

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

ERIC MILLER,

*Appellant,*

v.

Case No. 12-REM-04-0059

YOUNGSTOWN STATE UNIVERSITY,

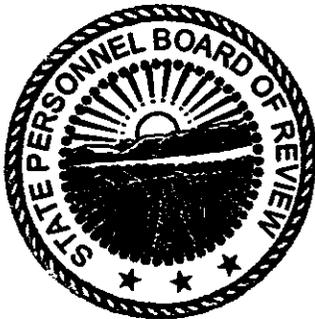
*Appellee*

**ORDER**

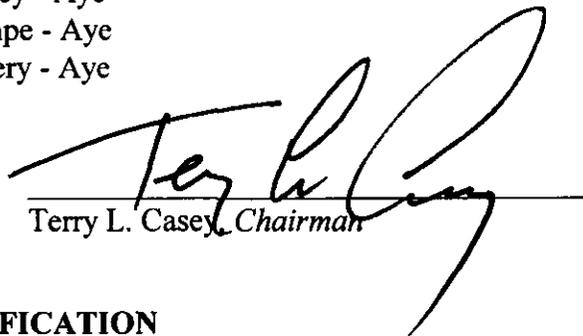
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Appellee's motion is **GRANTED** and the instant appeal is **DISMISSED** for lack of jurisdiction over its subject matter, pursuant to Ohio Revised Code Sections 124.03 (A)(1) and 124.30 (B).



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, July 11, 2012.



  
Erin E. Conroy  
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**

ERIC MILLER,

Case No. 12-REM-04-0059

*Appellant*

v.

June 6, 2012

YOUNGSTOWN STATE UNIVERSITY,

JAMES R. SPRAGUE

*Appellee*

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause comes on due to Appellant Eric Miller's March 21, 2012 timely filing of an appeal with the State Personnel Board of Review in response to receiving notice *via* a letter that he was terminated from his position as a university Police Officer with Appellee, Youngstown State University Police Department (YSU), effective March 30, 2012. On May 9, 2012, Appellee filed Appellee's motion to dismiss, memorandum in support, and accompanying documents, including the Affidavit of YSU Police Chief John Beshara. On May 23, 2012, Appellant filed a memorandum *contra* to the Appellee's motion to dismiss.

Appellant's removal was instituted by Appellant's supervisor, YSU Police Chief John Beshara, who characterized Appellant as an *intermittent* Police Officer, thus asserting that Appellant's position fell within the unclassified service pursuant to, *inter alia*, R.C. 124.30. As such, Appellee asserts, Appellant serves at the pleasure of the appointing authority.

Conversely, Appellant asserts, he should not have been considered an unclassified employee, but rather a classified employee whose termination would need to be supported by good cause.

R.C. 124.03 generally limits this Board's merit jurisdiction to employees whose positions fall within the classified service. Accordingly, for this Board to hear the instant appeal, jurisdiction over its subject matter must be established.

**CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT**

On September 28, 2008, Appellant received an appointment to the position of intermittent Police Officer with YSU. On March 6, 2012, Appellant received notice of the termination and, as noted, thereafter timely filed his appeal with this appeal with the Board. He continued on the payroll (but accrued no additional hours) as an intermittent Police Officer with YSU until March 30, 2012, which was the effective date of the termination of his appointment.

In YSU Fiscal Year 2010/2011, (which at YSU runs from July 1 to June 30 of the subsequent year), Appellant worked approximately 1,005 hours. Further, through December 31, 2011, Appellant worked approximately 649 hours. At no time during his employment with the YSU Police Department was Appellant disciplined.

Appellant applied for the aforementioned Police Officer position on January 4, 2008 and received his appointment on September 28, 2008. The application forms that Appellant filled out as well as the appointment forms completed by the Appellee contained language throughout that described the position of university Police Officer I as "classified" and "intermittent" in various parts.

In a letter dated October 2, 2008, Appellant received from Appellee confirmation of his provisional appointment to the position of "Officer I (intermittent)." That same letter refers to Appellant as a "classified employee." The letter also indicated that "... intermittent help is utilized as the need arises, and entirely at the discretion of the department."

