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95CVF096321

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
CIVIL DIVISION

KATHRYN A. CHUBB
Appellant,

CASE NO. 95CVF096321
JUDGE JOHN A. CONNOR

-vs-

JUDGMENT ENTRY

OHIO BUREAU OF WORKERS
COMPENSATION

TERMINATION NO. 8
BY RA 2/7/96

Appellee.

This matter came on for consideration by the Court upon the Appeal of the decision of the State Personnel Board of Review ("Board") issued September 13, 1995.

The Court, being fully advised in the premises, finds said Appeal well taken for the reasons stated in the Decision on the merits decided January 26, 1996.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Board committed error by failing to accord the Appellant a hearing to determine whether her actual job duties rendered her a classified or unclassified employee. Therefore, the decision of the Board to dismiss Kathryn D. Chubb's appeal for lack of subject matter jurisdiction is reversed. This matter is thereby remanded to the Board to conduct the proper proceeding. Further, the Clerk shall mail a time-stamped, filed copy of the Judgment Entry to counsel for both parties.

Wickman, Gordon,
Lurray & DeVan
Attorneys and Counselors at Law
The Manufacturing Building
33 Public Square
Cleveland, Ohio 44113

Connor
JOHN A. CONNOR, Judge

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

COPY

KATHRYN A. CHUBB,	1	
APPELLANT,	1	CASE NO. 95 CVF 09 6821
vs.	1	JUDGE CONNOR
OHIO BUREAU OF WORKERS, COMPENSATION,	1	
APPELLEE.	1	

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DECISION ON THE MERITS

Rendered this 26 day of JANUARY, 1996.

John Connor, Judge

Appellant has appealed the decision of the State Personnel Board of Review ("Board") issued September 13, 1995. That decision denied jurisdiction to hear the appeal of Ms. Chubb from her removal from employment with the Ohio Bureau of Workers' Compensation ("Bureau").

For purposes of this judicial review, the Court will assume that certain facts as stated by Appellant are correct. Appellant was hired by the Bureau as an attorney in the position designated as Attorney 2, a classified position. Appellant was promoted to Attorney 3, still in the classified service. In order to effectuate a pay raise to keep Appellant from taking another position, her department (Columbus Law Department) supervisor, Philip Donner arranged to borrow an Administrative Staff position from the Claims Department. It is not disputed that this position, No. 99580, is in an unclassified series. Appellant's duties did not change and she did not perform the duties ascribed to an Administrative Staff position.

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In January of 1995, Appellant was asked by Mr. Donner to prepare a job description based upon the duties she performed.(Ex. E) The position was posted as Attorney 4, which was classified. (Ex. F) Appellant's position was never changed to match her duties. An agreement between Appellant and the Bureau was executed pertaining to an apparent discipline/dispute in which Appellant acknowledged that she was holding an unclassified position. (Ex. G) Appellant was terminated on February 16, 1995. (Ex. A)

Appellee takes the position that once it is determined that Appellant was employed in a 99000 series classification, there was no need to consider the specific duties or job that she actually performed. Case law is replete with discussions of the status of public employees in regard to classified versus unclassified service and the applicability of R.C. 124.11.

In the case of *Miller v. Ohio*, (Sept. 5, 1984) Fairfield App. No.9-CA-84, unreported, the Court found an employee, in the same position for twenty years, to have fiduciary responsibilities. The Board has in other actions determined that the Appointing Authority's designation of a position of unclassified would not be the determinative factor, but rather the Board would look to the actual assigned and performed duties. The case law from the Supreme Court in *Yarosh v. Becane* (1980) 63 Ohio State.2d 5 and *Rarick v. Geauga County Board of County Commissioners* (1980) 63 Ohio State.2d 34 mandates such threshold review.

The Court is aware of only one unreported case which did not address the actual duties performed by the employee. That case, *University of Cincinnati v. Simpson*, (Dec. 27, 1988), Clermont App. No.CA88-05-045, unreported was a *per*

curiam opinion in which the dissenting judge was critical of the failure of the Court to address the issue of the employee's actual duties and whether there had been a voluntary waiver of her rights.

Every other case examined by this Court that has adopted estoppel of an employee from denying unclassified status, has also found that the actual duties of the employee were exempt under R.C. 124.11. This includes the recently decided case of *Westfall v. Ohio Dept. of Commerce*, (Jan. 25, 1994), Franklin App. No. 93AP-1067, unreported (1994 Opinions 145). As stated in the case of *Boston v. Dept. of Human Services*, 93 CVF 08-5411, 5422 by Judge Crawford (May 13, 1994)(affirmed by the Franklin County Court of Appeals on December 28, 1994), "although there is no evidence of subterfuge in this appeal, the use of estoppel against an employee without first finding some indicia of fiduciary capacity would invite the artifice of transfer or promotion into an unclassified position for the purpose of obtaining acquiescence to unclassified status. The subsequent removal of the employee could be done without cause and the provisions for civil service protection could be easily circumvented. This is not a circumstance to be encouraged. See *Leibson v. Ohio Dept. of Mental Ret.* (1992), 84 Ohio App.3d 751. Appellees would seek to have the Court adopt a position that ignores the realities of the duties and functions of an employee's classification and rely solely upon an agreement by the employee that the classification is exempt from civil service. While it may be unfair to the Appointing Authority to rely upon that agreement, only to later have it determined ineffective, the potential harm of using estoppel as a bar to avoid inquiry into the actual duties is more egregious." at pages 4 and 5.

The Court takes no position on the ultimate issue of the job duties of Appellant and the evaluation of those duties as to classified or unclassified. It is concluded that Appellant was entitled to a hearing on that issue and the Board committed error by failing to accord Appellant a hearing. The matter must therefore be remanded for further proceedings. Counsel for Appellant shall prepare a Judgment Entry accordingly.



JOHN A. CONNOR, JUDGE

Appearances:

J. Michael Murray (0019626)
Susan C. Margulies (0064445)
Attorney for Appellant

Jack Decker
Assistant Attorney General
Attorney for Appellee

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