

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

Matthew Ochlers,

Appellant.

v.

Case No. 10-REM-03-0056

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 **ORDERED** that the instant appeal be **DISMISSED** for lack of jurisdiction, pursuant to O.R.C. §§ 124.27 and 4117.10(A).



Lumpe - Aye
Sfalcin - Aye
Tillery - Not Participating



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, May 11, 2010.



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**

Matthew Oehlers

Case No. 10-REM-03-0056

Appellant

v.

April 14, 2010

Department of Transportation

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for consideration on April 14, 2010, upon Appellee's Motion to Dismiss, filed on March 24, 2010; Appellant's Memorandum in Opposition, filed on April 2, 2010; and Appellee's Reply Memorandum in Support of its Motion to Dismiss, filed on April 12, 2010.

Appellee has stated in its Motion to Dismiss that Appellant Oehlers' position from which he was removed, Highway Technician 1, was part of a bargaining unit and covered under the agreement between the Appellee and the Ohio Civil Service Employees Association (OCSEA) AFSCME Local 11, Lucas County Chapter. In its Reply Memorandum, Appellee attached as Exhibit F, section 25.01 of the agreement, which provides for grievances and final and binding arbitration. Consequently, this Board is without jurisdiction in this case. Section 4117.10(A) of the Ohio Revised Code states, in pertinent part as follows:

An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure.

The collective bargaining agreement also states that an employee who is removed during the employee's probationary period, has no right to grieve the removal or to appeal to this Board. (See Exhibit A, section 6.01(C) attached to Appellee's Motion to Dismiss). Section 124.27 of the Ohio Revised Code also provides that this Board has no jurisdiction of an employee who is removed during the employee's probationary period.

Appellant argues in his Memorandum in Opposition to Appellee's Motion to Dismiss that Appellee did not provide the section of the contract setting out that Appellant Oehlers had a one year probationary period. Appellee did attach a copy of the pertinent section of the agreement to its Reply Memorandum of April 12, 2010. Specifically, Exhibit C, Section M, states that as of "March 1, 2003, all ODOT new hires will serve an initial one (1) year probationary period."

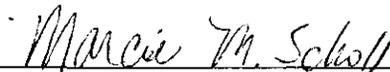
Appellant Oehlers also argues that because he had prior service with Appellee as a seasonal employee, his prior service time should be counted toward a portion of his probationary period (see Article 6.02 of the agreement). By adding a portion of that service time, Appellant Oehlers argues that he would not have been in a probationary period at the time of his removal, as he would have completed his probationary period prior to being removed. Appellee counters that argument in its Reply Memorandum, stating that according to Appellee's Exhibit D, Appellant Oehlers' time as a seasonal employee would not count since he was not hired as a full-time employee immediately after being a seasonal employee and the work he did as a seasonal employee was not the same as a full-time Highway Technician 1. Pursuant to section 4117.10(A) of the Ohio Revised Code, this Board has no jurisdiction to interpret the language of the collective bargaining agreement. That interpretation is more appropriately resolved through the grievance procedure provided by the agreement itself.

Appellant Oehlers argued that he tried to file a grievance of his removal but was ". . . refused and directed to submit an appeal to this body." (Appellant's Memorandum in Opposition, page 2).

This Board recognizes that there may be a genuine issue of fact with respect to the question of whether or not Appellant Oehlers' probationary period had been completed at the time of his removal. That issue should be addressed by the proper party, which unfortunately is not this Board. Unlike a court of general jurisdiction, this Board has only the authority granted to it by statute. The parties cannot confer jurisdiction on the Board where there is none and the case law is clear that this Board does not possess jurisdiction over an employee covered by a collective bargaining agreement.

Appellant may have a right to file an unfair labor practice charge with the State Employment Relations Board if he indeed was no longer in his probationary period and the union refused to process his grievance. The law is clear, however, that this Board is without jurisdiction in this matter.

Therefore, since Appellant Oehlers' position of Highway Technician 1 was covered under a collective bargaining contract and because he was removed as a probationary employee, this Board is without subject matter jurisdiction and it is my **RECOMMENDATION** that this appeal be **DISMISSED** for a lack of jurisdiction.



Marcie M. Scholl
Administrative Law Judge

:mms