

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

Tyrone Harris,

Appellant,

v.

Case No. 2014-REM-04-0071

Ohio State University,

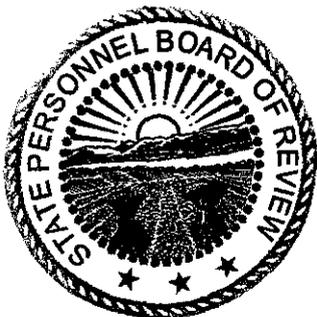
Appellee,

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.

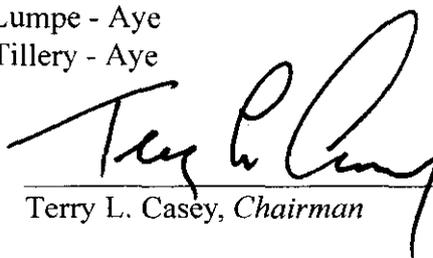
Wherefore, it is hereby **ORDERED** that Appellant's removal from his Assistant Dining Manager position is **DISAFFIRMED**, pursuant to R.C. 124.03, R.C. 124.11 (A) (9), and R.C. 124.34.



Casey - Aye

Lumpe - Aye

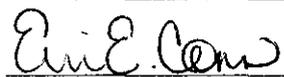
Tillery - Aye


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, March 25, 2015.


Eric A. Conroy
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**

Tyrone Harris

Case No. 2014-REM-04-0071

Appellant

v.

February 19, 2015

Ohio State University

James R. Sprague

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came to be heard at record hearing on December 4, 2014. Present at hearing was Appellant, who was represented by James J. Leo, Attorney at Law. Appellee, Ohio State University (OSU), was present through its designee, Zia Ahmed, Director of Dining Services, and was represented by Timothy M. Miller and Erin E. Butcher, Assistant Attorneys General.

Appellant served as Assistant Dining Manager at the Morrill Commons cafeteria and its associated grocery/convenience store, both located on OSU's Main Campus. Appellant received notice of his removal from this position through his receipt of a letter on or about March 5, 2014. Appellant's removal was effective on March 31, 2014. Appellant timely filed the instant appeal with this Board on April 2, 2014. A pre-hearing was held in this matter on July 31, 2014.

OSU has asserted that Appellant's position fell within the unclassified service at the time of Appellant's removal. Thus, OSU contested Appellant's claim that this Board possesses jurisdiction to consider Appellant's instant removal appeal.

Pursuant to R.C. 124.03 (A) (1) (Paragraph 5.), in determining whether a pertinent employee is in the unclassified service, this Board is to consider the inherent duties of the employee's classification during the two-year period immediately preceding the filing of the appeal (Please see, also O.A.C. 124-7-04). Because OSU did not issue an R.C. 124.34 Order of Removal to Appellant, this appeal turns on the examination of Appellant's duties for the pertinent review period.

At the hearing, Appellant moved to strike the testimony of Appellant's former supervisor, Rahul Ponappa. Mr. Ponappa served as Appellant's supervisor when Appellant's position bore the title of **Service Coordinator**. The record reflects that, on or about October 7, 2013, Appellant encumbered a position with the title of

Assistant Dining Manager. Yet, the record was not particularly clear regarding whether Appellant switched positions through transfer, promotion, or other means or, conversely, continued to encumber the same position which now had a new title.

If Appellant *actually changed positions and classifications* and if Mr. Ponappa did not supervise Appellant in Appellant's apparently new position, then Mr. Ponappa's testimony would be arguably irrelevant to determining whether Appellant's Assistant Dining Manager position and classification fell within the unclassified service. Conversely, if Appellant's position merely underwent a title change, then Mr. Ponappa's testimony would be relevant **for the time period covering approximately March 4, 2012 to June, 2013** during which time period Mr. Ponappa directly supervised Appellant.

In order to further develop the record regarding Appellant's motion to strike, on December 11, 2014, Appellee filed its Narrative Regarding Position Title and Number and on December 18, 2014, Appellant filed Appellant's Response to Appellee's Narrative Regarding Positions and Titles.

Based on the record developed at that point, it appeared more probable than not that Appellant's position had undergone a title change from Service Coordinator to Assistant Dining Manager. Thus, on December 23, 2014, this Board issued a Procedural Order finding that Mr. Ponappa's testimony could be considered in determining the status of Appellant's position.

The parties timely filed their respective comprehensive post-hearing briefs on or before February 3, 2015 and the instant record was then closed.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

At hearing, three witnesses testified.

First to testify was **Tyrone Harris, Appellant**, as if on cross. As noted, Appellant held the position of Assistant Dining Manager at the Morrill Commons cafeteria (traditional) and also at its grocery/convenience (retail) store on OSU's Main Campus at the time of his removal as an alleged unclassified employee, effective March 31, 2014. Appellant served for about nine years as a Service Coordinator and about one and one-half years as an Assistant Dining Manager.

As of October 1, 2013, Appellant was to be paid \$36,920.52 per annum. (Please see Appellee's Exhibit 4.)

Next to testify was **Zia Ahmed**, Director of Dining Services, who oversees the entire food service operation at OSU. Appellant served as an indirect report under Director Ahmed, approximately four administrative levels below Director Ahmed.

Next to testify was **Rahul Ponappa**, who has held the position of Operations Manager for at least the past eight years. As noted, Mr. Ponappa served as Operations Manager for the Morrill Commons operation from approximately the beginning of 2010 until June 2013. He has served as Operations Manager at Kennedy Commons for all times subsequent, including at the time of hearing.

For our purposes, the relevant period of Mr. Ponappa's supervision of Appellant essentially spans March 4, 2012 (two years prior to Appellant's receipt of his notice of removal) through May, 2013 (after which Mr. Ponappa went to Kennedy Commons).

Last to testify was **Tyrone Harris, Appellant**, both on direct and re-direct.

To understand OSU's dining operations, it is useful to examine the hierarchy that included Appellant's position. Appellant initially served as a Service Coordinator and, later, as an Assistant Dining Manager for the Morrill Commons operation. It appeared that Appellant had performed similar types of duties during his service at Kennedy Commons, some years prior to Appellant's more recent service at Morrill Commons.

Apparently also at Appellant's administrative level is the Chef, who has general control over the food production at Morrill Commons. Appellant's job focused on Student Employee selection, scheduling, and general supervision. Further, it involved making recommendations involving food line presentation and involved ensuring that the eating areas of Morrill Commons offered a clean environment for student customers. Appellant's position also involved significant customer/patron interaction and receipt of and follow-up concerning solicited customer/patron feedback.

At the time of hearing, OSU employed from perhaps 20 to 30 Service Coordinators and Assistant Dining Managers. They generally answer to between 10 and 20 Operations Managers, who answer to six Assistant Directors. The Assistant Directors answer to approximately four Associate Directors, who answer to the Director of Dining Services.

Testimony reflects that OSU students who are hired by Appellee (*i.e.* Student Personnel) comprise a large percentage of the work force at Morrill Commons. OSU students generally apply online and can apply for a position at the dining operation that offers the best location for the particular student.

Applicants for Student Worker positions are interviewed by one or more civil service employees. These include Service Coordinators (now Assistant Dining Managers), along with Operations Managers, whose participation in this process appears to wax and wane.

This interview process may also include Student Managers – who start as Student Workers, are further trained, show initiative and organizational talent, and are thus promoted.

The record reflects that, at times, Appellant offered significant input into the selection of Student Workers. Other times, it appears, Appellant at least made recommendations either individually or as a member of an interview team.

Appellant also appeared to have had persuasive input into the selection of Student Managers, but did not make the final decision. However, that input seems to have evaporated with the arrival of Appellant's new Operations Manager, Shannon Weimerskirch.

Operations Manager Weimerskirch began supervising Appellant sometime between Mr. Ponappa's departure for Kennedy Commons and October 1, 2013, the date of Appellant's "title change". Appellant testified that Mr. Weimerskirch made unilateral determinations regarding the hiring of Student Managers.

No specific credible evidence was offered to substantiate Appellee's designee's claim that Appellant (or any other Assistant Dining Manager) could and frequently did discipline Student Workers. Appellant did state that he could offer on-the-spot job coaching or could intervene in a time sensitive situation.

The record indicates that Appellant needed to bring any situation serious enough to potentially call for discipline to the attention of the Operations Manager, who would determine if the student should be disciplined. Appellant also completed and forwarded the *pro forma* paperwork for the removal of any Student Worker who had six consecutive no call in/no show days and he apprised his Operations Manager of same.

Appellant appeared to have some authority to effectively direct the work of Student Personnel, to approve their leave and scheduling requests, and to evaluate their performance. Appellant coordinated Student Personnel scheduling, but had no authority to authorize overtime without the prior approval of the Operations Manager.

For perhaps the first six months of the instant review period, Appellant supervised Custodians, who encumbered collective bargaining positions. However, the record reflects that, for about Appellant's last one and one-half years at OSU, no civil service employees reported to Appellant, nor did he have functional control over any civil service positions for his last one and one-half years.

It appears Appellant could request a transfer of food from another OSU food service operation to the Morrill Commons operation, if Appellant perceived that a shortage had or was about to develop. However, it appears that Appellant needed permission from an Operations Manager to do so.

Appellant offered credible testimony that Appellant utilized no purchasing authority and that he did not have, and was not aware of the purpose of, a "P Card". Appellee was unable to present any reliable probative evidence to rebut Appellant's testimony in this area.

Appellant did appear to indicate that, at one point, he believed he may have had authority to make a purchase in an emergency. Yet, given the testimony that a P-Card was necessary to make a purchase and given the testimony that Appellant did not even know what a P-Card was, it is questionable whether Appellant even had an understanding of the mechanics of making a purchase on behalf of OSU.

Appellant had access to two combination lock safes for the operation, with perhaps \$1,000.00 in cash at any one time. Appellant, the Operations Manager, the Chef, and two classified civil service managers had access to these safes.

The record reflects that Appellant did not order food and did not order paper goods. Further, credible testimony was offered that it was the Chef, not Appellant, who kept track of available on-site food stores and of the need to replenish food supplies if they were running low.

Appellant also offered credible, essentially un rebutted, testimony that he did not order any other supplies. Neither did he conduct inventories.

Appellant did indicate that some of these duties were contemplated to be included for his "new" Assistant Dining Manager position. Yet, Appellant offered, Mr. Weimerskirch was just learning the Operations Manager job and, so, had not yet had time to train Appellant on these functions prior to Appellant's removal.

Appellant could not remove food from the service line without checking with the Chef. Appellant could make suggestions to the Chef regarding food preparation *et cetera*, but the Chef served as the final arbiter in these situations. If the Operations Manager was present, Appellant would first go to the Operations

Manager. Appellant could then approach the Chef, if the Operations Manager permitted or directed Appellant to do so.

Further, the Chef, not Appellant, was responsible for food safety and was the point of contact, if pertinent Health Department personnel came on site. The Operations Manager served as the back-up for this function and Appellant would only serve as that contact if neither the Chef nor the Operations Manager was available.

Appellant also testified that, in the absence of the Operations Manager, Appellant would take his own leave requests, *et cetera* to the Chef for approval.

On or about November 23, 2013, Appellant was designated as an "Essential" employee regarding weather and other emergencies. The record does not reflect how many other employees of Dining Services may have also carried this designation.

Nothing in the record suggests that Appellant could authorize policy. Appellant did serve as a supervisor over the Custodians, but even that authority ended a year and a half before his removal. Thus, while Appellant may have implemented policy regarding Student Personnel, he would not have implemented any policies regarding any civil service employees for approximately 75 percent of the two-year "look back" period for this appeal.

When Appellant applied for his earlier/initial "Assistant Manager – Food Service" position at OSU, Appellant completed and submitted an "Unclassified/Professional Application", which he appears to have signed and dated September 2, 2005 (Please see Appellee's Exhibit 1). Appellant received a notification of appointment letter from OSU, dated September 1, 2005. The letter states, at Paragraph 2., that the position falls within the unclassified service and constitutes employment at will. Appellant does not appear to have signed the acknowledgment of receipt at the end of the letter. (Please see Appellant's Exhibit D.).

OSU has chosen to waive its opportunity to assert that Appellant should be estopped from claiming the protections of the classified service. However, as noted, OSU is claiming that Appellant's position is exempted from the classified service by operation of R.C. 124.11 (A) (9).

Based on the testimony presented and evidence admitted at hearing and upon the post-hearing briefs submitted by the parties, I make the following Findings:

First, I note that I incorporate, by reference, any finding set forth, above, whether express or implied.

Next, I find that Appellant essentially functioned as a floor manager at Morrill Commons, particularly during the last one and one-half of his last two years at OSU.

Appellant's duties and position do not appear to be unique. Indeed, during the time at issue, OSU employed approximately 20 to 30 Service Coordinators and Assistant Dining Managers. Appellant's position falls approximately four administrative levels below the Director of Dining Services on OSU's pertinent table of organization.

Moreover, Appellee did not demonstrate that Appellant was uniquely or exceptionally well-qualified for this position (although he had the prior experience to potentially fulfill the duties of same). Nor did Appellee demonstrate that Appellant was imbued with a special trust and confidence above what might be expected in comparison to the other 19 to 29 Service Coordinators and Assistant Dining Managers.

For most of Appellant's last two years at OSU, Appellant did not supervise civil service employees. He had significant input into the hiring of Student Workers, less so regarding Student Managers, and no hiring authority for these Student Managers following the arrival of Operations Manager Shannon Weimerskirch.

Appellant scheduled Student Personnel, yet he needed prior permission to authorize overtime. Appellant did approve Student Personnel absences and did direct their work on the floor, but not on the line or in the food production areas.

Appellant could not discipline Student Personnel but could conduct job coaching or immediate intervention, if needed. The Operations Manager effectuated any discipline or other dispositive actions and apprised Human Resources of same, as needed. Appellant completed *pro forma* paperwork regarding any Student Personnel who exceeded the allotted limit for no call ins/no shows. This was essentially a clerical task.

Appellant was in charge of ensuring a clean (non-line/non-kitchen) service area. He lacked authority to change food preparation or food service, but could make suggestions to the Chef or the Operations Manager regarding same. He could and did solicit and receive customer feedback regarding the Morrill Commons operation.

Appellant did not spend funds and did not purchase on behalf of OSU. He did not order supplies (either paper goods or food stuff). He could retrieve food

supplies from other OSU food operations, with prior permission from his Operations Manager. The Chef was responsible for monitoring food supplies.

Appellant had access to the two safes in the Morrill operation, which might have \$1,000 at any one time. This access was shared with the Operations Manager and the Chef, whose positions may be listed in the unclassified service. That access was also shared with two other managers, whose positions are listed in the classified service.

Appellant believed that he might have had the authority to make a purchase in an emergency. However, he lacked a P-Card and did not appear to understand the mechanics of making a purchase on behalf of OSU.

CONCLUSIONS OF LAW

This case presents this Board with the question of whether an Assistant Dining Manager, who performs only some of the duties envisioned for the position, who performs no special or higher level duties, and who possesses no special trust, confidence or extraordinary qualifications, can, nonetheless, be considered to encumber an unclassified position, pursuant to R.C. 124.11 (A) (9)? Based on the findings set forth, above, and for the reasons set forth, below, this Board should answer that Appellant's position fell within the classified service.

This Board generally lacks jurisdiction over the removal of an employee whose position falls within the unclassified service. Accordingly, this Board is frequently called upon to determine whether a pertinent Appellant's position falls within the classified or, conversely, the unclassified service. Some of those cases are close calls. This is not one of those cases.

Here, Appellee has asserted that Appellant's position fell within the fiduciary and/or administrative exemptions from the classified service set forth in R.C. 124.11 (A) (9), which reads, in pertinent part:

124.11 Unclassified service - classified service.

The civil service of the state and the several counties, cities, civil service townships, city health districts, general health districts, and city school districts of the state shall be divided into the unclassified service and the classified service.

(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:

(9) The deputies and assistants of state agencies authorized to act for and on behalf of the agency, or holding a fiduciary or administrative relation to that agency ...

The term "fiduciary" has been defined many times over by the courts and, in summary, requires the employee to complete his or her assigned job duties with a high degree of trust, confidence, reliance, integrity and fidelity, above and beyond the technical competence required to complete the job. *State, ex rel. Charlton v. Corrigan* (1988), 36 Ohio St.3d 68, 71.

O.A.C. 124-1-02 (I) provides additional guidance regarding the fiduciary exemption and indicates:

(I) "Fiduciary relationship" 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 are over and above the technical competency requirements to perform 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.

O.A.C. 124-1-02 (C) provides additional guidance regarding the administrative exemption and indicates:

(C) "Administrative relationship" generally means a relationship where an employee has substantial authority to initiate discretionary action and/or in which the appointing authority must rely on the employee's personal judgment and leadership abilities. The average employee would not possess such qualities or be delegated such discretionary authority. Whether one position occupies an administrative relationship to another is a question of fact to be determined by the board.

In the instant appeal, Appellant's duties did not require him to possess, nor did he possess, any special trust or fidelity on behalf of his appointing authority or agency. It is arguable that Appellant even exercised the level of discretion one might expect from an Assistant Dining Manager. Moreover, he almost certainly did not exercise a level of discretion beyond the level ordinarily expected for his classification.

Further, there is nothing in the record to demonstrate that Appellant performed duties that could not have been delegated to the average employee with

proper knowledge of the pertinent procedures. Nor did Appellant appear to hold qualifications above and beyond the technical competency requirements to perform his job.

Thus, Appellant cannot be said to have held a fiduciary relation to his appointing authority or agency.

Moreover, Appellant simply did not possess, and certainly did not exercise, substantial authority to initiate discretionary action at any level, and certainly not above that of the average employee. Thus, Appellant cannot be said to have held an administrative relation to his appointing authority or agency.

To summarize, Appellant exercised the level of authority and enjoyed the level of confidence from management we might expect for a low-level manager. It strains credulity to suggest that the instant record demonstrates that Appellant functioned at any higher level than this.

Appellee has not, to date, issued an R.C. 124.34 Order of Removal to Appellant. Accordingly, this Board should disaffirm Appellant's instant removal, for Appellee's lack of compliance with the mandates for classified removals set forth in R.C. 124.34.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **DISAFFIRM** Appellant's **REMOVAL** from his Assistant Dining Manager position, pursuant to R.C. 124.03, R.C. 124.11 (A) (9), and R.C. 124.34.


James R. Sprague
Administrative Law Judge