

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

Teresa Decker,

Appellant,

v.

Case No. 07-REM-01-0038

Department of Rehabilitation and Correction Central Office,

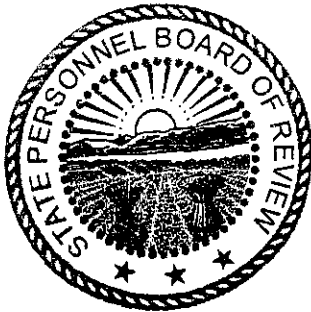
Appellee.

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 **ORDERED** that the instant appeal be **DISMISSED** for lack of jurisdiction, pursuant to O.R.C. § 124.11(A)(9).



Lumpe - Aye
Booth - Aye
Sfalcin - Aye

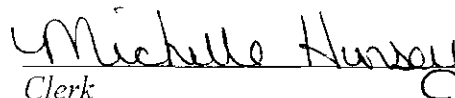


J. Richard Lumpe, *Chairman*

CERTIFICATION

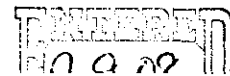
The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitute ~~(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, July 9, 2008.



Michelle Hunsay
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**

Teresa Decker,

Case No. 07-REM-01-0038

Appellant

v.

June 9, 2008

Department of Rehabilitation & Correction,
Central Office,

Appellee

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on due to Appellant's appeal of her January 12, 2007, removal from employment with Appellee. A record hearing was held in the instant matter on October 30, 2007. Appellant was present at record hearing and was represented by Samuel N. Lillard, attorney at law. Appellee was present at record hearing through its designee, Deputy Director Robert Keyes, and was represented by Assistant Attorneys General Lisa M. Eschbacher and James A. Hogan.

Appellant was removed from her position as Chief of the Bureau of Labor Relations, a position classified as Labor Relations Administrator 2; Appellee asserted in response to this Board's March 2007 questionnaire that Appellant occupied an unclassified position, pursuant to the provisions of R.C. 124.11(A)(9). Appellant's classified/unclassified status is a threshold issue impacting the jurisdiction of the Board to consider the merits of Appellant's removal, therefore, that status was the sole issue considered at the October 2007 record hearing.

Case law has determined that an employee's actual job duties are the determinative factor of whether an employee is classified or unclassified, accordingly, the testimony and evidence presented at record hearing was confined to information furthering the evidence of Appellant's job duties.

STATEMENT OF THE CASE

Appellant indicated that she held the position of Labor Relations Administrator 2 for approximately five and one-half years and served as the Chief of the Bureau of Labor Relations at the time of her removal in January 2007. She recalled that she was employed by the State of Ohio for approximately twenty-three years, transferring to the Department of Rehabilitation and Correction (DR&C) in 1996 from an unclassified administrative staff position in the Department of Administrative Services' Office of Collective Bargaining (OCB).

Appellant testified that although a "U" appeared on her paycheck, she was never told by Appellee that she occupied an unclassified position and never investigated her status as classified or unclassified. She recalled that when she was placed in the Labor Relations Administrator 2 position, the only thing discussed was the rate of pay. Appellant confirmed that she was familiar with designations of "classified" and "unclassified."

Appellant stated that she supervised nine employees in her position as Chief of the Bureau of Labor Relations, and that her immediate supervisor was Deputy Director Robert Keyes. She indicated that she made recommendations for hiring and for discipline of her subordinate employees, as necessary. Appellant testified that she did not set the budget for the Bureau of Labor Relations. She noted that she did not manage DR&C in Director Collins' absence and did not have the authority to sign his name.

Appellant testified that she did not create policy and did not have any discretion in implementing agency policy. She indicated that Director Collins retained final approval authority on matters of policy. Appellant confirmed that she was sometimes instructed by a Deputy Director or other higher-level management employee to work something out with regard to specific policy issues, and was sometimes asked for her opinion as to the union's probable reaction to policy changes. She explained that she generally served as a conduit for information between the parties working on policy matters and incorporated revisions into existing policies when requested to by Director Collins.

Appellant indicated that the Bureau of Labor Relations is responsible for making sure that the collective bargaining agreements affecting DR&C employees are followed. She confirmed that she was responsible for communicating with union representatives regarding policy rescissions (Appellee's Exhibit F), meeting dates

(Appellee's Exhibit G), and to clarify policy application (Appellee's Exhibit H). Appellant testified that she performed these tasks on her own authority as Chief of the Bureau of Labor Relations. She acknowledged that she had overall responsibility for the administration of all collective bargaining agreements affecting DR&C employees, and planning major personnel actions that affect those employees, including layoffs (Appellee's Exhibit D).

Appellant acknowledged that she had signature authority to approve Step 3 grievances on behalf of Director Collins. She explained that all grievances from DR&C's institutions and offices came to the Bureau of Labor Relations; Appellant explained that her role was to review the Labor Relations Officer's response to ensure that all of the pertinent issues had been addressed. She confirmed that she had the discretion to either approve or disapprove settlement agreements. Appellant noted that her signature on a settlement agreement indicated not only that she had reviewed and approved of the response, but that the settlement was also contractually compliant.

Appellant stated that she did not have discretionary authority to approve the amount of a financial award associated with a grievance settlement; she noted that Wardens and Deputy Directors were always consulted whenever a financial award was being contemplated. Appellant testified that she always informed the appointing authority of any proposed resolution to be sure they understood what would be happening, and if there was a problem, she would consult the Deputy Director of Prisons.

Appellant acknowledged that she was responsible for representing DR&C in the negotiation of collective bargaining agreements (Appellee's Exhibit E) and confirmed that she had the authority to bind Appellee through her signature. She identified Appellee's Exhibits P and Q as excerpts from Contracts between the State of Ohio and, respectively, the State Council of Professional Educators OEA/NEA (the "OEA Contract") and the Ohio Civil Service Employees Association (the "OCSEA Contract"), and confirmed that she signed the Contracts on behalf of Appellee in her own capacity and under her own authority, rather than on behalf of her supervisor or Appellee's Director. Appellant further identified Appellee's Exhibits M, R, and S as documents relating to or modifying collective bargaining agreements and confirmed that she signed these documents on behalf of Appellee in her own capacity and under her own authority.

Appellant explained that a collective bargaining agreement is a labor contract. She noted that the OCB is the statutory authority for negotiating labor contracts on behalf of the State of Ohio. Appellant indicated that prior to the expiration of an existing contract the Bureau of Labor Relations solicited information from managers, supervisors and directors to determine what, if any, contract issues needed to be addressed in a new agreement. She testified that Director Collins and the Deputy Directors formulated DR&C's position on any issues to be addressed during contract negotiations and OCB drafted a final document that might or might not include agency requests for changes, which was then taken to the bargaining table. Appellant stated that she did not have the authority to independently determine what issues should be addressed in the contract.

Appellant confirmed that some contract language (Appellee's Exhibit S) is addressed during the agency specific portion of the negotiations and stated that she, the Deputy Director of Prisons and OCB would all be involved in that portion of the negotiations.

Appellant testified that her signature on a collective bargaining agreement or a Memorandum of Understanding signified that DR&C would follow the terms of the contract, and bound the agency.

Robert Keyes testified that he has been employed by Appellee since 1989 and presently serves as the Deputy Director of the Office of Human Resources. He indicated that, in that capacity, he oversees the Bureau of Labor Relations, the Bureau of Personnel, the Corrections Training Academy, and the Assessment Center. The witness stated that he is responsible for determining policy for the departments in the Human Resources area, which includes establishing hiring practices and standards for staff.

Mr. Keyes noted that he reports to the Assistant Director of the Department, Mike Randle, although he may consult directly with Director Collins on matters concerning policy. He indicated that he was Appellant's direct supervisor from 2004 until the time of her termination. The witness noted that although Appellant reported directly to him, he did not provide constant supervision to Appellant and she exercised her own judgment in carrying out her duties.

Mr. Keyes testified that Appellant was a member of the Executive Staff and, as such, held one of the highest paid positions in the agency. He noted that she was one of only four employees compensated at pay range sixteen. The witness

explained that the Executive Staff is made up of all persons who the Director has determined hold a high status in the organization; as a member of the Executive Staff, Appellant was issued a laptop computer, a Blackberry device, had a reserved parking space and attended Executive Staff retreats which were paid for by Appellee. Mr. Keyes indicated that Appellant was one of approximately twenty-five employees within the agency who had a "red badge" identification card designating the highest level of security and allowing unlimited, 24/7, access within the Department.

Mr. Keyes noted that Appellant did not keep a set schedule of working hours, and explained that Bureau Chiefs have discretion to determine their own calendars, based on operational requirements. He indicated that Appellant was required to travel as part of her official duties and did not seek his approval before setting up travel and meetings on her calendar, although she would usually advise him of times that she would be out of the office. The witness noted that Appellant was considered an "essential employee" of the agency and also served as Appellee's primary contact person for weather emergencies.

Mr. Keyes testified that Appellant was the only individual within the agency who had authority to speak at staff meetings on matters regarding collective bargaining and the Office of Collective Bargaining. He stated that Appellant made presentations at Managing Officers/Wardens meetings regarding labor relations issues and consulted with individual facilities within DRC regarding labor issues and dealt directly with the unions and the Wardens about issues affecting specific institutions. The witness noted that all employee discipline was under Appellant's administration and Wardens, who serve as the appointing authority for their particular institution, were required to submit any proposed discipline to the Bureau of Labor Relations for review prior to implementation.

Mr. Keyes indicated that Appellant met with Director Collins and him to address ongoing labor relations issues, make recommendations and give advice. He recalled that Appellant advised him regarding the impact of collective bargaining on Appellee's operations, and that he also expected her to apprise the Deputy Director of Prisons of anything that might affect institutional operations. The witness testified that both he and Director Collins relied on Appellant's advice as the agency "expert" on labor relations and trusted her ability to perform her job; he observed that no other employee in the agency performed the same job duties as Appellant. Mr. Keyes emphasized that Appellant was the individual responsible for advising

DR&C as a whole, as it related to adherence to the three labor contracts that covered the bargaining unit staff.

Mr. Keyes observed that approximately eight thousand of Appellee's fourteen thousand employees are subject to collective bargaining. He testified that Appellant oversaw the collective bargaining process for the Department and was responsible for representing the agency and its positions to the parties, and for signing agreements on behalf of the agency. He recalled that Appellant occasionally talked to him about the details of the process while negotiations were ongoing and advised him of some discussions that had taken place regarding changes, but did not come to him for prior approval. The witness indicated that Appellant sometimes told him her position after the fact and often would tell him ahead of time what was going to take place, but was merely informing him rather than seeking approval.

Mr. Keyes testified that Appellant talked directly to Director Collins about matters concerning collective bargaining, and that the Director has always exercised his discretion to meet one-on-one with her. He observed that he sometimes found out only after the fact that Appellant had gone straight to the Director to discuss a particular collective bargaining matters.

The witness explained that the OCB has the statutory responsibility to serve as the principal negotiator for collective bargaining agreements. Mr. Keyes further explained that Appellant was a direct participant in collective bargaining negotiations to represent the interests of DR&C. He noted that Appellant was responsible for ensuring that any special language or provisions desired by Appellee were discussed for possible inclusion in the appropriate collective bargaining agreements.

The witness testified that Appellant signed collective bargaining agreements on behalf of Appellee (Appellee's Exhibit Q) and had the discretionary authority to refuse to sign a contract. Mr. Keyes observed that Appellant's signature on the contract indicated not only receipt of the document, but also an acknowledgement of the contract and an agreement to be bound by its terms.

Mr. Keyes noted that once the contract had been signed, Appellant was responsible for interpreting the language of the contract to be sure that DR&C was in compliance with the terms and conditions. He explained that Appellant was also responsible for overseeing grievance settlements, when a complaint arising from an alleged violation of a collective bargaining agreement was made.

Mr. Keyes noted that all DR&C grievances are ultimately brought to the Bureau of Labor Relations and estimated that in the two years preceding Appellant's termination the Bureau handled between 500 and 1,000 grievances each year. The witness stated that where the matter could be resolved by agreement between the parties, Appellant was responsible, as Bureau Chief, for approving the settlement agreements. Mr. Keyes indicated that Appellant had discretionary authority delegated to her by Director Collins to approve settlements that had both a financial impact and/or a policy impact for DRC, and that there was no dollar limit or cap on her authority to do so. He noted that although settlements did not have to be approved in advance by the warden of an institution, the warden was typically consulted and then advised as to the ultimate decision.

Mr. Keyes indicated that Appellant was involved in the development and implementation of agency-wide policies and recalled that she had a role in creating policies that applied to every facility and every part of operations, even Central Office and Parole. He testified that she was responsible for the revision of the Standards of Employee Conduct and stated that he did not tell her what changes to make, but relied on her discretion to revise them. The witness explained that Deputy Directors are responsible for reviewing the policies applicable to their areas, after which the Director signs off on policies and changes.

Mr. Keyes noted specifically that Appellant worked with several other people, including Regional Directors in the Office of Prisons, the Director of the Corrections Medical Center, and a representative from OCSEA to develop the Established Term Appointment Agreement (Appellee's Exhibit R), which enables the Corrections Medical Center to rehire individuals formerly employed by Appellee. He recalled that Appellant was authorized by Director Collins to formalize the policy decision to allow this, and to sign the Agreement on behalf of Appellee after the document had been formalized. The witness explained that the Agreement impacts collective bargaining employees and testified that nothing similar to the Agreement existed prior to its formulation and approval by Appellant. Mr. Keyes testified that although Appellant kept him informed about what was going on during the formulation of the Agreement, he was not involved in drafting it and relied on Appellant's expertise to develop the Agreement.

The witness stated that Appellant directly supervised one employee classified as a Labor Relations Administrator 1 and one employee classified as an Administrative Assistant. Mr. Keyes explained that Appellant had functional responsibility for providing direction to the five or six Labor Relations Officers in the

Bureau, and that although they did not report directly to her, Appellant trained them on how to abide by the collective bargaining agreements. The witness testified that Appellant was responsible for holding and directing periodic staff-type meetings with Labor Relations personnel.

Mr. Keyes confirmed that Appellant's supervisory authority included the authority to implement policy with her subordinates, to make recommendations regarding hiring, to initiate discipline as necessary and to conduct performance evaluations. He stated that Appellant was not required to seek his authorization prior to signing leave forms, approving travel expenses and overnight stays within the state, or conducting performance evaluations.

Mr. Keyes recalled that in the fall of 2006, prior to the transition to the new governor, there was a process in place for unclassified employees to reapply for their positions. He explained that an Executive Order was issued indicating that unclassified employees were no longer considered permanent employees and if they wanted to retain their positions, they should submit resumes and would be considered interim employees until they were reappointed. The witness noted that this process did not apply to classified employees. Mr. Keyes stated that Appellant submitted her resume to his Administrative Assistant. He observed that when she submitted her resume she never indicated to him that she believed her position was classified and recalled that she expressed concern in staff meetings about losing her job as a result of the reappointment process.

FINDINGS OF FACT

Appellant held the position of Labor Relations Administrator 2 and served as the Chief of the Bureau of Labor Relations at the time of her removal in January 2007. Her immediate supervisor was Deputy Director Robert Keyes.

As Chief of the Bureau of Labor Relations, Appellant oversaw the collective bargaining process for DR&C and was responsible for representing DR&C in the negotiation of collective bargaining agreements. She had the authority to bind Appellee through her signature. Appellant signed contracts on behalf of Appellee in her own capacity and under her own authority, rather than on behalf of her supervisor or Director Collins. She also signed documents modifying collective bargaining agreements on behalf of Appellee in her own capacity and under her own authority. Appellant had the discretionary authority to refuse to sign a labor

contract. Her signature on the contract indicated not only receipt of the document, but also an acknowledgement of the contract and an agreement to be bound by its terms.

Appellant was responsible for interpreting the language of applicable labor contracts to ensure Appellee's compliance with the terms and conditions. She participated in the creation and implementation of agency policy and advised her supervisor and Director Collins as to the impact of policy matters on collective bargaining employees and agency operations. Appellant met with her supervisor and with Director Collins to address ongoing labor relations issues, make recommendations and give advice. Both Director Collins and Mr. Keyes relied on Appellant's advice as the agency "expert" on labor relations and trusted her ability to perform her job; no other employee in the agency performed the same job duties as Appellant. Appellant was the individual responsible for advising DR&C as a whole, as it related to adherence to the labor contracts that covered the bargaining unit staff.

Appellant spoke at staff meetings on matters regarding collective bargaining and the Office of Collective Bargaining; she made presentations at Managing Officers/Wardens meetings regarding labor relations issues, consulted with individual facilities within DR&C regarding labor issues and dealt directly with the unions and the Wardens about issues affecting specific institutions. Appellant was responsible for communicating with union representatives regarding policy rescissions, meeting dates, and to clarify policy application. She had overall responsibility for the administration of all collective bargaining agreements affecting DR&C employees, and planning major personnel actions that affect those employees, including layoffs.

Appellant had discretionary authority delegated to her by Director Collins to approve or disapprove settlements that had both a financial impact and/or a policy impact for DR&C. Appellant's signature on a settlement indicated not only that she had reviewed and approved of the response, but also that she had determined that the settlement was contractually compliant. All employee discipline was under Appellant's administration and Wardens, who serve as the appointing authority for their particular institution, were required to submit any proposed discipline to the Bureau of Labor Relations for review prior to implementation.

Appellant was a member of the Executive Staff, holding one of the highest paid positions in the agency. As a member of the Executive Staff, Appellant was

issued a laptop computer, a Blackberry device, had a reserved parking space and attended Executive Staff retreats. Appellant had a “red badge” identification card, which designates the highest level of security and allows unlimited, 24/7, access within the Department. She had the discretion to determine her own calendar based on operational requirements. Appellant was not required to seek prior approval before setting up travel and meetings on her calendar. She was Appellee’s primary contact person for weather emergencies and was designate as an “essential employee” of the agency.

Appellant exercised her own judgment in carrying out her day to day duties. She made recommendations for hiring and for discipline of her subordinate employees, as necessary. Appellant was responsible for holding and directing periodic staff-type meetings with Labor Relations personnel. Her supervisory authority included the authority to implement policy with her subordinates, to make recommendations regarding hiring, to initiate discipline as necessary and to conduct performance evaluations. Appellant was not required to seek her supervisor’s approval prior to signing leave forms, approving travel expenses and overnight stays within the state, or conducting performance evaluations.

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 which 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 Ohio 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 ...

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.

Accordingly, this Board must consider whether Appellant acted for or on behalf of the agency, or whether the duties performed by Appellant placed her in either a fiduciary or an administrative relationship with the agency. Testimony presented at record hearing indicated that Appellant oversaw the collective bargaining process for the agency and represented it during the negotiation of labor contracts. Appellant had the authority to bind Appellee through her signature on contracts and documents modifying contracts. Appellant signed on her own behalf and in her own capacity, not on behalf of Mr. Keyes or Director Collins. I find that in performing these duties, Appellant acted on the agency's behalf, as referenced by R.C. 124.11(A)(9).

Testimony further indicated that Appellant advised the Director and the agency as a whole by interpreting the provisions of applicable labor contracts and making recommendations with regard to labor issues. She also had discretionary authority to act on behalf of Director Collins to approve or disapprove grievance settlements. Her signature on a settlement indicated not only review and approval, but also that the settlement was contractually compliant.

I find that these duties, while arguably not requiring a special confidence in Appellant's integrity or fidelity that would designate them as fiduciary in nature, did require that Appellant exercise her discretion and personal judgment. Such exercise of discretionary authority and use of personal judgment in carrying out job

Teresa Decker
Case No. 07-REM-01-0038
Page 12

duties are sufficient to support a finding that Appellant had an administrative relationship to DR&C.

In addition, I find that Appellee's estoppel argument has some merit. Appellant enjoyed the perquisites of an Executive Staff position, including one of the highest paid positions in the agency. To claim now that she was merely a conduit for information between individuals seems patently disingenuous.

Therefore, based upon the foregoing analysis, I find that the position of Labor Relations Administrator 2 occupied by Appellant and having the working title of Chief of the Bureau of Labor Relations was unclassified pursuant to the provisions of R.C. 124.11(A)(9). Accordingly, I respectfully **RECOMMEND** that the instant appeal be **DISMISSED** for lack of jurisdiction.


Jeannette E. Gunn
Administrative Law Judge

JEG: