

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

Patsy A. Warner,

Appellant,

v.

Case No. 2013-REM-08-0223

Meigs County EMS,

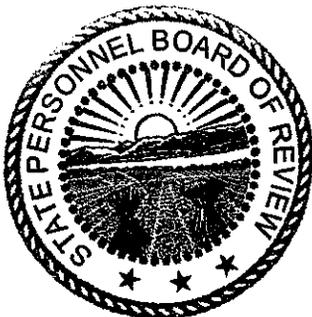
Appellee,

ORDER

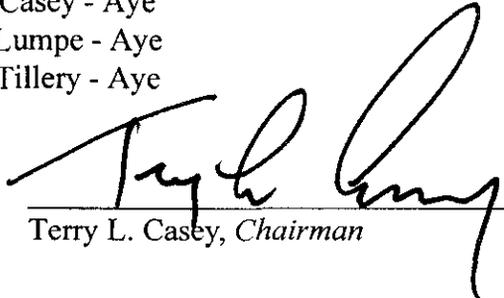
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 subject matter jurisdiction because the evidence established that the Appellant, Ms. Patsy A. Warner, as an Assistant Administrator, was serving in the unclassified service pursuant to Ohio Revised Code Section 124.11 (A) (28), and that Appellant's Motion for Summary Disaffirmance is **OVERRULED**.



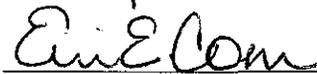
Casey - Aye
Lumpe - Aye
Tillery - Aye


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, September 03, 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**

Patsy A. Warner

Case No. 2013-REM-08-0223

Appellant

v.

August 8, 2014

Meigs County Ems

Christopher R. Young

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came on for record hearing on February 11, 2014 and concluded upon the submission of simultaneous post hearing briefs filed on February 24, 2014. Further, on March 5, 2014, Appellant Filed a Summary of Testimony Adduced during Record Hearing and Opposition to Motion to Dismiss, and on March 7, 2014, the Appellee Filed a Motion to Strike Appellant's Summary of Testimony Adduced during Record Hearing and Opposition to Motion to Dismiss, along with the Appellant on March 13, 2014, filed Appellant's Brief in Opposition to Appellee's Motion to Strike, and on March 14, 2014, the Appellant's filing Errata Correcting Brief in Opposition to Appellee's Motion to Strike. Having considered the above noted pleadings, Appellant's Opposition to Motion to Dismiss, is not well taken is hereby Overruled, and Appellee's Motion to Strike, is well taken, is hereby Granted. The Appellant, Ms. Pasty A. Warner, appeared at the hearing, and was represented by Mr. S. David Worhatch, Attorney at Law. The Appellee, Meigs County EMS, was present through its designee, Mr. Robert Jacks, the Director of the Meigs County EMS and was represented by Mr. Frank D. Hatfield, Attorney at Law.

The Appellant was removed from her position as Assistant Administrator on August 20, 2013, and timely filed her appeal to this Board on August 30, 2013. The aforementioned was stipulated to ensure the timely filing of the Appellant's appeal. Further, it was agreed at the outset of the Appellant's removal hearing that the Appellant's removal was not done in compliance with any of the procedural statutory safeguards provided under Ohio Revised Code Section 124.34 afforded to someone serving in the classified service. It was noted by the undersigned

Administrative Law Judge that due to correspondence in the file it has been alleged that the Appellant was removed as an unclassified employee under Ohio Revised Code Section 124.11(A)(28). Thus, it was discussed prior to going onto the record that the testimonial and documentary evidence to be taken into consideration at the record hearing was to cover the scope and nature of the Appellant's job duties as an Assistant Administrator. The Appellee has asserted that the Appellant was serving at the time of her removal as an unclassified employee pursuant to the above noted Ohio Revised Code Section and was therefore, subject to removal without compliance of any of the procedural statutory safeguards provided under the Ohio Revised Code afforded to someone serving in the classified service. The Appellant has challenged this allegation and alleges she was improperly classified as an unclassified employee and thus, should have been afforded the statutory provisions of the Ohio Revised Code entitled to employees within the classified service of the state.

Consequently, the sole issue presented at the February 11, 2014, record hearing was to determine whether the Appellant, Ms. Pasty A. Warner, was indeed a classified or unclassified employee at the time of her removal. If the Appellant is to be determined by this Board to be an unclassified employee at the time of her removal, then her appeal must be dismissed as a matter of law since this Board lacks jurisdiction over appeals from unclassified employees. However, should the Appellant be found to have been serving in the classified service, her removal must be disaffirmed and she must be reinstated, as a matter of law since no order as required by Ohio Revised Code Section 124.34 was given to her.

It should be noted that the Appellant's counsel made an oral motion for summary disaffirmance at the end of Appellee's case in chief, which the undersigned Administrative Law Judge held in abeyance pending the completion of the case, as well as reviewing and taking into consideration the post hearing briefs.

FINDINGS OF FACT

The Appellee first called Ms. Patsy Warner, the Appellant, to the witness stand as if on cross-examination. When questioned, the witness testified that she first began working with the Meigs County EMS as a part-time billing clerk in March 1997, and by March 2001 her employment status change to full-time billing clerk. The witness then explained that on or about May 11, 2006, she was promoted by

Ms. Gene Lyons, the Administrator of the Meigs County EMS, to the position of Assistant Administrator. The witness identified Appellee's Exhibit 2, as a letter she received on or about May 11, 2006, evidencing her promotion to the position of Assistant Administrator, and explained that soon after she received this promotion Ms. Lyons went off on medical leave, wherein then she reported directly to the County Commissioners. The witness explained on that Ms. Lyons did not return from medical leave and that on or about December 2006 Mr. Doug Lavender became the Administrator/Director of the Meigs County EMS. However, the witness explained that during Ms. Lyons absence she was involved in working with the County Commissioners regarding the collective bargaining process, until Mr. Lavender came on board. The witness then identified Appellee's Exhibit 1, as a table of organization that Mr. Lavender had put together that showed that her position was Assistant Office Administrator, reporting directly to Mr. Lavender, who in turn reported directly to the County Commissioners. After reviewing Appellee's Exhibit 3, the witness stated that it revealed that her promotion was journalized by the County Commissioners, although she was not aware that had been done.

Next, when questioned, the witness explained that after her promotion to Assistant Administrator she was authorized to write checks on behalf of the Meigs County EMS account, as a co-signatory. The witness identified Appellee's Exhibit 5, as a commercial signature card revealing that Ms. Patsy Warner was authorized to sign checks on behalf of the Meigs County EMS, beginning in June 30, 2006 which she still had authority to sign checks up until her separation from service in August 2013. The witness identified Appellee's Exhibit 6 as a check that she signed on or about June 24, 2013 for \$7,829.37 authorizing the payment of said amount to Multi-Med billing, which she signed as Administrator on the account. Further, on page 12 of Appellee's Exhibit 6, the witness again explained that she signed a check payable to Health Scope Benefits, as Administrator on the account in the amount of \$81.78, dated June 20, 2013, on a refund request. Moreover, the witness testified that the only other person that was authorized to sign checks on behalf of the Meigs County EMS, was Ms. Gene Lyons, who had not been there for quite some time.

Upon further questioning, the witness explained that the Meigs County EMS bills patients through Multi-Med Billing Services, and has been doing so since 1998/99. When questioned, the witness explained that EMS runs are not cheap and that patients are partially responsible for these billings through their own health insurance and the like. Ms. Warner explained that if their insurance would not cover the entire cost of the EMS run, they would bill the patient for the additional

uncovered cost. However, the witness explained that some patients who did not have the money to cover the cost, would ask for forgiveness of the EMS run billing. The Administrator could forgive the billing, as well as she could as an Assistant Administrator. The witness testified that she did this only during the time Ms. Lyons was not there, and that she documented the same. However, the witness identified Appellee's Exhibit 7, as a document which evidenced her as writing off the balance of patient LW on or about June 17, 2013, contradicting her previous testimony. The witness identified Appellee's Exhibit 8, as a document which evidenced her writing off the balance of patient MK on or about April 5, 2013 for \$51.90, and an additional bill for \$301.90. The witness then identified Appellee's Exhibit 9, as another instance that she wrote off an amount due to hardship on or about June 18, 2013.

With respect to payment vouchers, the witness testified that she would stamp Mr. Doug Lavender's name to vouchers which would in turn authorized the payment thereof, in addition to when she was the Acting Administrator she had the signature authority to do it on her own. The witness then identified Appellee's Exhibit 10, page 18 and 19, as approvals for payment, which she signed on July 29, 2013, authorizing the expenditure of \$3694.01, to Dell Computer. The witness then agreed when questioned that respect to Appellee's Exhibit 10, pages 20 through 127, there were approvals for payment which she signed authorizing the expenditure to the corresponding bill on the next page.

Further, when questioned, the witness explained that the Administrator could authorize the payroll for EMS employees from the Director all way through to all the part-time employees. When questioned, the witness testified that she never stamped the payroll when Mr. Lavender and Ms. Lyons were there, but that she did sign it a couple of times, April 25, 2010 through May 8, 2010 and March 27, 2011 through April 9, 2011, as evidenced by Appellee's Exhibit 11.

The witness then identified Appellee's Exhibit 19, as a July 1, 2013, letter evidencing an employee of the Meigs County EMS under her signature authority was moved from full-time to part-time status as an Assistant Administrator, and it was noted that there was no mention of Acting Administrator status. The witness also identified Appellee's Exhibit 12 as a letter which she received on or about July 1, 2013, accepting the resignation of Ms. Ashley Kimes, under her signature authority as an Assistant Administrator.

Next, the witness agreed that the Meigs County EMS currently has employees who are covered under a collective bargaining agreement. The witness agreed when questioned that the Administrator would negotiation the collective bargaining agreements, and that she did as Acting Administrator in 2006. The witness then identified Appellee's Exhibit 15 as a tentative collective bargaining agreement which he signed on behalf of Meigs County EMS on or about August 7, 2006. The witness then identified Appellee's Exhibit 17 as a series of grievances in 2011 which she responded to as an Assistant Administrator on behalf of the Meigs County EMS, and not as an "Acting Administrator". The witness also identified Appellee's Exhibit 13, as discipline she issued in July 2006, while serving as an Acting Administrator. Further, the witness identified Appellee's Exhibit 14, as her granting a vacation request in July 2006. Furthermore, when questioned, the witness identified Appellee's Exhibit 16, as correspondence dated June 1, 2006, which she had with other agencies, specifically the Bureau Worker's Compensation and claims thereof, wherein she would sign on behalf of Meigs County EMS, as an Assistant Administrator. The witness identified Appellee's Exhibit 18, as an example wherein she would schedule all EMS employees, as part of her duties as an Assistant Administrator. Furthermore, the witness identified Appellee's Exhibit 20, as correspondence which she had with attorneys and law firms dated December 2, 2008.

Appellee's second witness to testify was Mr. Randy Smith, a Meigs County Commissioner, a position he's held for little over 14 months. When questioned, the witness testified that he presently holds position of pastor at a local church, as well as holding a Commission at the Middleport Police Department. As a Commissioner, the witness testified that they are charge of the budgets and in relation to the Meigs County EMS they have oversight of that Department and its budget, and the appointment of the Administrator of the department. As a Commissioner, the witness testified he is familiar with the usual working order of the Commission and the records thereof, and identified Appellee's Exhibit 3, as a journal entry which memorialized Ms. Patsy Warner being promoted to the position of Assistant Administrator of the Meigs County EMS. When questioned, the witness testified that he has known Ms. Warner for some time and it is his understanding that she was the Assistant Administrator and that she was to act in the absence of the Administrator, and was second-in-command of the Meigs County EMS. Next, the witness testified that when Mr. Doug Lavender, the former Director and/or Administrator resigned, he became familiar with the job duties assigned to Ms. Warner who best described her position as being second in command. When

questioned, the witness testified that when asked, Ms. Warner did not want to take over the job as Administrator of the Meigs County EMS.

On cross-examination, the witness identified Appellant's Exhibit Q, as a letter dated December 13, 2013, from Ms. Patsy Warner written to the Meigs County Commissioner's Office requesting various documents, including but not limited to payroll records, which the witness considered it to be like a public records request. The witness, when questioned, with regard to Appellant's Exhibit P, explained that he had not seen this document before as it was sent to the Meigs County EMS, and not the County Commissioner's Office. Further, when questioned, the witness re-identified Appellee's Exhibit 3, as an accurate copy of a portion of the County Commissioner's journalized entry dated May 11, 2006.

Next, when questioned, the witness testified that when Mr. Robert Jacks came on board as the new Meigs County EMS Director/Administrator he was asked to sign a one-year employment contract. Further, the witness testified that he has no knowledge whether Ms. Warner was ever asked to sign a one-year employment contract. However, the witness did state that Mr. Lavender was asked to sign a one-year employment contract. Further, when questioned the witness explained that he personally got to know Ms. Patsy Warner's duties as the Assistant Administrator when Mr. Doug Lavender walked out, and before Mr. Jack's was hired, as well as when Mr. Jack's came on board, as Ms. Warner signed off Commissioner's vouchers, as shown in Appellee's Exhibit 10. The witness testified that while Ms. Lori Reynolds and Mr. Jack's could've signed off on these, the Commissioner's recognized Ms. Warner as the second in command with the authority to sign off on the vouchers. Moreover, the witness testified Ms. Warner was to do exactly what Mr. Doug Lavender was doing as Administrator after he resigned in May 2013, without notice or giving any two-week to transition period to transfer his duties. Specifically, when questioned, the witness testified that he did not have firsthand knowledge of personally observing Ms. Warner performing her duties or what Mr. Lavender had assigned her to do. Furthermore, the witness testified that the County Commissioner's did not journalize Ms. Warner's new title after Mr. Lavender left, as she had made it clear that she did not want to take over as the Director. Additionally, the witness testified that Mr. Robert Jacks started as the Director of the Meigs County EMS on or about July 1, 2013. However, the witness testified when questioned that he has never seen Ms. Patsy Warner's position description or anything saying that her position was in the unclassified service.

When questioned, if the journal proceedings ever recognized Ms. Lori Reynolds as managing EMS in Mr. Lavender's absence, answered in the negative. The witness then re-identified Appellee's Exhibit 1 as a table of organization of the Meigs County EMS, that revealed that Ms. Patsy Warner was noted as an Assistant Office Administrator, and again stated he has not seen her job description regarding the position of Assistant Office Administrator. When questioned, the witness testified that he never told Mr. Jacks that he must keep Ms. Warner as his Assistant Administrator, as she was already in that position. The witness testified that after Mr. Lavender left, they didn't move Ms. Reynolds or Ms. Warner into any temporary working level. When questioned if Ms. Warner could hire and fire staff, the witness explained that when Mr. Lavender and/or Mr. Jacks were the Director, she wouldn't have had that authority, but when she was acting director in that three-month period of time between May and July she could have had the authority to hire and fire, if the need arose. Moreover when questioned, the witness testified Ms. Warner had a firsthand working knowledge of budget. Further, when questioned, the witness testified that he has no knowledge if Ms. Warner developed any policies, nor whether Mr. Lavender or Mr. Jacks had pre-programed guidelines which to work from. However, the witness did note that after 2006 during Mr. Lavender's tenure Ms. Warner, specifically when identifying Appellee's Exhibit 17, was involved as a hearing officer regarding discipline covered under the collected bargaining agreement, wherein she would make a recommendation. Additionally, the witness testified that when Mr. Lavender left, it was noted that he was angry and upset about his departure.

Appellee's third witness to testify was Mr. Robert Jacks, the Meigs County EMS Director/Administrator who has been employed in such position since July 2, 2013, and who was also employed at the River City Fellowship Church. As the Meigs County EMS Administrator, the witness described his duties included, but were not limited to, directing the Meigs County EMS services which provides ambulance and EMT services to the residents of the County and to ensure that the day-to-day activities are carried out efficiently. As the Administrator, witness testified that he is familiar with the business records of the Meigs County EMS somewhat, as he noted he is still learning. Further, when questioned, the witness testified that he answers directly to the Meigs County Commissioners. The witness then identified Appellee's Exhibit 1 as a table organization, or flowchart, the depicting the positions within the Meigs County EMS, as they were under Mr. Doug Lavender, the previous Meigs County EMS Administrator, which he displaced. Further, the witness noted that currently the table organization includes the addition of a captain and four

lieutenants that run the shifts each day on the EMS side, along with Ms. Reynolds taking over Ms. Patsy Warner's place as the acting Assistant Administrator. Additionally, the witness testified that the Meigs County EMS currently employs 22 full-time employees and 22 part-time employees as EMT specialists/paramedics and dispatchers. With respect to the table organization wherein it was noted that the Advisory Board answers directly to the EMS Director stated that he also is in charge of all the volunteer operations throughout all the townships within Meigs County, and their oversight. Additionally, with respect to the Medical Director's position on the table organization, the witness testified it is there to help ensure that proper medical protocol is developed.

When questioned, the witness testified that when Ms. Patsy Warner began employment there was no formal position description written for her position, nor for her position as an Assistant Administrator. When questioned as to Ms. Patsy Warner's duties as an Assistant Administrator, the witness testified that she acted in his absence and that she took care of the day-to-day business operations of Meigs County EMS. The witness testified that he did not have a heavy background in EMS procedures and operations, as he came from law enforcement, and that he relied heavily on Ms. Warner to take care of the day-to-day business operations of the Meigs County EMS. Again, the witness testified that when he came on board there was no written a position description outlining Ms. Warner's duties, but that he was told by the County Commissioners and Ms. Warner herself she was basically the second in command. The witness then identified Appellee's Exhibit 2, as a letter which Ms. Warner presented to him, shortly after his arrival, outlining the fact that she was the second in command as the Assistant Administrator of the Meigs County EMS. Further, the witness identified Appellee's Exhibit 4 as an e-mail which she sent out on or about July 8, 2013 to all the employees of the Meigs County EMS which stated in part that Ms. Warner was in fact the second in command at the Meigs County EMS, and that Ms. Warner never objected to being referred to as the second in command.

On cross-examination, the witness testified that he is currently in the unclassified service as the Director of the Meigs County EMS, and answered in the negative if he had signed a one-year employment contract. Further, when questioned, the witness testified that he did explain to Ms. Warner, as well as Ms. Reynolds, that they were both in the unclassified service, although he did not provide them written notification of the same. Upon further questioning, the witness testified that Ms. Warner provided him with a letter of her job duties and that there

was not a formalized job description ever presented to Ms. Warner. However, the witness did state that he eventually put together a job description for Ms. Warner's position as an Assistant Administrator, as it is in the Policy and Procedural Manual, although it was put in the manual after Ms. Warner had been terminated from her position. Moreover, when questioned, the witness testified that he never asked Mr. Doug Lavender anything regarding Ms. Warner's duties as an Assistant Administrator.

Next, the witness identified Appellant's Exhibit M, as a copy of Ms. Patsy Warner's job responsibilities which she gave to him after he came on board which outlines various duties she performs. However, upon questioning, the witness testified that while the document contained various duties which she performs she does not state that she is second in command as the Assistant Administrator or that she runs the day-to-day activities of the Meigs County EMS. Further, witness testified that he as a Director, also gave her the authority to buy certain things which is not listed on said document, as well as he told her to take care of employee discipline. However, the witness testified it was his understanding that Ms. Warner could not make Improvements without his approval or the County Commissioners. Again, the witness testified that he did not know how Mr. Doug Lavender managed her and her position as Assistant Administrator. Furthermore, the witness when questioned testified that the both of them had daily policy discussions, as they were going through a lot of transitions, and that she specifically sat in with the team, but that the ultimate decision was his. Moreover, the witness testified that Ms. Warner could not hire, fire any employee unless he was not there and explained that two weeks went he was not there Ms. Warner acted in his stead, when he went on a mission trip and left her in charge.

The witness then identified Appellee's Exhibit 6, pages 11 and 12, and explained that he does not know whose handwriting that was on the checks in the payee line and the memo line, but understood the signature on the check to be Ms. Patsy Warner's. Upon questioning, the witness testified when referencing the above noted checks that he does not even know where the checks were located at that time, June 24, 2013 and June 20, 2013, as he was not employed by the Meigs County, at that time. Additionally, the witness identified Appellee's Exhibits 7 and 8 as two documents which revealed that Ms. Warner on June 17, 2013 and April 5, 2013 approved the writing off of the balance of monies owed to Meigs County EMS due to a hardship, a duty which she did not have to ask for anybody else's approval.

The Appellant began her case in chief by calling Mr. Doug Lavender, to the witness stand. When questioned, the witness explained that he presently works as a Charge nurse in the ER department at Ohio University's O'Bleness hospital. Further, when questioned, the witness testified that he is familiar with Ms. Warner, as he and she were co-workers at Meigs County EMS, as he was the Director of the Meigs County EMS from 2006 through June 15, 2013, when he resigned. The witness testified that he resigned from his position due to management philosophical differences with respect to issuing discipline. The witness testified that when a new County Commissioner came on board, namely Mr. Randy Smith, he had issued discipline to someone that was working two different jobs, wherein that person should have only been working for the Meigs County EMS, only to have that person suspended one day, contrary to his management decision. Mr. Lavender explained that he felt County Commissioners had undermined his authority as the Meigs County EMS Director. Moreover, when questioned, the witness testified that upon his departure the County Commissioners denied him from being granted all his accrued leave, which he in turn filed a legal action against the County Commissioners, to recover the same.

Next, when questioned, the witness testified that when he took over as the Meigs County EMS Director in 2006 he never assigned Ms. Warner any supervisory authority, she had no role in policy writing, she had no spending authority without his approval, she could not initiate any disciplinary action, she couldn't hire or fire employees, she did not issue discipline, as she just followed guidelines that he laid out for her. Upon further questioning, the witness testified he did not repose any special confidence and trust in Ms. Warner in her position. Furthermore, the witness testified that he did not assign Ms. Warner the title of Assistant Administrator, and that he tried to change it, but since she was pass her probationary period it was not allowed to be changed.

Mr. Lavender then identified Appellee's Exhibit 1, as a table organization which he authored that indicated that Ms. Warner's position was that of Assistant Administrator, not Assistant Office Administrator, noting that she was over the office side of things, not EMS. The witness then identified Appellant's Exhibits A through I, although he had never seen them before today, which outlined among other things duties Ms. Warner performed in her position as Assistant Administrator. When questioned, the witness testified that in his absence if he were on vacation Ms. Warner would do payroll, but that if anything big were to arise he would review it and approve it himself. Additionally, when questioned, the witness testified there

was a job description for Ms. Patsy Warner located in her personnel file, as he personally placed it in the file. Specifically, when questioned, the witness testified that while he was an unclassified employee appointed by the County Commissioners he treated Ms. Patsy Warner as a classified employee.

The witness identified Appellee's Exhibit 3, as a portion out of the Commissioner's Journal, and stated that he is never seen this before nor has he seen anything that states that Ms. Warner was indeed an unclassified employee. Furthermore, the witness identified Appellee's Exhibit 5, as a commercial signature card, giving Ms. Warner signature authority on the Meigs County EMS checks, and agreed that he maintained that she should still be on the checks, if something were to happen to him. However, the witness testified that Ms. Warner was not given any authority to writing a check without his prior approval. The witness then identified Appellee's Exhibit 6, as a check signed and dated June 24, 2013 by Ms. Patsy Warner, an event which took place after he resigned. Additionally, the witness testified that he did approve Ms. Warner scheduling the workers. Moreover, the witness identified Appellee's Exhibit 8 as a fax from multi-med regarding writing off the balance due to hardship dated April 5, 2013, and that Ms. Warner approved this action, only to be explained by the witness that since he was there he would have had the ultimate authority on this action. Further, the witness explained that he formulated a policy regarding write offs on hardships for individuals over the age of 70, as well.

Next, the witness testified that Mr. Jacks never inquired as to how he ran things at the office, nor inquired into Ms. Warner's duties at all. The witness then identified Appellee's Exhibit 10 and explained that these Commissioner vouchers which appear to have Ms. Patsy Warner signature on for approval of payment would have been things and he normally would've signed off on. The witness then identified Appellant's Exhibit J, as the recently signed collective bargaining agreement and explained that on page 11, under step 1, a grievant must file a written grievance with the administrator or designee within 14 days. The witness also identified Appellant's Exhibit N, the previous collective bargaining agreement which shows among other things that under step one of the grievance process the grievant must file a written grievance with the Assistant Administrator, or Ms. Patsy Warner. The witness then identified Appellee's Exhibit 17, as a grievance dated June 9, 2011 that Ms. Patsy Warner as the Assistant Administrator handled, and was not really sure she handled any other grievance after that date.

On cross-examination, the witness testified that Ms. Patsy Warner signed payroll when he was there, sometimes, and that he had a signature stamp for Ms. Warner to stamp his name on payroll and vouchers, as well, but only with his approval. When questioned, the witness testified that he did entrust Ms. Warner to do the above, as well. The witness also identified Appellee's Exhibit 21, as his appeal that he filed to the State Personnel Board of Review against the Meigs County Commissioners, wherein it was noted that the Commissioners had created undue personal financial hardship upon himself and his family.

The Appellant, Ms. Patsy Warner, was called back to the witness stand and was questioned, as if on direct examination. The witness identified Appellant's Exhibit K, as an interoffice communication dated August 20, 2013, to her regarding an administrative investigation and finding. The witness testified that as noted on the above noted exhibit it was given to her regarding various violation of workplace rules, including but not limited to, breach of confidentiality contract, insubordination, improper use of cell phones and inefficiency. Upon further questioning, the witness noted that on page 3 of the exhibit, although it states as you know you are an "unclassified employee" as documented in the letter from then EMS Director Gene Lyons (Appellee's Exhibit 2) dated May 11, 2006, upon looking at that letter it does not state that, nor had she ever heard that before she had received the above noted exhibit.

The witness then identified Appellant's Exhibits J and N, as the new collective bargaining agreement contracts effective from May 30, 2012 through May 29, 2015 and the previous contract which was effective from May 30, 2010 through May 29, 2012, respectively, and noted that under the old contract that any grievance which was filed, she as the Assistant Administrator was to receive that grievance at first step, and under the new contract the Administrator was to receive that grievance at first step. The witness then after identifying Appellee's Exhibit 17, a grievance that had been filed on June 3, 2011, which she received, was the last one that she did receive before being terminated. The witness then identified Appellant's Exhibits A through I, and Appellant's exhibit M and noted that these were all put together when Mr. Jack's came on board, to review her duties. The witness then identified Appellant's Exhibit P as a letter which she sent on November 16, 2013 to Meigs County EMS requesting access to her personnel records, which Mr. Jack's responded that she could stop by the office, which she did although no job description or statement that she was an unclassified employee was her personnel file. Additionally, when reviewing Appellee's Exhibit 3, the Journal entry regarding

Ms. Patsy Warner's promotion stated that it was not located in her personnel file. Moreover, the witness testified upon review of Appellant's Exhibit Q, as a letter which she sent on or about December 13, 2013, to the Meigs County Commissioner's office, requesting any and all records relating to her employment, explained that she never received a response to the above noted letter. Furthermore, with respect to Appellant's Exhibits A thru I, the witness explained that she always acted only with Mr. Doug Lavender's prior approval. Along this line of questioning, the witness testified that when she was first appointed as an Assistant Administrator, under Ms. Lyons, she acted one way, but then when under Mr. Lavender began his tenure as Director, she acted another way, as he told her right off at his beginning that he was in charge. Specifically, when questioned, the witness explained that when Mr. Jack's came on board, until her separation, she did primarily what she had done for Mr. Lavender except for covering call offs and scheduling, but that she had put a copy of this on the Director's desk for his approval, which is primarily based on seniority pursuant to the union contract.

Next, the witness was asked about what her duties were between the interim period time that Mr. Lavender had left and before Mr. Jack's being hired. When questioned, the witness testified that she did not receive any increase in pay, nor could she just spend anything at any time, as she didn't have access to the checkbook, nor did anyone in the Commissioner's office indicate that her duties would increase or that she was then thrust into an unclassified position. The witness then re-identified Appellee's Exhibit 6, as two checks that she had signed to pay regular monthly billings by Multi-Med, that Ms. Lori Reynolds actually wrote out. Further, the witness testified that she never cut and/or signed a check during Mr. Lavender's tenure or under Mr. Robert Jacks' tenure. The witness then re-identified Appellee's Exhibits 7, 8 and 9 as interim write-offs which he did perform. However, the witness testified that while under Mr. Lavender if any write offs would come into the office she only would write those requests off only after Mr. Lavender had specifically told her to do so. On the other hand, the witness testified that during Mr. Jacks' tenure she did not perform any write-offs at all.

The witness then identified Appellee's Exhibit 4, as an e-mail that was sent out by Mr. Jacks on or about July 6, 2013, which among other things indicated that she was second-in-command, but noted they only spoke about her being an Administrative Assistant, never mentioned anything about her being second in command, nor did she receive a job description of her position. Specifically, when questioned, the witness testified that on Mr. Jacks' first day of vacation soon after

he came on board, a co-worker had told her after he had received a telephone phone call from Mr. Jacks stating that the medics were going to be in charge, and was told this via a cell phone conversation from Mr. Jacks. Next, the witness testified that she never seen any employment contract; was notified in any manner whatsoever that she was in the unclassified service prior to her removal; was not reposed with the authority to hire and fire any employee; had no authority to set any budget or to approve any policy; did not supervise anyone; could not initiate any discipline upon an employee; could not spend any money without prior approval and was not required to hold any special license with respect to carry out her duties as an Administrative Assistant, although she is certified as an EMT. The witness testified after this cell phone conversation with Mr. Jacks, she then reported to whatever medic was in charge that day at the Meigs County EMS. Additionally, the witness testified that neither Mr. Lavender or Mr. Jacks ever gave her any discretionary authority, along with the checkbook was in the possession of Ms. Reynolds, who wrote the checks, wherein she only signed those checks with prior approval. When questioned after identifying Appellee's Exhibit 10, why some of her signatures on some Commissioner's vouchers explained that this was during Mr. Jacks' two-week vacation.

CONCLUSIONS OF LAW

The determination of the Appellant's status as a classified or unclassified employee while employed by the Meigs County EMS will mandate the outcome of this appeal. As was previously stated, the Appellant was removed as an unclassified employee pursuant to Ohio Revised Code sections 124.11 (A) (28). The burden is on the Appellee to prove, by a preponderance of the evidence that the Appellant was serving in the unclassified service at the time of her termination. If the Appellee meets this burden, then the case will be dismissed, as this Board has no subject matter jurisdiction over unclassified employees. If, however, the Appellee fails to meet its burden, then the Appellant would be reinstated to her position, as no O.R.C section 124.34 Order of Removal was filed in this case.

The issue which will be dispositive of this appeal is whether the Appellant was serving in the unclassified service of the state pursuant to Ohio Revised Code sections 124.11(A) (28) at the time of her removal.

Employment with the state of Ohio is divided into the classified and unclassified service. The division between these two groups of public employment is delineated in Ohio revised code section 124.11 (A) which describes a variety of positions within the public sector which are located within the unclassified service. The Appellee in this matter claims that the Appellant, Patsy A. Warner, was employed in the unclassified service under the provisions of Ohio Revised Code sections 124.11 (A) (28).

Revised Code 124.11 (A) (28) Exemption

The Appellee has alleged that the Appellant's position and job duties were fiduciary in nature and thus fell under the statutory exemption from the classified civil service found in Revised Code Section 124.11 (A) (28), which reads, in pertinent part:

* * * *

(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 acquired by this chapter:

* * * *

(28) for cities, **counties**, civil service township, 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 the principals or holding a fiduciary relation to their principals.** (Emphasis Added.)

* * * *

This Board defines "fiduciary relationship" in administrative rule 124-1-02 (I) of the Ohio Administrative Code. "Fiduciary relationship" is defined as follows:

... Generally means 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 or over and above technical competency

requirements form 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.

The case which set the standard for determining if a position is or is not fiduciary is the case of *Yarosh v. Becane*, 65 Ohio St. 2d 5 (1980). The standard articulated by that court was that it is the job duties of a particular appellant which determine if they are classified or unclassified, not necessarily the designation given to their position. Accordingly, I have also reviewed the following cases which are in the line of the judicial determinations rendered in connection with the question of the definition of "fiduciary relationship."

In re Termination of Employment (1974), 40 Ohio St. 2d 107; *Rarick v. Board of County Commissioners* (1980), 63 Ohio St. 2d 34; and, *State, ex rel. Charlton v. Corrigan* (1988), 36 Ohio St. 3d 68.

Ohio Revised Code section 124.11 (A) (28) provides two independent basis upon which an Appellant may be deemed to occupy position within the classified service: (1) authorized to act for and in the place of their principals or (2) holding a fiduciary relation to their principals.

While the appointing authority has the burden of proof to show by a preponderance of the evidence is in the unclassified service, it does not have to establish that the employee spent the majority of his or her time performing duties of an unclassified nature while in that position, and it is only sufficient to show that the employee perform some of his/her duties as an unclassified employee. See *Honacker v. Scioto County Common Pleas Court* (Dec. 6, 1993), Scioto App. No. 92-CA-2087, *unreported*, 1993 WL 524974. In the above referenced case the court found that while both Appellants occupied a hybrid positions, with the majority of the time spent in the classified probation officer position, and only a minimal of time spent in the unclassified position of a bailiff, that fact alone was enough to show that someone was occupying a position in the unclassified service. Along this line of reasoning, in the instant matter, the evidence revealed that the Appellant while occupying the Administrative Assistant's position didn't always perform job duties and/or responsibilities that were fiduciary in nature, she did in fact perform some fiduciary duties when the Administrator was there, when the Administrator was absent and/or when the Administrator's position was vacant.

Under the first prong of the above noted statute that an employee may occupy a an unclassified position when that person is authorized to act for and in place of their principals, was proven by a preponderance of the evidence as only Ms. Warner, as the Assistant Administrator, and the Administrator were authorized signatories on the Meigs County EMS checking account. See Appellee's Exhibit 6. While Appellant's testimony, along with her only witness, Mr. Doug Lavender, who resigned abruptly, maintained that she had no independent authority, or independent decision-making ability, and only acted at the direction of the Meigs County EMS Administrator, appeared disingenuous, as the testimonial and documentary evidence proved otherwise. Clearly, Ms. Warner's testimony, when questioned, revealed that when she was an Assistant Administrator, acting as the Administrator, in the Administrator's absence, she had the authority to sign payment vouchers and sign checks on behalf of Meigs County EMS.

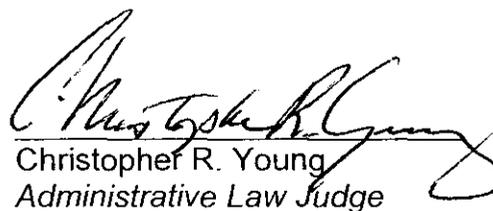
With respect to the second prong of the above noted statute that for one to be considered an unclassified employee under Ohio Revised Code Section 124.11 (A) (28) one must hold a fiduciary relation to their principal, was also proven by a preponderance of the evidence. The holding in the case of State ex rel Charlton v. Corrigan, (1988), 36 Ohio St. 3d 68., held that in order to establish a fiduciary relationship emphasis should be placed upon whether the assigned job duties require, as essential qualifications over and above technical competency requirements, a high degree of trust, confidence, reliance, integrity, and fidelity. In the case at hand, the evidence was quite clear that after the Appellant in 2006 became the Assistant Administrator of the Meigs County EMS, shortly thereafter she was put on the signature card authorizing her to sign checks on behalf of the Meigs County EMS. This duty and/or job responsibility remained with Ms. Warner throughout her tenure until she was separated from service in August 2013. It should be noted that while Ms. Warner did not typically sign checks on a daily basis, she did in the absence of the Administrator/Director of the Meigs County EMS. The evidence revealed that Ms. Warner recently between the resignation of Mr. Lavender in April 2013 and the appointment of Mr. Jack's in July 2013 signed checks and vouchers on behalf of Meigs County EMS. The evidence was also shown that Ms. Warner acted as a decider on forgiving patient Billings; authorized payroll; accepted and/or denied workers compensation claims on behalf of Meigs County EMS employees; accepted the resignations of employees; issued disciplines; approve leave requests; negotiated articles within the Collective Bargaining Agreement on behalf of management; served as a hearing officer making recommendations pursuant to a Collective Bargaining Agreement that was

in effect until 2012, and corresponded with attorneys involving the Meigs County EMS. All of the above noted duties proved, by a preponderance of the evidence, that the Appellee placed a high degree of trust, confidence and reliance upon the Appellant.

In the case at hand, the Appellee has not only satisfied one prong of the above mentioned test, but both, proving that the Appellant was authorized to act for in the place of her principal, and held a fiduciary relationship to her principal, as well.

RECOMMENDATION

I respectfully **RECOMMEND** that the instant appeal be **DISMISSED** for lack of subject matter jurisdiction because the evidence established that the Appellant, Ms. Patsy A. Warner, as an Assistant Administrator, was serving in the unclassified service pursuant to Ohio Revised Code section 124.11 (A) (28), and that Appellant's Motion for Summary Disaffirmance is hereby **OVERRULED**.


Christopher R. Young
Administrative Law Judge