

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Richard Bryant,

Appellant,

v.

Case No. 2013-LAY-10-0297

Butler County Care Facility,

Appellee,

ORDER

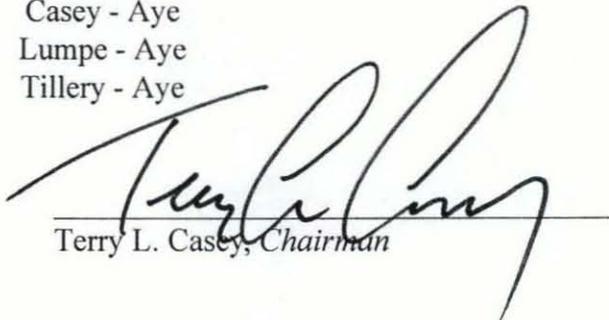
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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** due to a lack of jurisdiction over an unclassified employee pursuant to Ohio Revised Code Section 124.03.



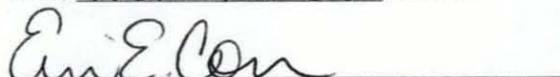
Casey - Aye
Lumpe - Aye
Tillery - Aye


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 20, 2014.


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**

Richard Bryant

Case No. 2013-LAY-10-0297

Appellant

v.

August 29, 2014

Care Facility Butler County

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter came on for record hearing on March 19, 2014. Present at the hearing was Appellant Richard Bryant, appearing *pro se* and Appellee Care Facility Butler County designee Charles Demidovich, Administrator, represented by Gary Sheets, Attorney at Law.

Appellant Bryant's position of Assistant Administrator was abolished effective November 1, 2013. He appealed his abolishment to this Board. Appellee then filed a Motion to Dismiss, on March 5, 2014, alleging that this Board did not possess jurisdiction over the appeal as Appellant Bryant was an unclassified employee pursuant to sections 124.11(A)(8) and (28) of the Ohio Revised Code. Evidence at hearing consisted of the job duties of Appellant Bryant to determine if those duties placed him into the unclassified service at the time of his job abolishment and evidence was also presented on the propriety of the job abolishment. If this Board finds that Appellant Bryant's duties placed him in the unclassified service, then this Board is divested of jurisdiction over the appeal, as pursuant to section 124.03 of the Ohio Revised Code, this Board only possesses jurisdiction over classified employees. If, however, this Board determines Appellant Bryant was a classified employee, then the propriety of the job abolishment will be ruled on.

STATEMENT OF THE CASE

Charles Demidovich was the first witness for the Appellee and he testified he has been the Administrator of the Care Facility since August 27, 1997. As Administrator, he provides overall direction, is responsible for the finances and reports to the Commissioners. He explained the Care Facility is a skilled nursing facility and adult day service center. In October, 2013, there were approximately 152 employees, but after the job abolishments and layoffs, there are currently 131 employees. Mr. Demidovich stated the Facility is certified, meaning there are

Medicare, Medicaid and private pay clients. Medicaid accounts for eighty percent of their funding.

Mr. Demidovich testified Appellant Bryant's duties as of October, 2013, included human resources management, payroll and resident accounts. He acted in Mr. Demidovich's stead in his absence and was responsible for maintaining all of the residents' accounts and the checkbooks, as well as payroll. Mr. Demidovich stated Appellant Bryant supervised the three women who ran the front desk, as he gave them their performance evaluations, assigned them duties and was able to discipline, if needed.

With respect to the residents' accounts, Mr. Demidovich explained the Facility acts as an in-house bank. Each residents gets \$40.00 a month and that money is deposited into an interest-bearing account. It was Appellant Bryant's responsibility to protect those funds and to ensure that all of the accounts balanced. Appellant Bryant supervised the employees handling the accounts. Mr. Demidovich stated that awhile ago, an employee was suspected of taking money from the accounts and that employee was eventually convicted of taking approximately \$11,000 from the accounts. It was Appellant Bryant who conducted a large part of the investigation. As far as payroll duties, Appellant Bryant ensured all employees clocked in and out. He was the only employee responsible for submitting payroll, as he downloaded information from the timekeeping system, KRONOS, moved the information to the green bar and then submitted the information so the employees would get paid. Appellant Bryant also was the only employee during Mr. Demidovich's tenure who did all the banking for the Facility. Subsequent to Appellant Bryant's layoff, payroll has changed as everything is done now through the timekeeping system, which interfaces with the payroll software (MUNIS). It is now a fifteen to twenty minute process.

