

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Kevin Whaley,

Appellant,

v.

Case Nos. 2014-REM-02-0041

2014-INV-02-0043

Ohio Veterans Home,

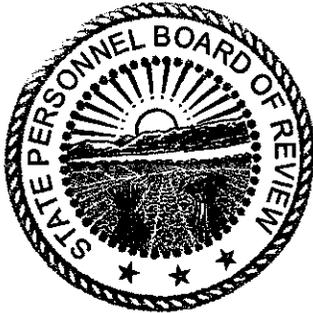
Appellee,

ORDER

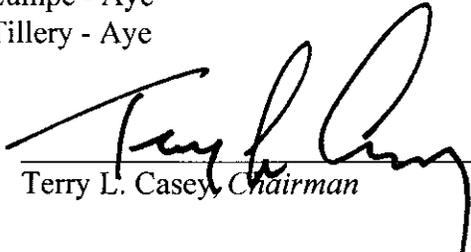
These matters came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

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 the appeals are **DISMISSED** because this Board lacks jurisdiction to consider an appeal on the merits of Appellant's removal from employment with Appellee and because Appellant has asserted no violation of civil service law over which this Board may exercise investigatory jurisdiction.



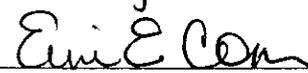
Casey - Aye
Lumpe - Aye
Tillery - Aye


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, August 21, 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**

Kevin Whaley,

Appellant

v.

Ohio Veterans Home,

Appellee

Case Nos. 2014-REM-02-0041
2014-INV-02-0043

July 8, 2014

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on for consideration pursuant to Appellee's Motion to Dismiss, filed on April 21, 2014, in SPBR Case No. 2014-REM-02-0041 and Appellee's Renewed Motion to Dismiss SPBR Case No. 2014-REM-02-0041 and Motion to Dismiss SPBR Case No. 2014-INV-02-0043, filed on May 12, 2014. Appellant filed no memoranda *contra*. Appellee asserts that this Board lacks jurisdiction over Appellant's appeal of his removal from employment with Appellee because he occupied a position in the unclassified service at the time of his removal. Appellee requests that the Board dismiss Appellant's request for investigation due to his failure to respond to this Board's correspondence dated April 15, 2014.

Based upon the uncontroverted evidence contained in the record, I make the following findings of fact:

At the time of his removal from employment, Appellant was employed by Appellee in a position classified as a Program Administrator 3. On July 18, 2012, prior to accepting the Program Administrator 3 position, Appellant executed a Consent to Transfer acknowledging that the Program Administrator 3 position was in the unclassified service; on August 2, 2012, Appellant signed an Acknowledgement of Unclassified Status. The acknowledgement indicated that Appellant served at the pleasure of Appellee. As an unclassified employee, Appellant was exempted from the competitive hiring process, had the flexibility to

schedule his time, and could freely accrue compensatory time without prior approval.

On April 15, 2014, this Board sent correspondence to Appellant requesting that he state with particularity those requirements of the civil service law which he believed had been violated by Appellee's actions and notifying him that failure to provide such information would result in a dismissal of his case. Appellant has filed no information with this Board identifying any violation of civil service law on the part of Appellee.

CONCLUSIONS OF LAW

This Board does not possess subject matter jurisdiction over the removal of an unclassified employee since Ohio Revised Code Section 124.03 limits this Board's jurisdiction to actions concerning classified employees. Appellee presented evidence to assert the affirmative defenses of waiver and estoppel. The Supreme Court discussed the application of waiver and estoppel in Chubb v. Ohio Bureau of Workers' Compensation (1998), 81 Ohio St. 2d and 3d 275, noting that the State may assert the defenses if an employee has accepted the benefits of an unclassified position, regardless of whether the employee's actual job duties fell within a classified status. Further, the court in *Chubb* held that if a public employee has served in an unclassified position and has enjoyed the benefits of the unclassified service, then as a matter of equity and fairness, the employee should be precluded from claiming classified status in order to receive the statutory benefits afforded classified civil servants. If the employee knowingly and voluntarily accepted an appointment into an unclassified position and reaped other benefits, the employee has voluntarily relinquished the statutory rights and protections of civil service status.

In the cases at hand, Appellant has filed no memorandum *contra* with this Board to contest the assertion that he occupied an unclassified position at the time of his removal from employment with Appellee. The undisputed information contained in the record demonstrates that Appellant signed an acknowledgment form noting that his position was considered unclassified, and that he served at the pleasure of the Director of the Ohio Department of Veterans Services. Appellant has not contested Appellee's assertion that he accepted the benefits of the unclassified service. Accordingly, I find that sufficient evidence is contained in the

Kevin Whaley

Case Nos. 2014-REM-02-0041, 2014-INV-02-0043

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record to indicate that Appellant knowingly and voluntarily accepted an appointment to the unclassified service and reaped the benefits of that appointment, thereby relinquishing the statutory rights and protections of the classified civil service. Appellant is thereby estopped and/or waived from asserting that he was a classified employee and this Board has no jurisdiction to consider an appeal on the merits of his removal from employment with Appellee.

Pursuant to O.A.C. 124-7-05, this Board has the authority to conduct investigations by an exchange of correspondence, rendering its decision based on information received within the response time allowed. Appellant was apprised in the Board's April 15, 2014, correspondence that failure to respond within the designated time frame would result in dismissal of the appeal. I find that Appellant has failed to provide this Board with any information identifying a violation of the civil service laws over which it may exercise its investigatory jurisdiction.

Therefore, because this Board lacks jurisdiction to consider an appeal on the merits of Appellant's removal from employment with Appellee and because Appellant has asserted no violation of civil service law over which this Board may exercise investigatory jurisdiction, I respectfully **RECOMMEND** that the above-referenced appeals be **DISMISSED**.


Jeannette E. Gunn
Administrative Law Judge