

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

James D. Ross,

Appellant,

v.

Case No. 2013-REM-07-0165

Attorney General,

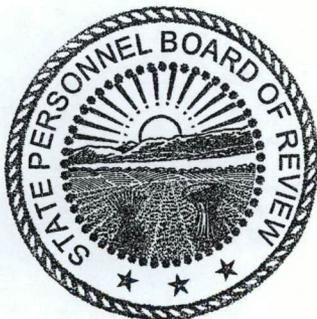
Appellee.

ORDER

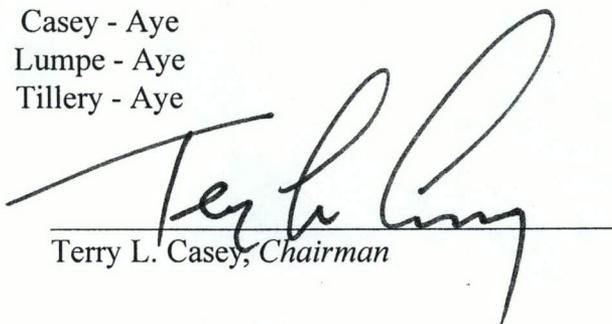
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Appellant being estopped from claiming the protections of the classified service.



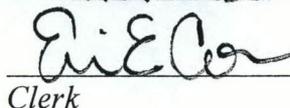
Casey - Aye
Lumpe - Aye
Tillery - Aye


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 07, 2013.


Clerk

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

ENTERED
11-7-13

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

James D. Ross,

Appellant

v.

Attorney General

Appellee

Case No. 2013-REM-07-0165

September 27, 2013

James R. Sprague

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on due to Appellant's July 8, 2013 filing of an appeal from his removal from his position with the Office of the Attorney General of Ohio (AGO).

On July 31, 2013, this Board issued a Procedural Order and accompanying No Order Removal Questionnaire to Appellee. On September 6, 2013, Appellee filed its response to the Questionnaire, in which it asserted that Appellant's position fell within the unclassified service pursuant to R.C. 124.11 (A) (30).

On September 6, 2013, Appellee also filed Appellee's motion to dismiss, memorandum in support, the Affidavit of AGO Director of Human Resources Kathleen Madden, and various accompanying exhibits in support. On September 16, 2013, Appellant requested a 14-day extension to file his memorandum *contra* to Appellee's motion to dismiss. On September 17, 2013, this Board granted Appellant's motion for extension and Appellant was provided with the new due date of September 30, 2013 to file his memorandum *contra*. On September 25, 2013, Appellant timely filed Appellant's Memorandum Contra of Appellant James D. Ross to Appellee Ohio Attorney General's Office Motion to Dismiss, memorandum in support, and various accompanying exhibits in support.

In its exhibits attached to Appellee's motion to dismiss, Appellee has included **Appellee's Exhibit 2**, a document in which Appellant accepts the appointment to a specific Administrative Staff position with the AGO. This document bears what appears to be Appellant's signature and is dated February 22, 2010.

Appellee's Exhibit 1 is a State of Ohio Personnel Action showing Appellant moving from a Clerk 2 position in the classified service to an Administrative Staff

position in the unclassified service and receiving a pay rate increase from \$15.20 per hour to \$19.24 per hour. This constitutes \$4.04 per hour increase and an approximate \$8, 403.20 per annum increase.

Also in Appellee's Exhibit 2, Appellant acknowledges that his new Administrative Staff position is an unclassified position and is not subject to civil service protection. He further acknowledges that he serves at the pleasure of the Attorney General and can be removed from the position at any time. Additionally, Appellant agrees that he accepts the benefits of the unclassified service and that he will not assert in the future that his position is a classified position.

The full text of Appellee's Exhibit 2 reads:

I, James D. Ross, hereby accept the appointment to the position of **Administrative Staff (Process Improvement Analyst)** in the Ohio Attorney General's Office. I understand this is an unclassified position, not subject to civil service protection. This means that I serve at the pleasure of the Attorney General and can be removed from the position at any time. I accept the benefits of the unclassified service and agree that I will not assert that the position I hold is a classified position in the future. This position is overtime exempt. (emphasis in original)

It appears that, as a consequence of the AGO's concern regarding Appellant's performance, particularly regarding his alleged acrimonious interaction with his supervisor, Appellant was offered a Last Chance Agreement (LCA) on or about May 16, 2013. The terms of same apparently included Appellant's resumption of his Clerk 2 bargaining unit position, serving a 15-day suspension, and agreement that any misconduct (defined as any violation of the AGO's policies or procedures or any other general failure of good behavior) would trigger the requisite discipline. Appellee then placed Appellant back in his erstwhile Clerk 2 bargaining unit position and Appellant then served the 15-day suspension.

However, Appellant continued to choose not to sign the LCA. Accordingly, Appellee proceeded and removed Appellant from his newly re-encumbered Clerk 2 position.

Appellant's grievance of his removal with AFSCME/OCSEA was denied. Appellee asserts that denial was issued, "As Appellant was not a bargaining unit member at the time he agreed to a demotion in lieu of removal and the conditions of the LCA on May 16, 2013 ... ". (Appellee's Memorandum in Support at p. 4, Footnote 1.)

In its motion to dismiss and attachments thereto, Appellee presents a reasonable case that Appellant's position fell within the unclassified service pursuant to R.C. 124.11 (A) (30). This argument is premised upon the Attorney General's authority under R.C. 109.05 to appoint such employees as are necessary. This argument is further premised upon the Attorney General's authority under R.C. 124.14 (B) to establish his or her own class plan and to set the desired compensation for those positions; coupled with R.C. 124.11 (A) (30)'s indication of unclassified service for employees appointed to administrative staff positions for which the appointing authority is given specific statutory authority to set compensation.

However, this case also presents the nearly inescapable conclusion that Appellant should be estopped from claiming the protections of the classified service when he clearly enjoyed the benefits of the unclassified service. Appellant took his Administrative Staff position upon the condition that he consent to serving in the unclassified service. Further, in his agreement, he clearly evidenced an understanding of what unclassified service entailed. Finally, it appears that his acceptance of these conditions was a condition precedent to his appointment to his Administrative Staff position and that he garnered more than an \$8, 400.00 per annum pay increase upon assuming that same position.

Case law has held that an employee cannot both obtain clear benefits from an unclassified appointment and then assert the protections of the classified service upon facing an adverse employment action. (Please see, *Chubb v. Ohio Bur. of Workers' Comp.* (1998), 81 Ohio St. 3d 275, 279) Here, Appellant appears to be doing just that. While one cannot necessarily be faulted for pursuing one's self interest, the equitable principles confirmed in Ohio case law preclude this Board from taking jurisdiction over this matter.

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **DISMISS** the instant appeal, due to Appellant being estopped from claiming the protections of the classified service.

James D. Ross
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James R. Sprague
Administrative Law Judge