Mr. Demidovich testified that at the end of 2013, Appellee had to borrow \$375,000 to make it through the year for payroll and to be able to pay the bills. He stated it is going to be fiscally tight for the next four to five years even though in 2012, all the employees took a 6.5% pay cut (gave up lunch). Mr. Demidovich explained the Facility is dependent on reimbursement from Medicare and Medicaid and on May 1, 2014, MyCareOhio was implemented. Prior to that, payments would come in from Medicaid within five days, but now the insurance companies are telling him it will take approximately ninety days before the payments will be distributed. That meant Appellee had to come up with approximately \$1.2 million to meet the shortfall. He talked to the Commissioners in early 2013 about these changes, as in 2013, their costs exceeded what is paid by Medicaid.

The Facility was built in 1830 as a TB clinic and a half-way house. In 1976, a levy was passed to build a new home, which is the building they are currently in. The occupancy runs between 92 to 94% full and half of the building has shared bathrooms, while the other half has two rooms sharing a bathroom. Due to the facility being a county home, they are overstaffed compared to what Medicaid pays. They are also one of five test areas that will convert to an HMO system.

Mr. Demidovich testified he trusted Appellant Bryant to do the human resources duties, deal with personnel issues and to make decisions. He stated Appellant Bryant tended to remain more objective, so he trusted his advice. Mr. Demidovich testified he would not have abolished Appellant Bryant's job if the circumstances were not as they were. He explained no staff that provided direct patient care was laid off, only the support staff. He then identified Appellee's Exhibit A as a table of organization depicting what the facility looked like in October, 2013. Even though the table of organization shows Appellant Bryant on the same line with Mr. Demidovich, he testified Appellant Bryant should be below him with the Director of Nursing. Appellant Bryant worked with environmental services and the dietary department, taking some of the burden off Mr. Demidovich. He testified that in his absence, Appellant Bryant was responsible for all of the non-nursing decisions.

Appellee's Exhibits A-1 and A-2 were identified by Mr. Demidovich as the table of organizations, with A-2 listing the changes made through the abolishments. He testified Appellant Bryant's job was abolished because a central human resources office was being established and the payroll duties were going to be automated. Mr. Demidovich stated it was his opinion that Appellant Bryant's position could be eliminated without over-burdening the facility. He testified Appellant Bryant could not displace any other employee in Central Office as there were no employees left in central office. He could not displace into the Dietary department, as the position must be held by a licensed dietitian, which Appellant Bryant was not. The director of Environmental Services, Ms. Baumann, had more years of service and hence, more retention points than Appellant Bryant, so there was no displacement opportunity there either. Appellee's Exhibit K was identified as the retention point list, completed by the central human resources office and it shows Ms. Baumann with 688 retention points and Appellant Bryant with 610. Mr. Demidovich stated there were no other positions for Appellant Bryant to displace into.

Mr. Demidovich identified Appellee's Exhibit A-3 as the table of organization showing the current staffing, with the exception that the Activities section is under Social Services. All of the employees formerly supervised by Appellant Bryant are now supervised by Mr. Demidovich. Appellee's Exhibit C was identified as the rationale for the abolishments. Mr. Demidovich testified in June or July, 2013, the Commissioners asked him what would bring the costs of the facility down and he

answered that the front office areas could be cut without affecting patient care, which he felt was important to maintain since it is the facility's main purpose. Appellee's Exhibit D was identified by Mr. Demidovich as a letter to Appellant Bryant regarding his layoff, which was written by human resources.

Mr. Demidovich identified Appellee's Exhibits E-1, E-2, F-1, F-2, G-1, G-2, H-1, H-2 and I as notices signed by Appellant Bryant and given to employees to notify them of a pre-disciplinary hearing to determine if discipline will be levied based on the number of attendance points accumulated. Appellant Bryant conducted these hearings for the housekeeping and dietary employees covered by the union contract. Mr. Demidovich conducted the hearings for the nursing section and Appellant Bryant would be the presenter at those hearings. Appellant Bryant had the authority to discipline these employees independently and would review the situation with the department head.

Appellee's Exhibits L-1 and L-2 were identified as Resolutions of the Commissioners giving Appellant Bryant a raise. The three highest paid people at the facility were Appellant Bryant, the director of Nursing and Mr. Demidovich. He testified Appellant Bryant attended some labor programs with him and went to a three day conference as well as a national conference in Arizona approximately one year ago. Appellant Bryant was also on the bargaining team for the new contract two years ago, representing management.

Mr. Demidovich identified Appellee's Exhibit B-2 as a position description for Appellant Bryant's position, although he testified when Appellant Bryant was employed, there was no position description. Mr. Demidovich testified he considered Appellant Bryant to have extraordinary experience, good judgment and he trusted him.

On cross examination Mr. Demidovich testified there currently exists a boiler plate contract which has to be signed by a vendor and if the vendor does not sign the contract, no payment will be forthcoming. He testified that all contracts used to go through the Commissioners and this was done for approximately a one-year period. Contracts under a certain dollar amount could go through without the approval of the Commissioners. Appellant Bryant was responsible for the contracts for the yellow pages and the copier.

Mr. Demidovich testified that due to some changes in Medicare, the facility is losing some of the long-term population they used to have. Medicaid is turning people over faster due to improved technology and as a result, the people are not staying in the facility for as long as they used to. This means there will be a big drop-off of long-term Medicare patients. He stated employee discipline is now handled by central human resources, banking is done by the Activities section

during the country store time, and the balancing and checkbook work is done by Mr. Demidovich, as well as acting as the liaison with the State for the audits.

Mr. Demidovich confirmed that in 2007, the facility had to borrow approximately \$200,000 from the Commissioners and no lay-offs were implemented then. He also confirmed that employees took a 6.5% pay cut in either 2010 or 2011. He stated that due to the Governor moving the price of a day down and lowering the reimbursements, it contributed to a situation necessitating layoffs. The other reasons were a 2% sequester cut from Medicare in October, 2012, the budget cuts by the Governor and the drug bills having to be paid that were previously paid by Medicaid. Mr. Demidovich testified there may have been some employees who received raises in 2012, like Janie, who obtained her nursing home administrator license, as she is being groomed to be his replacement. Since the layoff, an Activity person and an Assistant Director for Nursing have been hired.

Mr. Demidovich testified he put together a list of positions that could be abolished and showed it to the Commissioners. Some people who held some of those positions chose to retire and then essential and non-essential positions were looked at. He explained that Ms. Turner, a Scheduler, had announced she was going to retire in January, 2014, so she was permitted to do so and not be laid off. When asked why Appellant Bryant could not displace Ms. Gustin, the Assistant Administrator of Accounts Receivable, Mr. Demidovich testified she does all of the billing and all of the accounts receivable, which Appellant Bryant does not have the experience to do. When asked if Appellant Bryant could have displaced the Dietary Director, Mr. Demidovich replied he did not know.

Appellee's Exhibit C is not dated and Mr. Demidovich testified the rationale was submitted to the Commissioners in a report dated August 6, 2013, but that this particular document was created after the job abolishments. Mr. Demidovich testified that with regard to the discipline levied by Appellant Bryant to employees with attendance points, the union contract dictated the amount of discipline based on the number of points accumulated and Appellant Bryant had no authority to change the number of points accumulated by any employee. He testified Appellant Bryant was the fifth highest paid employee. He also stated that the other employees paid higher than Appellant Bryant all possess Nursing licenses and that the Dietary and Therapy Directors are involved in patient care.

On redirect examination Mr. Demidovich testified Appellant Bryant does not possess any licenses and that neither he nor Appellant Bryant could do things such as writing orders and patient care that a nurse can do. Mr. Demidovich stated Appellant Bryant never asked to be trained for another job and he does not have a four year degree. He testified Ms. Gustin asked to take an Administrator-in-training

course approximately two to three years ago and the program requires a four year degree.

Appellant Bryant testified he has a degree in Hospitality Management and worked in food places, so he feels he should have been able to bump into the Dietary Manager position. He testified it was his opinion that the job abolishment was done because of procedural mishaps and that the layoff was punitive and politically motivated. He also took issue with the fact that some employees were allowed to stay employed until they retired. Appellant Bryant testified the argument that he was unclassified was not accurate and that all decisions he made were run through Mr. Demidovich.

On cross examination Appellant Bryant testified he began his employ on March 14, 1994, doing payroll and personnel functions. He started working with resident accounts a year or two after Mr. Demidovich was hired and he agreed that there has to be a certain level of trust to work with a third party's money.

Appellant Bryant testified he felt the layoff was procedurally defective since there were no directions attached to the layoff notice, the notice was not signed and his bumping rights were denied.

Appellant Bryant testified he was not part of the dietary function at the facility as he only supervised the department. He also stated he did not think his travel and training opportunities were changed due to the moratorium in effect but he did feel it was inconsistent with the fiscal situation to allow other employees to have training opportunities.

Appellant Bryant testified he felt his job abolishment was politically motivated due to a complaint about him brought by a relative of someone from the Republican party. He was concerned that this politically connected person was allowed to make accusations about him. An investigation was commenced and he was completely exonerated of any wrong doing, but he felt that the Commissioners were looking for an opportunity to get rid of him after that and this was their opportunity. Appellant Bryant testified a position was created for the person who brought the complaint about him and once she announced her retirement, she was allowed to stay employed until she retired. He stated he was four months shy of health insurance and he was not given the option of staying employed. He believes his layoff was a punitive action for the complaint situation. Appellant Bryant testified Mr. Demidovich had not spoken to him for several months prior to his layoff and he had seen a situation before where Mr. Demidovich did not talk to people prior to knowing they were going to leave or be fired.

FINDINGS OF FACT

After thoroughly reviewing the testimony of the witnesses and the documents admitted into evidence, I find the following facts:

1. Appellant Bryant had been employed with Appellee for approximately twenty years.
2. His title was that of Assistant Administrator and his responsibilities included the supervision of the Dietary and Environmental Services units; payroll; maintaining the accounts of the residents and the vault; and balancing the checkbooks of the Appellee. He also conducted pre-disciplinary hearings and acted in the place of the Administrator in his absence. Appellant Bryant also entered into contracts on behalf of Appellee for the copier and the Yellow Pages.
3. Appellant Bryant also served on the management team during the last negotiations between the Appellee and the employees' union.
4. Appellant Bryant did not have any duties with respect to direct care of the residents.
5. Appellee and Appellant stipulated to the fact that there had been a complaint filed by a relative of a well-connected Republican against Appellant Bryant. The matter was thoroughly investigated and Appellant Bryant was cleared of any wrongdoing and received no discipline.

CONCLUSIONS OF LAW

Appellee has alleged that Appellant Bryant was an unclassified employee at the time of his job abolishment and layoff, pursuant to sections 124.11(A)(8) and (28) of the Ohio Revised Code. Since this Board does not possess jurisdiction over unclassified employees (see section 124.03 of the Ohio Revised Code), this appeal must be dismissed if Appellant Bryant is found to have been an unclassified employee at the time of his job abolishment. Appellee has met its burden of proving by a preponderance of the evidence that Appellant Bryant was an unclassified employee at the time his position was abolished.

Section 124.11(A)(8) of the Ohio Revised Code states as follows:

(A)The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:

(8) Four clerical and administrative support employees for each of the elective state officers, four clerical and administrative support employees for each board of county commissioners and one such employee for each county commissioner, and **four clerical and administrative support employees for other elective 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**; (Emphasis added).

Mr. Demidovich was appointed by the Commissioners as the Administrator and Chief Executive Officer of Appellee. He testified to this fact and Appellant Bryant did not present any evidence to the contrary. As the Administrator, Mr. Demidovich has the power to hire and fire and to abolish positions. Ohio Attorney General Opinion Number 2007-031, (2007) held that "The superintendent of a county home, rather than the board of county commissioners, is the appointing authority, as defined in R.C. 124.01(D), of the officers and employees of a county home for purposes of R.C. Chapter 124."

Section 5155.03 of the Ohio Revised Code states as follows:

The board of county commissioners or operator shall appoint a superintendent, who may be authorized to use the title "administrator," who may reside on the premises of the county home or another building contiguous to the county home, and who shall receive the compensation the board or operator determines. The superintendent or administrator and any administrative assistant shall each be allowed actual necessary expenses incurred in the discharge of official duties. The superintendent or administrator shall perform the duties that the board or operator imposes and shall be governed in all respects by the board's or operator's rules. The superintendent or administrator shall be in the unclassified civil service.

The board or operator may, by resolution, provide for the appointment by the superintendent or administrator of an assistant superintendent or administrator, who shall perform the

duties at the county home prescribed by the superintendent or administrator. The board or operator shall not appoint one of its own board members superintendent or administrator, nor shall any commissioner or trustee be eligible to any other office in the county home, or receive any compensation as physician or otherwise, directly or indirectly, wherein the appointing power is vested in the board of county commissioners or board of county hospital trustees, as applicable. (Emphasis added).

As can be seen from reading the above statute and the holding by the Ohio Attorney General, Mr. Demidovich is the appointing authority for the Appellee, and as such, he had the authority to appoint an Assistant Administrator, as did the Superintendent or Administrator before him. Mr. Demidovich testified Appellant Bryant was employed by Appellee as an Assistant Administrator when he was hired as Administrator and Appellant Bryant did not dispute that as his classification. Appellee's Exhibits L-1 and L-2, Resolution Nos. 05-08-1624 and 06-04-0629, dated August 18, 2005 and April 6, 2006, respectively, both refer to Appellant Bryant as "Assistant Administrator" when increasing his salary.

Pursuant to section 124.11(A)(8) of the Ohio Revised Code, since Appellant Bryant was an administrative support employee to Mr. Demidovich, he is in the unclassified service under that statute. That statute allows the Administrator to designate up to four employees as administrative support employees and thus, as unclassified employees. In looking at the tables of organization submitted into evidence, Appellant Bryant and Janie Gustin are the only two employees with such designation. Therefore, this Board is divested of jurisdiction to hear the appeal of Appellant Bryant since he was an unclassified employee pursuant to section 124.11(A)(8) of the Ohio Revised Code.

Evidence was also presented on the duties performed by Appellant Bryant. Section 124.11(A)(28) of the Ohio Revised Code states as follows:

(A)The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:

(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).

The evidence presented on the duties establishes that Appellant Bryant had the authority to act for and in the place of Mr. Demidovich during his absence and he also performed fiduciary duties. Mr. Demidovich testified Appellant Bryant had the authority, in his absence, to make all non-nursing decisions in the facility. Appellant Bryant did not offer any testimony or documentary evidence to contradict this testimony. Appellant Bryant testified that approximately one or two years after Mr. Demidovich was hired, he began doing the residents' accounts. Appellant Bryant agreed that a certain amount of trust had to be instilled in him by Mr. Demidovich to allow him to be responsible for all of the residents' accounts. In addition to being responsible for the residents' accounts, Appellant Bryant was also responsible for the balancing of and the maintaining of the checkbooks for the Appellee. He was responsible for payroll for the entire facility and entered into several contracts on behalf of the facility. Appellant Bryant also represented management during the negotiations between Appellee and the representatives of the bargaining unit and supervised two departments within the facility, having the authority to conduct performance evaluations and to levy discipline. He also was the personnel officer and Mr. Demidovich testified he relied on Appellant Bryant's advice and counsel.

The duties performed by Appellant Bryant were very similar to those performed by the appellant in the case of *Lawrence v. Hardin Hills Health Center*, 992 N.E.2d 1160, 2013-Ohio-2048 (Ohio App.3 Dist. 2013). In that case, appellant Lawrence had the authority to approve payroll, to balance the home's checkbook, to sign contracts for the home and to transfer funds between accounts. The court in *Lawrence, supra*, found that those duties placed her into a fiduciary relationship with the administrator and that she was unclassified. The same is true with Appellant Bryant. The duties performed by Appellant Bryant, regardless that he was carried "on the books" as a classified employee, are such that by matter of law, he is an unclassified employee.

Inasmuch as the evidence has established that Appellant Bryant, as an Assistant Administrator, was serving in the unclassified service pursuant to section 124.11(A)(8) of the Ohio Revised Code and because of the type of duties he performed and the amount of trust placed in him, he is considered unclassified pursuant to section 124.11(A)(28) of the Ohio Revised Code, this Board is divested of jurisdiction to consider his appeal of his job abolishment. While evidence was presented on the job abolishment, there is no need to discuss that evidence due to the finding of unclassified status on the part of Appellant Bryant.

Richard Bryant
Case No. 2013-LAY-10-0297
Page 11

Therefore, I respectfully **RECOMMEND** that the instant appeal be **DISMISSED** due to a lack of jurisdiction over an unclassified employee pursuant to section 124.03 of the Ohio Revised Code.

A handwritten signature in cursive script that reads "Marcie M. Scholl". The signature is written in black ink and is positioned above a horizontal line.

Marcie M. Scholl
Administrative Law Judge