

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

Thomas Flanders,

*Appellant,*

v.

Case No. 2015-REM-02-0020

Montgomery County Sheriff,

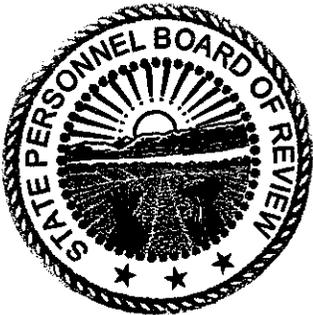
*Appellee,*

**ORDER**

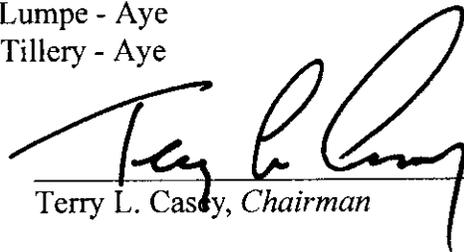
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 this matter is **DISMISSED** for lack of jurisdiction, pursuant to R.C. 124.03 and 124.34.



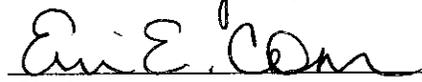
Casey - Aye  
Lumpe - Aye  
Tillery - Aye

  
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, May 05, 2016.

  
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 May 12, 2016.** 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 Number: 2015-REM-02-0020

Transcript Costs: \$168.00 Administrative Costs: \$25.00

Total Deposit Required: \* \$193.00

Notice of Appeal and Deposit Must  
Be Received by SPBR on or Before: May 20, 2016

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

Thomas Flanders

Case No. 15-REM-02-0020

*Appellant*

v.

April 6, 2016

Montgomery County Sheriff

Jeannette E. Gunn

*Appellee*

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause came on to be heard on November 4, 2015. Appellant was represented at record hearing by Matthew Schultz, attorney at law, but did not appear personally before this Board. Appellee Montgomery County Sheriff was present at record hearing through its designee, Chief Deputy Rob Streck, and was represented by Todd M. Ahearn, Assistant Prosecuting Attorney.

Appellant was removed from employment with Appellee effective February 6, 2015. Appellee asserted that Appellant's position was unclassified pursuant to R.C. 124.11(A)(9). At record hearing, Appellee further asserted the doctrines of waiver and estoppel. Appellant's representative indicated prior to the beginning of testimony that Appellant had filed the instant appeal in order to exhaust his remedies for the purpose of filing a mandamus action.

**CONSOLIDATED STATEMENT OF THE CASE  
AND FINDINGS OF FACT**

Appellant was employed by Appellee as a Captain in the Sheriff's Office at the time of his removal from employment; he held that position for approximately two years prior to his termination. His immediate supervisor was Major Scott Landis. Appellant also communicated directly with and was assigned tasks by Appellee.

Appellant was part of Appellee's command staff, which is comprised of the Sheriff, the Chief Deputy, and employees holding the rank of captain or above (i.e., captain or major). He attended weekly command staff meetings, was party to confidential information discussed in command staff meetings, and provided updates directly to Appellee on issues occurring within his areas of responsibility during command staff meetings. Appellant also attended monthly staff meetings.

Members of Appellee's command staff, including Appellant, are compensated at a higher rate than sergeants and deputies. Appellant, like other command staff, was issued a departmental vehicle to be used whenever needed, as well as a mobile phone that was available to him for both business and personal use. As a member of the command staff, Appellant campaigned for and engaged in political activity on behalf of Appellee. He attended meetings and fundraisers as Appellee's personal representative, and his photo and biography, along with those of the other command staff, appeared on Appellee's website as a community contact.

At the time of his removal, Appellant was responsible for oversight of Appellee's jail population and operation of the jail facility. Two captains are assigned to Appellee's jail facility, with one captain supervising the population, housing units, and personnel working in those units, and one captain supervising booking, records, laundry and food service. Appellant provided direct supervision to sergeants within his chain of command.

Appellant assessed the need for maintenance and repair projects in the jail facility and proposed those projects to Appellee in command staff meetings. He acted as Appellee's representative in obtaining quotes from outside vendors for those projects, and coordinated additional security for workers and equipment needed to carry out the projects within the jail facility.

Appellant was responsible for managing the day to day operations of court security for Montgomery County and represented Appellee at monthly court meetings. He oversaw the functionality of metal detectors and assigned appropriate staffing to address security needs. Appellant determined the need and selected and obtained pricing for security equipment. Appellant coordinated general security for other courts in other county locations, including the Riebold Building, the Juvenile Justice Center and the Montgomery County Job Center, and for the Board of Elections.

Appellant oversaw jury security in general and scheduled additional security as needed for sequestered juries. He conducted statutory inspection tours of the jail facility for grand juries. Appellant was responsible for overseeing the transportation unit, which provided transportation services to and from the jail facility, courts and other county locations. He purchased vehicles for the transportation unit on Appellee's behalf.

Appellant was responsible for assigning disciplinary investigations to staff, as well as investigating inmate complaints, and recommending discipline as needed. He monitored and controlled the budget for the Administrative Division and the Court Security Division and had the authority to approve overtime for employees in those divisions. Appellant identified employee training needs and examined operations to identify effective practices and meet division goals.

Appellant coordinated special projects for Appellee, including high profile investigations, and reported directly to him in those instances. He communicated directly with Appellee when the Chief Deputy was out of the office. Appellant participated in labor arbitration on behalf of Appellee as a management labor relations representative.

Upon his appointment to the position of Captain within Appellee's office, Appellant signed a Memorandum of Understanding acknowledging that he understood his promotion to Captain to be at the will and pleasure of Appellee. Appellant further indicated his understanding that his position was considered by Appellee to be a fiduciary and administrative position, as defined by R.C. 124.11(A)(9).

### **CONCLUSIONS OF LAW**

Civil service employment in the state of Ohio is divided into the classified and unclassified services; the division between these two types of public employment is outlined in R.C. 124.11(A), which describes a variety of positions in the public sector that are placed in the unclassified service. In this instance, Appellee asserts that Appellant's position fell within the unclassified service pursuant to R.C. 124.11(A)(9). That section of the Revised Code exempts from the classified service:

(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 and those persons employed by and directly responsible to elected county officials or a county administrator and holding a fiduciary or administrative relationship to such elected county officials or county administrator, and the employees of such county officials whose fitness would be impracticable to determine by competitive examination ... (emphasis added)

The terms "fiduciary relationship" and "administrative relationship" are not defined by the Revised Code, but are defined within the Administrative Code. O.A.C. 124-1-02 defines "fiduciary relationship" in subsection (I) as:

... 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.

An "administrative relationship" is defined in subsection (C) as:

... 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.

Appellee is an elected county official. Accordingly, this Board must consider whether Appellant was directly responsible to Appellee and whether the duties performed by Appellant placed him in either a fiduciary or an administrative relationship with Appellee. Because Appellant offered no testimony or evidence at

record hearing, the testimony and evidence presented by Appellee provides the sole basis for the conclusions of law made herein.

Testimony presented at record hearing indicated that Appellant communicated directly with and was assigned some tasks by Appellee. He campaigned for and engaged in political activity on behalf of Appellee, attending meetings and fundraisers as Appellee's personal representative. He conducted high profile investigations for Appellee and coordinated special projects. I find that the evidence presented supports a conclusion that Appellant was directly responsible to Appellee, an elected county official. In addition, I find that the duties performed by Appellant on behalf of Appellee required Appellee to rely on Appellant's integrity and fidelity; these duties were sufficient to establish a fiduciary relationship to Appellee. *Yarosh v. Becane* (1980), 63 Ohio St.2d 5.

Testimony and evidence presented at record hearing also established that Appellant exercised broad discretion in his oversight of Appellee's jail population and operation of the jail facility. Appellant monitored his divisions' budgets and expenditures to ensure compliance. He was responsible for directly supervising and evaluating employee performance and for approving overtime. Performance of such duties required Appellant to interpret and carry out agency policy. I find that duties of this nature required Appellee to rely on Appellant's personal judgment and leadership qualities, see, *Rarick v. Bd. of Cty. Commrs.* (1980), 63 Ohio St.2d 34, and are characteristic of an administrative relationship.

Accordingly, upon a comprehensive review of the information contained in the record, I find that Appellant was directly responsible to and held both a fiduciary and an administrative relationship to Appellee. Appellant's position, therefore, is exempt from the classified service and this Board lacks jurisdiction to consider the instant appeal.

Appellee also presented evidence to assert the affirmative defenses of waiver and estoppel. In the event that this Board were to conclude that Appellant's position was not exempted from the classified service by operation of R.C. 124.11(A)(9), I find that Appellant should, nevertheless, be estopped from claiming the protections of the classified service.

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. 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 case at hand, Appellant knew that Appellee considered his position to be fiduciary and administrative, as defined by R.C. 124.11(A)(9). He signed an acknowledgment form noting this, as well as acknowledging that his appointment was at the will and pleasure of Appellee. No evidence was presented to rebut Appellee's assertion that Appellant's acceptance was knowing and voluntary. Evidence at record hearing established that Appellant received compensation commensurate with his position and, as a member of command staff, was issued a vehicle and mobile phone for both business and personal use.

Accordingly, I find that sufficient evidence is contained in the 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 should consequently be estopped and/or waived from asserting that he was a classified employee over which this Board may exercise jurisdiction.

Therefore, based upon the foregoing analysis, I respectfully recommend that this matter be **DISMISSED** for lack of jurisdiction, pursuant to R.C. 124.03 and 124.34.

  
Jeannette E. Gunn  
Administrative Law Judge