

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

Shobna Varma,  
*Appellant,*

v.

Case No. 07-REM-01-0034

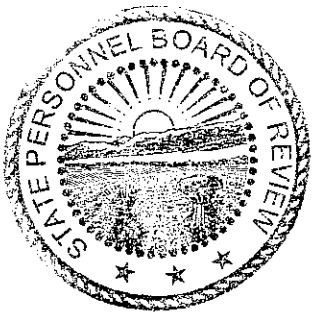
Department of Transportation,  
*Appellee.*

**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 record and 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 that the instant appeal be **DISMISSED** for lack of subject matter jurisdiction, pursuant to O.R.C. §§ 124.03 and 5501.04(E).



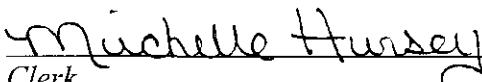
Lumpe – Aye  
Booth – Aye  
Tracy – Aye

  
\_\_\_\_\_  
J. Richard Lumpe, *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 the foregoing is ~~(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 7, 2007.

  
\_\_\_\_\_  
Michelle Hursey  
*Clerk*

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

9-7-07

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

Shobna Varma,

Case No. 07-REM-01-0034

*Appellant*

v.

June 28, 2007

Ohio Department of Transportation,

Elaine K. Stevenson  
*Hearing Officer*

*Appellee*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This matter came on for consideration due to Appellant's timely filing of a notice of appeal of her removal from employment with Appellee, Ohio Department of Transportation. On April 25, 2007, a status conference was held to discuss the jurisdictional questions raised by Appellant's appeal. Pursuant to instructions issued at that status conference and this Board's April 25, 2007 procedural order, Appellant filed her jurisdictional brief on May 23, 2007, and Appellee filed its Response to Appellant's Jurisdictional Brief and Appellee's Motion to Dismiss on June 25, 2007.

**FINDINGS OF FACT**

Based on a thorough review of the information contained in the record and after careful consideration of the jurisdictional briefs and documents submitted by the parties, I make the following findings of fact:

1. Appellant was employed by Appellee, the Ohio Department of Transportation (ODOT) for approximately six and one half years.
2. On March 17, 2000, Appellant applied for a promotional position of Deputy Director of the Division of Information Technology, ODOT. Effective July 2, 2000, Appellant was promoted from her Systems Analyst 1 position to the Deputy Director position, which was classified as Data Systems Administrator, classification number 64135. Appellant reported directly to the former Director of ODOT, Gordon Proctor, and her position's working title was Deputy Director of the Division of Information Technology. The Deputy Director of the Division of Information Technology directs all IT services throughout ODOT. Mr. Proctor placed Appellant's position in the career professional service, pursuant to O.R.C. § 5501.20.

3. Effective January 8, 2007, Keith C. Swearingen was appointed the Acting Director of ODOT by Governor Ted Strickland. At all times relevant to this appeal, Mr. Swearingen was the Acting Director of ODOT and possessed the powers of appointment, suspension, reduction, layoff, and removal.
4. On January 8, 2007, Mr. Swearingen met with members of the Governor's staff to discuss personnel issues. One of the issues discussed at that meeting was Appellant's position. Due to the scope and nature of Appellant's job responsibilities, Mr. Swearingen determined that Appellant's position should have been designated as unclassified pursuant to O.R.C. § 5501.04(E).
5. On January 8, 2007, Mr. Swearingen sent a letter to the Ohio Department of Administrative Services requesting the re-designation of Appellant's position as unclassified pursuant to O.R.C. § 5501.04(E).
6. On January 9, 2007, then Director of the Department of Administrative Services, Carol Nolan Drake, acknowledged the January 8, 2007 letter designating Appellant's position as unclassified pursuant to O.R.C. § 5501.04(E).
7. On January 9, 2007, Mr. Swearingen executed a personnel action changing Appellant's civil service status from the career professional service to the unclassified service, pursuant to O.R.C. § 5501.04(E).
8. At all times relevant to this appeal, Appellant's position has been classified as Data Systems Administrator, classification number 64315. The position control number for Appellant's position, 20064522, has not changed.
9. The January 9, 2007 personnel action changing Appellant's civil service status from career professional to unclassified pursuant to O.R.C. § 5501.04(E) does not constitute a reclassification of Appellant's position within the meaning of O.R.C. § § 124.03 and 124.14, and O.A.C. § 124-1-02(X).
10. On January 10, 2007, Mr. Swearingen executed a personnel action terminating Appellant's employment as an unclassified employee with Appellee, effective January 10, 2007. On January 10, 2007, Mr. Swearingen handed a letter to Appellant notifying her that her employment was terminated.
11. On January 18, 2007, Appellant filed a notice of appeal of her removal from employment to the State Personnel Board of Review. In her notice of appeal, Appellant indicates that she received notice of her removal on January 10, 2007 and that the effective date of her removal was also January 10, 2007.

### CONCLUSIONS OF LAW

In the present appeal, Appellant asserts that Appellee failed to follow proper procedures when it changed the status of her position from career professional pursuant to O.R.C. § 5501.20 to unclassified pursuant to O.R.C. § 5501.04(E) and then removed her from employment. Appellant requests this Board disaffirm Appellee's actions of changing her position from the career professional service to the unclassified service and subsequently terminating her employment. Appellant further requests this Board order Appellee to reinstate her to her position and award her any and all back pay and benefits to which she is entitled. Accordingly, the threshold issue presented by the instant appeal is whether this Board has jurisdiction to review ODOT's action changing an employee's position from the career professional service to the unclassified service pursuant to O.R.C. § 5501.04(E).

O.R.C. § 124.03 provides that this Board shall:

(A) Hear appeals, as provided by law, of employees in the *classified state service* from final decisions of appointing authorities or the director of administrative services relative to reduction in pay or position, job abolishments, layoff, suspension, discharge, assignment or reassignment to a new or different position classification. . . (Emphasis added.)

O.R.C. § 5501.04 states, in pertinent part:

The following divisions are hereby established in the department of transportation:

...

(E) The division of information technology;

...

The director of transportation shall distribute the duties, powers, and functions of the department among the divisions of the department.

Each division shall be headed by a deputy director, whose title shall be designated by the director, and shall include those officers and employees as may be necessary to carry out the work of the division. The director shall appoint the deputy

director of each division, who shall be in the *unclassified civil service of the state* and shall serve at the pleasure of the director. (Emphasis added.)

O.R.C. § 5501.20 states in pertinent part:

(A)(1) "Career professional service" means that part of the competitive classified service that consists of employees of the department of transportation, who regardless of job classification, meet both of the following qualifications:

(a) They are supervisors, professional employees who are not in a collective bargaining unit, confidential employees, or management level employees, all as defined in section 4117.01 of the Revised Code.

(b) They exercise authority that is not merely routine or clerical in nature and report only to a higher level unclassified employee or employee in the career professional service.

...

(B) Not later than the first day of July of each odd-numbered year, the director of transportation shall adopt a rule in accordance with section 111.15 of the Revised Code that establishes a business plan for the department of transportation that states the department's mission, business objectives, and strategies and that establishes a procedure by which employees in the career professional service will be held accountable for their performance. The director shall adopt a rule that establishes a business plan for the department only once in each two years. Within sixty days after the effective date of a rule that establishes a business plan for the department, the director shall adopt a rule in accordance with section 111.15 of the Revised Code that identifies specific positions within the department of transportation that are included in the career professional service. The director may amend the rules that identified specific position included in the career professional service whenever the director determines necessary. . . .

(D) An employee in the career professional service may be suspended, demoted, or removed because of performance that hinders or restricts the fulfillment of the department's business plan or for disciplinary reasons under section 124.34 or 124.57 of the Revised Code. *An employee in the career professional service may appeal only the employee's removal to the state personnel board of review. . . .* (Emphasis added.)

\* \* \*

There is no language in the above-cited statutes that confers jurisdiction on this Board to review Appellee's decisions regarding the designation of positions included in the career professional service and changes to such designations. In fact, O.R.C. § 5501.20(D) specifically limits this Board's jurisdiction to hear only appeals from removals of career professional employees. Therefore, the validity of the procedures used to change the career professional designation of Appellant's position is not an issue that this Board has statutory authority to review.


Appellant argues, however, that this Board does have jurisdiction to review the above-mentioned action as a "reclassification" of her position. Although the status change of Appellant's position was referred to as a "reclassification" in the April 25, 2007 procedural order, after developing the record through the parties' briefs and documentary evidence, it is clear that Appellant's position has been classified as Data Systems Administrator and her working title has been Deputy Director of the Division of Information Technology at all times relevant to this appeal. Therefore, Appellee's action changing Appellant's position from the career professional service to the unclassified service does not constitute a "reclassification" within the meaning of O.R.C. §§ 124.03 and 124.14, and O.A.C. § 124-1-02(X).

With regard to Appellant's removal, it is noted that Appellant's position was included in the career professional service for a number of years of her employment with Appellee; however, Appellee changed the status of Appellant's position from the career professional service to the unclassified service pursuant to O.R.C. § 5501.04(E), effective January 9, 2007. Subsequent to that action, Appellee removed Appellant from employment as an unclassified employee, effective January 10, 2007. While it is true that O.R.C. § 5501.20(D) provides that an employee in the career professional service may appeal the employee's removal to this Board, in this case the evidence established that Appellant was not in the career professional service at the time of her removal.

Lastly, in its response to Appellant's jurisdictional brief, Appellee also asserts that Appellant held a fiduciary relationship to ODOT and therefore her position was unclassified pursuant to O.R.C. § 124.11(A)(9). Usually, this Board would conduct a record hearing to

determine whether an employee is unclassified pursuant to O.R.C. § 124.11(A)(9), as case law has established that an employee's actual job duties are the determinative factor of whether an employee is unclassified pursuant to O.R.C. §124.11(A)(9). See *State ex rel. Charlton v. Corrigan* (1988), 36 Ohio St.3d 68, 71. Assuming for the sake of argument that the Board conducted a hearing regarding the scope and nature of Appellant's job duties and determined that Appellant was not an unclassified employee pursuant to O.R.C. § 124.11(A)(9). In that case, the Board would have no authority to order Appellant's reinstatement to her position since this position was unclassified pursuant to O.R.C. § 5501.04(E) at the time of her removal. Clearly, it would be superfluous to hold such a hearing.

Therefore, because this Board does not have the statutory authority to review Appellee's action changing the status of Appellant's position from the career professional service to the unclassified service pursuant to O.R.C. § 5501.04(E) and because Appellant was in the unclassified service at the time of her removal, I respectfully **RECOMMEND** that Appellee's motion to dismiss be granted and the instant appeal be **DISMISSED** for lack of subject matter jurisdiction, pursuant to O.R.C. §§ 124.03 and 5501.04(E).

  
Elaine K. Stevenson  
Hearing Officer

EKS:/