Appellant contends that he was a classified employee and not an unclassified employee. Thus, he essentially argues that this Board possesses jurisdiction over the subject matter over his removal pursuant to R.C. 124.03 (A)(1).

We note that R.C. 124.30 (B) indicates that "[p]ersons who receive temporary or intermittent appointments are in the unclassified civil service and serve at the pleasure of their appointing authority."

The definition of an "intermittent employee" can be found in Ohio Administrative Code Section 123:1-47-01 (A)(40), which states that an intermittent appointment is one "... where an employee is required to work less than one thousand hours per fiscal year."

Appellant contends that he worked 1,005 hours in YSU FY 2010/2011 and was on track to work in excess of 1,000 hours for YSU FY 2011/2012. Thus, he asserts, he could not have been an intermittent employee.

The Revised Code and the Ohio Administrative Code are silent as to whether working in excess of 1,000 hours in a fiscal year transforms an unclassified, intermittent employee into a classified employee.

From the facts of this case, it cannot be determined whether Appellant was "required to work" fewer than the 1,005 hours that he accrued in YSU FY 2010/2011.

From the appointment letter issued to Appellant from October 2, 2008, it was conveyed to him that ". . . intermittent help is utilized as the need arises, and entirely at the discretion of the department." Therefore, this *de minimis* excess of 5 hours worked in YSU FY 2010/2011 likely cannot form a dispositive basis for Appellant's argument that he was not an intermittent employee.

Indeed, it is difficult to rationalize a finding that merely working slightly in excess of 1,000 hours in a *single* fiscal year takes an employee into the classified service. This would set forth a standard by which numerous intermittent employees could transform their intermittent, unclassified appointments into classified civil service appointments merely by slightly eclipsing 1,000 hours of work within a fiscal year, arguably making almost any designation of an intermittent position superfluous.

As Appellee has stated and has supported through affidavit, Appellant has at all times of his employment served in an intermittent capacity. Appellant has offered evidence of his purported classified status in the form of records that indicate that, for YSU FY 2010/2011, Appellant worked in excess of 1,000 hours. He has also offered into evidence the several forms that Appellant and Appellee filled out concerning the application and appointment process that do contain some language referencing classified employment. Thus, while the record is mixed on this issue, the weight of the evidence appears to require a finding that Appellant served at all times as an intermittent employee with the YSU Police Department, and I so find.

Appellant has cited authority for the proposition that merely labeling an employee as "intermittent" is not in of itself conclusive as to whether the employee is within the classified or unclassified service. He also cites authority that this Board may determine an employee's status regardless of how the employee has been designated by the appointing authority. This discretionary authority only underscores the need for an Appellant to offer substantial evidence to support the plea that this Board amend or correct an employee's status and provide whatever remedy may accrue as a result thereof.

### CONCLUSIONS OF LAW

This case presents this Board with the question of whether Appellant served in a classified position, which would provide this Board with jurisdiction over the subject matter of Appellant's removal? Based on the findings set forth, above, and for the reasons set forth, below, this Board should answer this question in the negative and, so, should dismiss the instant appeal.

To reiterate, pursuant to R.C. 124.03 (A)(1), the Board may only hear merit cases arising from employees in classified civil service positions. To further reiterate, pursuant to R.C. 124.30 (B), intermittent employees are unclassified and, thus, cannot avail themselves of the Board's merit jurisdiction.

Appellant was hired and at all times worked as an intermittent employee. The Ohio Revised Code sets forth that intermittent employees are to be in the unclassified service. Thus, their removals are excluded from the merit review of the Board. Accordingly, this Board should find that Appellant served as an unclassified employee and, commensurately, grant Appellee's motion to dismiss.

### RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **GRANT** Appellee's motion and **DISMISS** the instant appeal for lack of jurisdiction over it subject matter, pursuant to R.C 124.03 (A)(1) and R.C. 124.30 (B).

  
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JAMES R. SPRAGUE  
Administrative Law Judge