STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Daniel L. Orr,

Appellant,

v.

Case Nos. 2014-REC-04-0078
2014-INV-04-0079
2014-MIS-04-0080

Department of Administrative Services,

Appellee,

ORDER

These matters came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

After a thorough examination of the entirety of the records, 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 to Dismiss is **GRANTED** and that the two instant appeals and one Request for an Investigation are **DISMISSED** as a matter of law, pursuant to O.A.C section 124-1-02(X) and O.R.C. sections 124.03, 124.11(D), 124.11(D)(2) and 124.56.

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, January 28, 2015.

Clerk

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

NOTICE

Where applicable, this Order may be appealed under the provisions of Chapters 124 and 119 of Ohio Revised Code. An original written Notice of Appeal or a copy of your Notice of Appeal setting forth the Order appealed from and the grounds of appeal must be filed with this Board fifteen (15) days after the mailing of this Notice. Additionally, an original written Notice of Appeal or a copy of your Notice of Appeal must be filed with the appropriate court within fifteen (15) days after the mailing of this Notice. At the time of filing the Notice of Appeal or copy of your Notice of Appeal with this Board, the party appealing must provide a security deposit to the Board. In accordance with administrative rule 124-15-08 of the Ohio Administrative Code, the amount of deposit is based on the length of the digital recording of your hearing and the costs incurred by the Board in certifying your case to court. The length of the digital recording, the costs incurred, the corresponding amount of deposit required, and the final date that the Notice of Appeal or copy of your Notice of Appeal and the Deposit will be accepted by this Board are listed at the bottom of this Notice. If a full or partial transcript of the digital recording has been prepared prior to the filing of an appeal, the costs of a copy of that certified transcript will be accepted by this Board; transcript costs will be listed at the bottom of this Notice.

IF YOU ELECT TO APPEAL THIS BOARD'S FINAL ORDER, THEN YOU MUST PROVIDE THE DEPOSIT LISTED BELOW AT THE TIME YOU FILE YOUR NOTICE OF APPEAL OR COPY OF YOUR NOTICE OF APPEAL WITH THIS BOARD. Please note that the law provides that you have fifteen (15) calendar days from the mailing of the final Board Order to file your Notice of Appeal or copy of your Notice of Appeal both with this Board and with the Court of Common Pleas. The fifteenth day is the date that appears at the bottom of this Notice.

METHOD OF PAYMENT: for all entities other than State agencies, payment of the deposit must be by money order, certified check, or cashier's check. State agencies are required to use the Intra-State Transfer Voucher (ISTV) system (OBM Form 7205), which must be processed prior to the filing of an appeal. To initiate an ISTV, State agencies may call the State Personnel Board of Review Fiscal Office at 614/466-7046.

IF YOU MAINTAIN YOU CANNOT AFFORD TO PAY THE DEPOSIT LISTED BELOW, THEN YOU MUST COMPLETE THE BOARD'S "AFFIDAVIT OF INDIGENCE" FORM. YOU CAN OBTAIN THAT FORM BY CALLING 614/466-7046. THE COMPLETED AFFIDAVIT MUST BE RECEIVED BY THIS BOARD ON OR BEFORE February 4, 2015. You will be notified in writing of the Board's determination. If the Board determines you are indigent, you will be relieved of the responsibility to pay the deposit to the Board. However, if the Board determines you are NOT indigent, then YOU MUST FILE YOUR NOTICE OF APPEAL OR A COPY OF YOUR NOTICE OF APPEAL AND PAY THE DEPOSIT BY THE DATE LISTED BELOW.

If you have any questions regarding this notice, please contact the Board at 614/466-7046.

Case Numbers: 2014-REC-04-0078, 2014-INV-04-0079, 2014-MIS-04-0080

Transcript Costs: N/A Administrative Costs: $25.00

Total Deposit Required: * $25.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: February 12, 2015

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Daniel L. Orr	Case Nos. 2014-REC-04-0078 2014-INV-04-0079 2014-MIS-04-0080
Appellant	
v.	November 26, 2014
Dept. of Administrative Services	
Appellee	Christopher R. Young *Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

These matters come on for consideration upon Appellee's Motion to Dismiss filed on August 29, 2014, upon Appellant's Memorandum in Opposition to Appellee's Motion to Dismiss filed on September 16, 2014, and after a status conference was held on August 4, 2014, attended by all of the interested parties.

At the status conference, the Appellee asserted that Appellant's position, a Data Systems Administrator's position, which had previously been denoted as a "classified" position was re-designated as an "unclassified" position. Appellee further asserted that this Board does not possess jurisdiction over these appeals, as no adverse action occurred. However, Appellant asserts that the Appellee had pressured the Appellant in delegating increased fiduciary purchase authority, to create an appearance of independent judgment and discretion, to support the finding of unclassified service.

The pleadings in the case files indicate that in 1994, the Department of Administrative Services (DAS) hired Mr. Orr as a Computer Acquisition Analyst, a position within the bargaining unit. Further, throughout Mr. Orr's employment with DAS he held a number of positions in DAS' information technology department. In January 2011, Mr. Orr was assigned to a temporary work level (TWL), to a Deputy Director 6 position, within the unclassified service. On or about April 29, 2013, Mr. Orr was notified that his unclassified position was being revoked, and he was granted the option of exercising his "fallback" rights, falling back into his previously

held classified position of a Data Systems Administrator, which he elected to do. In October 2013, Mr. Orr became responsible for managing and overseeing Enterprise IT Contracting, while he still held the position of a Data Systems Administrator.

In the summer of 2013, Ms. Marissa Walter, DAS' Employee Services Administrator, began to review every position within DAS that was above pay range 15. The purpose of Ms. Walter's review was to determine whether these positions were properly designated as either classified or unclassified. Mr. Orr's position as a Data Systems Administrator was in pay range 18, and was one that was reviewed. After the review, based upon Mr. Orr's duties, Ms. Walter determined that his position should be designated as unclassified. On March 27, 2014, Ms. Walter sent Mr. Orr a letter informing him that his Data Systems Administrator's position had been re-designated as unclassified. In addition to Mr. Orr's position, four other Data Systems Administrators within DAS were re-designated as unclassified as result of Ms. Walter's review. On April 11, 2014, the Appellant filed the above referenced appeals and Request for Investigation.

In the cases at bar, Mr. Orr claims that DAS has reclassified his position. Pursuant to O.A.C. section 124-1-02(X), a reclassification occurs when an employee is assigned a different classification specification. However, Mr. Orr continues to be employed by DAS as a Data Systems Administrator, although his designation has changed from classified to unclassified. Moreover, there has not been any adverse personnel action taken against Mr. Orr. While it is true that when an Appellant seeks to invoke the jurisdiction of this Board, it is often necessary to determine initially whether an Appellant's position falls within the classified or alternatively the unclassified service. However, such a determination must be precipitated by an adverse personnel action, such as a removal, lay off, reduction or a transfer, which is either accompanied or followed by an Appellant's change or "correction" of status. Under O.R.C. section 124.03, the State Personnel Board of Review does not have the authority to issue declaratory judgments determining the classified or unclassified status of an employee's position.

The Appellant has also asserted that when his Data Systems Administrator's position was re-designated as unclassified, he was denied an alleged right to fallback into a previously held classified position. Pursuant to O.R.C. section 124.11(D), an employee in the classified service, who was appointed to an unclassified position with the same employer, retains the right to fallback to the

previously held classified position. However, O.R.C. section 124.11(D)(2) states that employee's right to fallback "may only be exercised when an appointing authority demotes an employee to a pay range lower than the employee's current pay range or revokes the employee's appointment to the unclassified service." In this situation, Mr. Orr has not been demoted to a different pay range, nor has his appointment been revoked, as he is still employed by DAS as a Data Systems Administrator. Therefore, any dispute regarding whether Mr. Orr is entitled fallback rights, is not ripe for adjudication.

The Appellant had also filed a Request for an Investigation with this Board. O.R.C. section 124.56 sets forth the basis for this Board's subject matter jurisdiction over the Request for Investigation that Appellant filed. That section provides, in pertinent part,

> When the state personnel board of review ... has reason to believe that any officer, board, commission, head of a department, or person having the power of appointment, layoff, suspension, or removal, has abused such power by making an appointment, layoff, reduction, suspension, or removal of an employee under his or their jurisdiction in violation of this chapter of the Revised Code, the board...shall make an investigation, and if it finds that a violation of this chapter, or the intent and spirit of this chapter has occurred, it shall make a report to the governor... The officer or employee shall first be given an opportunity to be publicly heard in person or by counsel in his own defense. The action of removal by the governor, mayor, or other chief appointing authority is final except as otherwise provided in this chapter of the Revised Code.

Consequently, the Appellant's Request for Investigation under O.R.C section 124.56 must, of necessity, focus upon the actions of the appointing authority with respect to abusing its power. In the instant appeal, the Appellant, in essence, does allege an abuse of authority by the appointing authority in connection to failing to afford the Appellant fallback rights and/or subverting the civil service laws and

regulations in re-designating his position from the classified service to the unclassified service.

O.R.C. section 124.56 limits the State Personnel Board of Review's investigatory powers to cases in which an appointment, layout, reduction, suspension, or removal has been made in the derogation of O.R.C. chapter 124. Where a complaint does not allege any of the above stated triggering devices, the State Personnel Board of Review is without jurisdiction to proceed with an investigation. *Okapal v. University of Toledo,* (1982) PBR 82-INV-10-3019 and *Logsdon v. University of Cincinnati*, (1982) PBR 82-INV-08-2690. Fallback rights and re-designating someone's position from the classified service to the unclassified service are not covered under this Board's investigatory powers. As can be seen by the Appellant's investigation request, none of the above stated grounds triggers this Board's investigatory powers.

In fact, in Appellant's Request for Investigation, he has not alleged that he has been subject to an appointment, reduced, laid off, suspended or removed from his position as required by O.R.C. section 124.56. Further, the evidence revealed that Mr. Orr was not reclassified, but only had his position as a Data Systems Administrator re-designated from the classified service to the unclassified service. Thus, since no employment action triggering O.R.C. section 124.56 occurred, the State Personnel Board of Review lacks subject matter jurisdiction over Mr. Orr's Request for Investigation, and the Investigation Request should be dismissed as a matter of law.

Further, designating a position as classified or unclassified is in itself a lawful action on the part of an appointing authority. See, in general, *Lawrence v. Edwin Shaw Hospital* (1986), 34 Ohio App. 3d 137; *Shearer v. Cuyahoga Cty. Hospital, Sunny Acres* (1986), 34 Ohio App. 3d 59 (citing *State, ex rel. Store v. Raschig* (1943), 141 Ohio St. 477). See, also, *Spindler v. Medina Cty. Board of Mental Retardation and Developmental Disabilities* (July 19, 1991, State Personnel Board of Review 91-INV-03-0164, Silver, ALJ, affm'd Full Board, August 26, 1992). While that appointing authority may or may not be mistaken in that designation, it is an issue that can only be determined whenever the jurisdiction of the State Personnel Board of Review is invoked in regard to another issue.

Additionally, in the case of *Adams v. Wray* (Mar. 15, 1994), Franklin App. No. 93APE-09-1283, unreported, 1994 WL 85626 it was held that a change in the Appellant's status, from classified to unclassified, did not establish a present controversy, and until an employment action is taken which triggers the protections claimed to have been lost, no genuine controversy exists and Appellant's claims are not ripe for adjudication.

Therefore, because Appellant has already received actual notice of a change or "correction" in his status, should Appellant thereafter be adversely affected by a personnel action, Appellant may file another appeal with the State Personnel Board of Review. Thus, this Board does not need to determine whether the Appellant's position with DAS is in the classified or unclassified service, at this time. When, or if, an adverse employment action actually occurs, this Board, at that time, will determine whether it possesses jurisdiction over the subject matter of that appeal.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that Appellee's Motion to Dismiss be **GRANTED** and that the two instant appeals and one Request for an Investigation be dismissed as a matter of law, pursuant to O.A.C section 124-1-02(X) and O.R.C. sections 124.03, 124.11(D), 124.11(D)(2) and 124.56.

Christopher R. Young
Administrative Law Judge