell within the unclassified service pursuant to R.C. 124.11(A)(28). R.C. 124.11(A)(28) exempts from the classified service:

(28) For cities, counties, civil service townships, 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 their principals or holding a fiduciary relation to their principals. (emphasis added)

Accordingly, this Board must consider whether Appellant acted for or in the place of a county elective or principal executive officer, and/or whether the duties performed by Appellant placed her in a fiduciary relationship to that individual.

In reviewing the above-cited sections of the Ohio Revised Code, I find that Appellant did not act for or in the place of a county elective officer. As an Assistant Public Defender, Appellant performed her duties on behalf of then Hamilton County Public Defender, Shelia Kyle-Reno. The Public Defender is not an elective county officer, as referenced in R.C. 124.11(A)(28), however, this Board may also consider whether or not she was a principal executive officer.

In addition to the statutory responsibilities placed upon a county public defender by R.C. 120.16, in Hamilton County the Public Defender also acts through staff as guardian ad litem for alleged or adjudicated abused, neglected, or dependent children in Hamilton County. In order to carry out these and other responsibilities and duties of the office, the Public Defender has the authority to appoint assistant public defenders and other personnel, which also implies the authority to remove them. See, *State ex rel. Minor v. Eschen*, (1995) 74 Ohio St.3d 134, 139. The Public Defender maintains an office, keeps and maintains related financial records and collects fees which are paid into the general revenue fund of the county treasury. I find that the Public Defender is a "principal executive officer" in Hamilton County, as referenced in R.C. 124.11(A)(28).

Therefore, this Board must now consider whether the scope and nature of Appellant's job duties demonstrate that she was authorized to act for and in place of the Public Defender or that she held a fiduciary relationship to her. No evidence was presented to demonstrate that a delegation of power was made to Appellant by the Public Defender to act as her agent, or otherwise to act for or in her place. Absent such a delegation, I find that Appellant did not act "for and in the place of" the Public Defender.

This Board's determination may now turn to the question of whether or not Appellant held a fiduciary relation to her principal, the Hamilton County Public Defender. The term "fiduciary relationship" is not defined by the Revised Code, but is 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.

As previously noted, the court in *State, ex rel. Charlton v. Corrigan* (1988), 36 Ohio St.3d 68, indicated that an examination of an employee's job duties is necessary when determining the employee's classified or unclassified status. Job duties may be sufficient to place an employee in a fiduciary relationship even when exercised infrequently or even when only some of the duties are of such a nature. *Rarick v. Geauga County Board of Commissioners* (1980), 63 Ohio St.2d 34; *Smith v. Sushka* (May 18, 1995), Washington App. Nos. 94CA37, 94CA38, unreported, 1995 WL 299895; *Honaker v. Scioto County Common Pleas Court* (Dec. 6, 1993), Scioto App. No. 92-CA-2087, unreported, 1993 WL 524974.

As noted in the Statement of the Case and Findings of Fact, it is undisputed by the parties that Appellant carried a caseload of thirty-five to forty cases in which she was appointed to act in the dual role of attorney and guardian ad litem for abused youth. Appellant also acted as attorney for a social worker who served as guardian ad litem on a similar number of cases.

Appellant independently investigated the circumstances of each case, conducted visits with family and friends of the youths involved, and advocated on behalf of the youths to whose cases she was assigned. Appellant appears to have performed these duties primarily in her role as a guardian ad litem.

In her role as an attorney, Appellant performed additional duties, both for those cases assigned to her and the cases assigned to the social worker. The duties she performed in her role as an attorney included filing motions, presenting evidence, cross-examining witnesses and conducting legal research. Appellant was not required to obtain the Public Defender's signature on court filings; she had complete discretion to handle all aspects of her cases from start to finish and had independent authority to enter into plea agreements. She had very little direct supervision and was responsible for making her own decisions on her cases. Appellant had access to highly confidential information. She did not need prior permission to contact county officials or to attend legal education seminars.

In *Johnson-Hebb v. Clinton County Public Defender* (2010), 187 Ohio App.3d 17, the Twelfth District Court of Appeals upheld this Board's determination that a Clinton County assistant public defender held a fiduciary relationship to the Public Defender and was an unclassified employee pursuant to R.C. 124.11(A)(28). The duties performed by Johnson-Hebb and the undisputed duties performed by this Appellant in her role as attorney in her assigned cases are virtually identical. Both employees had nearly absolute discretion to manage their own caseloads, handled all aspects of their cases from start to finish, and did not need either the Public Defender's signature on court filings or prior permission to enter into plea agreements.

The appeals court in *Johnson-Hebb* noted that "the hallmarks of a fiduciary relationship are the need for extraordinary trust and confidence to be placed in an employee and a concomitant expectation of the utmost loyalty and integrity from the employee." The appeals court affirmed the reasoning of the trial court, observing that "as an attorney representing persons charged with crimes in the courts, an APD's duties require much more than technical competency. How APD's performed their legal duties reflected on [the Public Defender's] own professional reputation and competence as well as the reputation of this office. Accordingly, [the Public Defender] is entitled to expect a high degree of trust, confidence, reliance, integrity and fidelity from his APDs."

As an Assistant Public Defender assigned to the dedicated guardian ad litem

Shonita M. Black
Case No. 11-REM-05-0176
Page 6

division of the Hamilton County Public Defender's Office, Appellant assisted the Public Defender in discharging the duties of her office and Appellant's job performance reflected directly on the Public Defender. Appellant had broad discretion to manage and discharge her caseload with minimal supervision, and as such I find that the evidence contained in the record, along with case law directly on point, is sufficient to support a conclusion that Appellant held a fiduciary relation to her principal, the Hamilton County Public Defender. Accordingly, the provisions of R.C. 124.11(A)(28) exempt Appellant's position from the classified civil service.

Therefore, because Appellant occupied a position in the unclassified service at the time of her removal from employment, this Board lacks jurisdiction to consider her appeal and I respectfully **RECOMMEND** that the appeal be **DISMISSED**, pursuant to the provisions of R.C. 124.03.



Jeannette E. Gunn
Administrative Law Judge

JEG: