

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Audrey Flinn,

Appellant,

v.

Case No. 2012-RED-03-0045

Summit County Alcohol Drug Addiction & Mental Health Services,

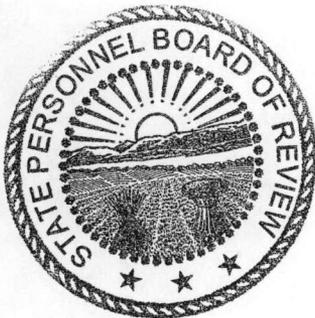
Appellee.

ORDER

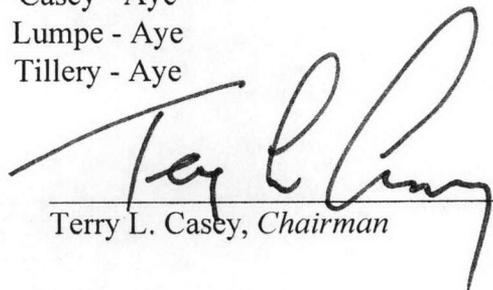
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 jurisdiction over its subject matter due to untimely filing, pursuant to O.A.C. 124-1-03 (E) and due to Appellant's failure to demonstrate that a "reduction in pay" occurred, pursuant to R.C. 340.04 (E) and O.A.C. 124-1-02 (Y).



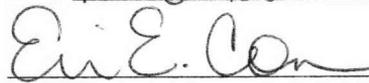
Casey - Aye
Lumpe - Aye
Tillery - Aye


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, December 04, 2013.


Erin E. Con
Clerk

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

ENTERED
12/4/13 ee

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

AUDREY FLINN,

Case No. 12-RED-03-0045

Appellant

v.

October 30, 2013

SUMMIT COUNTY ALCOHOL DRUG ADDICTION
AND MENTAL HEALTH SERVICES,

Appellee

JAMES R. SPRAGUE
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came to be heard at record hearing on February 22, 2013 and June 20, 2013. Present at the hearing was Appellant, who was represented by Dennis R. Thompson, Attorney at Law. Appellee, Summit County Alcohol, Drug Addiction and Mental Health Services Board (ADM Board), was present through its designee, Jackie Steward, Manager of Administration. Appellee was represented by Thomas E. Green and Julie A. Trout, Attorneys at Law.

There was substantial development of the record prior to the occurrence of the hearing in this matter. This development included two telephone pre-hearings, a number of telephone conferences with counsel prior to and subsequent to hearing, and a robust motions practice.

Counsel for the parties are to be individually and jointly commended for their diligence, professional, and effective representation of their respective clients in this matter.

Post-Hearing Briefs

By agreement of the parties, a post-hearing schedule was established. However, that schedule had to be extended due to intervening circumstances neither created by nor under the control of the parties.

Accordingly, on October 11, 2013, Appellee timely filed Appellee County of Summit Alcohol, Drug Addiction & Mental Health Services Board's Post Hearing

Brief. On October 11, 2013, at 5:08 p.m. (*i.e.* after 5:00 p.m.), Appellant fax filed a Motion for Extension to File Post Hearing Brief; due to unforeseeable and unavoidable events. On October 14, 2013, at 9:29 a.m., Appellant fax filed Appellant's Proposed Findings of Fact and Conclusions of Law. Because October 14, 2013 was the date the State of Ohio celebrated Columbus Day, the offices where Appellant's brief was received were closed on October 14, 2013. Accordingly, Appellant's aforementioned motion for extension of time and Appellant's post hearing brief were time stamped in as received on October 15, 2013, the first working day after October 14, 2013.

On October 15, 2013, Appellee filed Appellee's Motion to Exclude Appellant's Post Hearing Brief and Findings of Fact and Conclusions of Law. On October 23, 2013, Appellant filed Appellant's Brief in Opposition to Appellee's Motion to Exclude Proposed Findings of Fact and Conclusions of Law.

Appellee's motion to exclude Appellant's post-hearing brief is factually accurate. Further, this Board understands Appellee's concern regarding the fact that Appellant's brief was not filed within the time parameters set for same. However, granting Appellee's motion to exclude could place upon Appellant an undue hardship without rendering any discernable benefit to the instant record. This is particularly so, since it appears Appellant bears the burden of proof in this matter. Accordingly, the undersigned must respectfully decline to grant Appellee's motion to exclude Appellant's post-hearing brief.

Further, the parties should consider as admitted into the record all exhibits properly moved into the record by respective counsel.

Lack of Jurisdiction – Appeal Untimely Filed

While provided with ample opportunity to do so, Appellant has failed to demonstrate that this Board possesses jurisdiction over the subject matter of this appeal. This is the case because Appellant failed to timely file the instant appeal pursuant to O.A.C. 124-1-03 (E). Indeed, Appellant filed more than one year after Appellant received actual notice of Appellee's action. Such a filing not only exceeds the 90-day time limit set forth in O.A.C 124-1-03 (E), but also far exceeds even the discretionary limit also provided in O.A.C. 124-1-03.

No "Reduction in Pay" Occurred

Further, even if we presume, for the sake of argument, that Appellant's appeal *is* timely filed, Appellant has also failed to demonstrate that Appellant suffered a "reduction in pay" as defined in O.A.C. 124-1-02 (Y). This is because, pursuant to R.C. 340.04 (E), (and secondarily pursuant to ADM Board Policy 1.02), Appellee's Executive Director (ED) can ... "Employ and remove from office such employees and consultants in the classified service ...".

Additionally, pursuant to that authority, in this case, the current ED, Gerald Craig, merely red-lined or froze Appellant's pay at its current level. That level had actually increased following a three percent raise Appellant received in January 2010 and that raise has continued to be in effect and paid, even with ED Craig's actions that froze Appellant's pay.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

At hearing, both parties called the same three witnesses.

Testifying at hearing was **Jackie Steward**, the Manager of Administration for the ADM Board.

Also testifying at hearing was **Gerald Craig**, the ADM Board's Interim Executive Director from approximately June 2010 to March 2011 and the ADM Board's Executive Director since March 2011.

Finally, testifying at hearing was **Appellant, Audrey Flinn**, who serves as Claims Adjudicator for the ADM Board.

Appellant's, Audrey Flinn's, job title is Claims Adjudicator, a classified civil service position, for Appellee, Summit County Alcohol, Drug Addiction and Mental Health Services Board. Appellant has worked for the ADM Board since July 19, 1999.

Prior to encumbering her current position, Appellant worked in the accounting section for the ADM Board. Her current compensation is \$18.55 per hour. This rate includes a three percent increase she received in January, 2010.

In 2009, Appellee authorized an audit by a third party, J.K. Evans and Associates, to establish a salary compensation system (hereinafter Evans System, Evans Study, or Study). The Evans System assigns and places each position within the organization into a Pay Grade. Each Pay Grade includes Steps of salary increases based upon seniority in grade.

The Evans Study initially placed the Claims Adjudicator in Pay Grade 6 within Step 5 and 6. This was because then-ADM Board Executive Director William Harper applied a "point factor exception" and placed the Claims Adjudicator job within a higher Pay Grade.

This salary compensation package required that Appellant's position receive a three percent increase added to her hourly wage in January, 2010. It also required that Appellant's position receive an additional five percent wage increase effective on Appellant's employment anniversary date in July, 2010.

The Evans Study included Position Descriptions and policies of Authority and Responsibility.

A discrepancy existed in the Claims Adjudicator description. The published section read that the Claims Adjudicator "assists with front office coverage." Appellant submitted that she has never helped with the front desk and crossed that line out; when J.K. Evans was auditing the Claims Adjudicator position before the Evans Study was completed.

Section 1: Compensation Program Policies, 1.02 Authority & Responsibility, established the following policy:

Executive Director

e. Serves on point factor team with Manager of Administration. Maintains final authority for point factor determinations.

The Evans System (self-evidently proposed by J.K. Evans and Associates) was ratified by the ADM Board of Directors at their meeting in December, 2009.

In early 2010, Appellant was advised that her position as Claims Adjudicator was assigned a Pay Grade of 6 and she would be receiving an additional salary increase of five percent in July, 2010 on her anniversary date of employment.

On August 4, 2010, Appellant checked the Summit County employee's website to verify her increase. At that time, the web site did not indicate that Appellant's hourly rate of pay had increased on her anniversary date.

Gerald Craig was appointed as the Board's Interim Executive Director in approximately June, 2010. Pursuant to that appointment, Mr. Craig reached out to J.K. Evans and Associates and requested that Evans re-analyze the Claims Adjudicator position. ED Craig provided additional information for J.K. Evans to include in their Study.

As a result of the additional information and analysis received from J.K. Evans, ED Craig re-assigned the Claims Adjudicator position to Pay Grade 3. He also removed the point factor exception that had previously permitted the position to be assigned to a higher Pay Grade.

(Substantial testimony was given at hearing comparing the Claims Adjudicator position to other positions within the ADM Board.)

Appellant followed internal procedures and discussed the lack of her hourly rate increase with the Board's Manager of Administration, Jackie Steward, and also with Gerald Craig.

At Appellant's August 24, 2010 meeting with Gerald Craig, Appellant was handed a letter, dated August 19, 2010, regarding her compensation and position.

This letter stated that the ADM Board was changing her Pay Grade to Pay Grade 3 but not lowering her current compensation. This in effect "red-lined" her hourly wage, which will stay at \$18.55, until it falls in step with Pay Grade 3. Appellant then filed a grievance, in email form, directly with the Chairperson of the ADM Board of Directors.

Appellant did not receive correspondence from the ADM Board of Directors and sought counsel from Lynda Harvey Williams, Attorney at Law. On March 10,

2011, Lynda Harvey Williams sent a letter to Gerald Craig asking that the Appellant's five percent increase, Pay Grade and previous Step be reinstated.

On June 10, 2011, Marvin D. Evans, an Assistant Prosecuting Attorney for Summit County, responded. This correspondence served as a formal response on behalf of the ADM Board of Directors and upheld the current Executive Director's (Gerald Craig) authority to change the Appellants Pay Grade.

On March 12, 2012, Appellant filed an appeal with the State Personnel Board of Review.

I note that I incorporate, herein, by reference any Findings set forth above, whether express or implied.

CONCLUSIONS OF LAW

Appellant has alleged that her salary was improperly reduced when Appellee changed her Pay Grade. Pursuant to O.A.C. 124-5-02, **the employee** so alleging **shall prove by a preponderance of the evidence** that the action complained of (here an alleged reduction in pay) occurred.

The facts of this case show that Appellee, the ADM Board, sanctioned a third party to analyze salaries paid to, and job responsibilities assigned to, all of its employees. From this initial review, Appellee established pay and policies for the organization. After the initial review, the previous Executive Director wrote in a point factor exception for Appellant's position, Claims Adjudicator, keeping that job at a Pay Grade of 6. The ADM Board of Directors approved the plan, with the exceptions, in December, 2009.

After receiving a salary increase of three percent in January 2010, which the plan's exception called for, but before the expected five percent anniversary bump in July, 2010, the new Executive Director for Appellee removed Appellant's point factor exception, of Pay Grade 6, from the established pay system. The effect of this action was to red-line Appellant's salary at \$18.55; until such time as that salary corresponds with a Pay Grade of 3 and appropriate steps within.

The ADM Board Executive Director has independent authority to set compensation for classified employees, including the authority to establish *and delete* point factor exceptions

Appellee states that the Executive Director of the ADM Board has the authority to adjust employees' respective Pay Grades without the ADM Board of Directors' approval. For the following reasons, it appears this argument has merit.

R.C. 340.04 is entitled "Executive director of board - powers and duties" and reads, in pertinent part:

In addition to such other duties as may be lawfully imposed, the executive director of a board of alcohol, drug addiction, and mental health services shall:

(E) Employ and remove from office such employees and consultants in the classified civil service and, subject to the approval of the board, employ and remove from office such other employees and consultants as may be necessary for the work of the board, and fix their compensation and reimbursement within the limits set by the salary schedule and the budget approved by the board; (emphasis added)

Applying the pertinent Revised Code provisions to the facts of this matter, it appears, and I find, that the Executive Director of the ADM Board has the authority to change an employee's Pay Grade.

R.C. 340.04 (E) states that, among other things, the E.D. can employ and remove from office employees in classified civil service.

It is uncontested that Appellant's position of Claims Adjudicator for the ADM Board falls within classified civil service.

Although R.C. 340.04 does not expressly state that the E.D. has power to change one's salary, it can easily be inferred from that provision. This is because R.C. 340.04's broad "**appointing authority**" that it essentially grants to the E.D. -- to employ and remove -- includes the (lesser) authority to red-line or freeze salaries for any reason, not otherwise violative of law.

Appellant could argue that the E.D. must have Board approval to employ or remove from office employees, because the second clause of R.C. 430.04 (E) reads as such. Yet, the initial power granted to the E.D. to employ and remove those in classified civil service comes before the statement of "subject to approval of the board" which is preceded by "and."

It would appear, then, that the General Assembly authored this provision so as to give the E.D. very broad authority over classified civil servants. Yet, it appears that, to employ or remove those *not* classified civil service, the E.D. *would* need Board approval.

Accordingly, it appears that, in this instance, ED Craig had the authority to red-line the Appellant's hourly rate at \$18.55 until it corresponds to Pay Grade 3, just as ED William Harper had the authority to initially establish a point factor exception for the position at issue, herein.

The ADM Board has provided the Executive Director with final authority to make point factor determinations

In order to ensure the development of a complete record, we address Appellant's assertion that the ADM Board must approve all actions affecting employees' pay.

To reiterate, we have noted, above, that the General Assembly appears to have designated the Executive Director of ADM Boards as the appointing authority for classified employees of the Board.

Thus, while it may be mere surplusage for our purposes here, we note that the Summit County **ADM Board's Program Policies at Section 1, Sub-section 1.02 expressly provide the Executive Director the "Authority [and] Responsibility" to " ... Maintain ... final authority for point factor determinations."**

Appellant suffered no "reduction in pay"

Ultimately, Appellant is appealing what she sees as a reduction in pay. O.A.C. 124-1-02 (Y) defines a reduction in pay as: " ... an action which diminishes

an employee's pay." Appellant's pay does not appear to have been reduced; since her pay had not *diminished* by virtue of ED Craig's actions.

After her January 2010 increase, Appellant has an hourly rate of \$18.55. When Appellee withdrew Appellant's point factor exception and changed her Pay Grade, Appellee did not change or diminish Appellant's hourly rate. Appellee simply froze Appellant's salary until it aligned with the new Pay Grade and available seniority Step. **Appellant continues to be paid at the rate of \$18.55 per hour.**

Appellant's appeal is untimely filed

Finally, we turn to the issue of whether Appellant's appeal is timely filed.

O.A.C. 124-1-03 is entitled "Time limits for filing appeals". O.A.C. 124-1-03 (E) deals with alleged reductions in pay or position which do not involve an R.C. 124.34 Order.

O.A.C. 124-1-03 (E) indicates such appeals:

... shall be filed with the board, in writing, within ninety days after receipt of notice of the reduction or if no notice is given, within ninety days of the actual imposition of the reduction. The appeal time may be extended within the discretion of the board.

In the present case, Appellant would have needed to have filed her appeal within 90 days of knowledge that her pay was red-lined at \$18.55. **Appellant filed on March 12, 2012.**

Appellant acknowledges that she was aware of the lack of a salary increase on August 4, 2010; from her review of information provided on the Summit County employee website. Moreover, Appellant's knowledge was reinforced on **August 24, 2010**; when E.D. Gerald Craig handed her written notice.

Even if this Board determines that Appellant did not have sufficient notice until **June, 2011** when Assistant Prosecuting Attorney Marvin D. Evans sent a correspondence to Appellant's counsel at that time, the period of more than eight months far exceeds this Board's 90-day time limit. Indeed, even with the discretion that O.A.C. 124-1-03 (E) provides to this Board, such a lengthy delay in Appellant's filing of her appeal cannot be overlooked. Thus, I find the date that Appellant filed

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her appeal with this Board far exceeds the time limit set forth in O.A.C. 124-1-03 (E).

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **DISMISS** the instant appeal for lack of jurisdiction over its subject matter due to untimely filing, pursuant to O.A.C. 124-1-03 (E) and due to Appellant's failure to demonstrate that a "reduction in pay" occurred, pursuant to R.C. 340.04 (E) and O.A.C. 124-1-02 (Y).



JAMES R. SPRAGUE
Administrative Law Judge

JRS: