

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

Cheryl Cade,

Appellant,

v.

Case No. 09-REM-02-0072

Public Employees Retirement System,

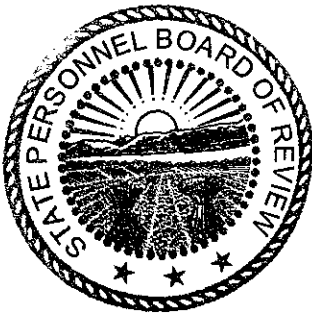
Appellee.

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.



Lumpe - Aye
Sfalcin - Aye
Tillery - Aye

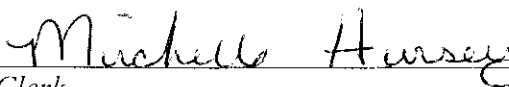


J. Richard Lumpe, *Chairman*

CERTIFICATION

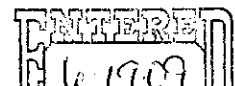
The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto 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, June 19, 2009.



Michelle Hursey
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**

Cheryl Cade,

Case No. 09-REM-02-0072

Appellant

v.

May 18, 2009

Public Employees Retirement System,

Appellee

Christopher R. Young
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter comes on for consideration on May 18, 2009, upon the Appellee's motion to dismiss filed on May 5, 2009. The Appellee has alleged that the Appellant, Cheryl Cade, was not an employee within the service of the state at time of her removal, and that this board lacks jurisdiction over her, and therefore should dismiss this appeal. To date, the Appellant has not responded to Appellee's motion to dismiss, nor has she requested an extension of time to respond to the same.

For clarification, the Appellant, Cheryl Cade, was employed by the Ohio Public Employees Retirement System, hereafter "OPERS", as an Investment Assistant. On February 2, 2009, OPERS terminated Cade's employment and she filed an appeal of her termination on February 19, 2009.

It should be noted that this Board is created by statute, and it derives its jurisdictional authority from R. C. Chapter 124. *Ketron v. Ohio Dept. of Transportation* (1991), 61 Ohio App. 3d 657, 659. Therefore, this Board "possesses only such powers and duties as conferred on it by the provisions of the enabling statute..." Id. (citing *Hansen v. State Personnel Board of Review* (1977), 51 Ohio App. 2d 7). As such, the board may only hear discharge appeals from employees in the "classified state service." R.C. section 124.03(A)(1). Employees in "state service" include those in "all offices and positions in the *service of the state*..." R. C. section 124.01(B). In turn, "service of the state" or "civil service of the state" includes all offices and positions of trust or employment *with the government of the state.*" R. C. section 124.01(K). Thus, one can reasonably infer that one who is not

an employee of the government, is not in the service of the state, and therefore not entitled to the jurisdiction of this Board, and has no right to appeal to this Board.

OPERS does not exercise any function of the state government, and therefore Ms. Cade was not in the service of the state, and that this Board has no jurisdiction over her appeal. "As used in Title 1 of the Revised Code, "state agency", except as otherwise provided in the Title, means every organized body, office, or agency established by the laws of the state for the exercise of any function of state government." R. C. section 1.60. However, OPERS, does not perform any "function of state government". See 2004 Ohio Atty. Gen. Op. 2004-014, 2004 Ohio Ag Lexis 12, at 39-44.

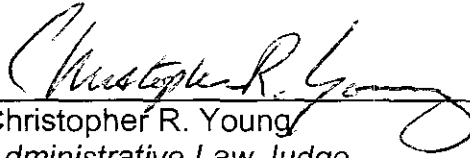
Rather, OPERS functions on behalf of its stakeholders. The General Assembly expressly charged the OPERS board of trustees with the duty to administer the funds "solely in the interest of participants and beneficiaries; for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the public employees retirement system." R. C. section 145.11 (A). A trustee, whose duty is to act solely in the interest of the participants and beneficiaries, does not function as an agent of the state. See 1996 Ohio Atty. Gen. Op. No. 96-032, 1996 Ohio AG Lexis 34, at 8. In this regard, OPERS is comparable to the State Teachers Retirement System of Ohio (STRS) – and the Tenth District Court of Appeals has already recognized that employees of STRS are not in the service of the state and, therefore this Board has no jurisdiction over its employees' appeals. See *In re Appeal of Ford*, 3 Ohio App. 3d 416, 420 (10th App. Dist. 1982).

Because the retirement system has not been created to exercise functions of state government on behalf of the state, the relationship between the state of Ohio and OPERS is not one of agency. Hence, an employee of OPERS is not an employee of the government of the state, nor can Ms. Cade be an employee of the state.

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RECOMMENDATION

Based upon the above stated reasons, I respectfully **RECOMMEND** that Appellee's motion to dismiss be **GRANTED** and that this appeal be **DISMISSED** for lack of jurisdiction.


Christopher R. Young
Administrative Law Judge

CRY: