

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Annie Sawicki,

Appellant,

v.

Case No. 10-REM-06-0150

University Of Toledo,

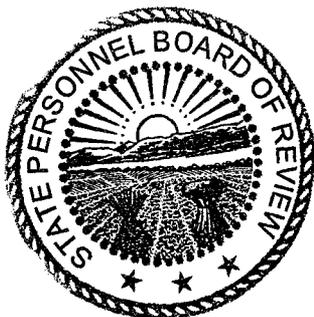
Appellee.

ORDER

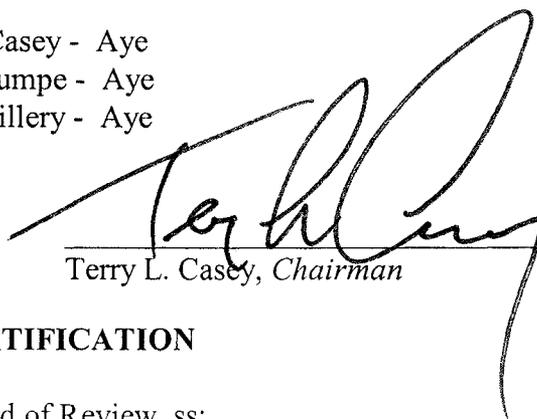
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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** because Appellant waived her right to claim classified civil service status and because the evidence established that the Appellant, as a Principal Gifts Officer at the University of Toledo, was in the unclassified service pursuant to O.R.C. §§ 124.11 (A)(7)(a), 124.11(A)(9) and 124.11 (A)(30).



Casey - Aye
Lumpe - Aye
Tillery - Aye


Terry L. Casey, *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, July 29, 2011.


Michelle Hussey
Clerk

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

7-29-11 MN

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

Annie Sawicki,

Case No. 10-REM-06-0150

Appellant

v.

June 27, 2011

University of Toledo,

Christopher R. Young

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came on for record hearing on October 29, 2010 and concluded upon the simultaneous filing of post hearing briefs on February 25, 2011 by both the Appellee and Appellant. The Appellant, Annie Sawicki, was represented at the record hearing by Renisa A. Dorner, Attorney At Law. The Appellee, University of Toledo, was represented by Joseph N. Rosenthal and Komlavi Atsou, Assistant Attorney Generals.

This case came on for consideration on July 21, 2010 via a procedural order that was issued that, based upon the information contained in the record, this Board does not possess subject matter jurisdiction over the Removal of an unclassified employee since Ohio Revised Code Section 124.03 limits this Board's jurisdiction to actions concerning classified employees. Further, the Appellee alleged that the Appellant was removed as an unclassified employee pursuant to Ohio Revised Code § 124.11(A)(7)(a), 124.11(A)(9), and 124.11(A)(30). Consequently, the sole issue presented at the October 29, 2010 record hearing was to determine if the Appellant was a classified or an unclassified employee at the time of her Removal. If the Appellant is determined by this Board to be an unclassified employee at the time of her Removal, then her appeal must be dismissed as a matter of law since this Board lacks jurisdiction over appeals from unclassified employees. However, should the Appellant be found to be a classified employee, her Removal must be disaffirmed for not being in accordance with R.C. 124.11(A)(7)(a), 124.11(A)(9), and 124.11(A)(30).

Case law has determined that an employee's actual job duties are the determinative factor of whether an employee is classified or unclassified. Further,

whether or not an individual is serving in the capacity of a classified or unclassified position is a question of fact to be determined by this Board.

STATEMENT OF THE CASE

The Appellee's first witness was Mr. Vern Snyder, the Vice President of Institutional Advancement for the University of Toledo (UT). The witness testified that he has held current position for eight years, and prior to that, he was at Eastern Kentucky University in a similar capacity. The witness also holds a Bachelor's and a Master's degree in Music from West Virginia University. Additionally, the witness holds a designation as an Advanced Fundraising Executive from the Association of Fundraising Professionals.

The witness stated that the approximate enrollment at UT is 23,000 students. UT has five campuses, two of which are the primary campuses: the main academic campus and the Health Science Campus. It was noted that the Health Science Campus is four miles south of the main campus. The main campus has the following schools: Engineering, Arts and Sciences, Education, College of Law, Health Science and Human Service, and Business. The Health Science Campus contains the Colleges of Pharmacy, Medicine, and Nursing.

The witness described his primary responsibility as developing strategies for fundraising and overseeing fundraising operations, as well as overseeing alumni relations and special events. Additionally, the witness has a liaison relationship with the UT Foundation and with the UT Alumni Association.

The witness identified Exhibit 4, which is an Institutional Advancement Organization Chart that lists the witness at the top. Institutional Advancement is a division within the university structure. The witness was asked to briefly describe the UT Foundation, and he described the UT Foundation as a separately chartered 501(c) (3). The Foundation is a repository for all gifts to the university and acts as an investment manager for all funds received as well as some of the university's assets. The total assets of the Foundation consist of the endowment of \$190MM. Additionally, the foundation manages another \$200MM in university assets. All gifts to the university go to the UT Foundation.

The witness described the alumni association as the fundraising arm of UT. There are over thirty (30) chapters throughout the country, and the Alumni Association oversees a membership of 15,000. The purpose of the Association is to keep alumni generally engaged and informed. The witness stated that alumni are the main source of giving.

The witness identified Mr. Howard Newman as the Associate Vice President of the Health Science Campus and that he manages fundraisers associated with the Health Science Campus and the College of Medicine.

The witness stated that he knew the Appellant, Annie Sawicki. The Appellant came to UT as the Principle Gifts Officer (PGO) for the College of Law and then became the PGO for the College of Nursing. The witness said there are five PGOs at UT. The Appellant reported to Mr. Newman, and Mr. Newman in turn reported to the witness. The witness stated that the Appellant went to the Health Science Campus in approximately January 2009.

The witness stated that PGOs are expected to fundraise, on average, \$5MM per year. PGOs also are expected to work with the highest donors in order to secure six-plus figure gifts. PGOs are responsible for identifying, soliciting, and closing gifts. All money received goes to the UT Foundation for administration. While at the College of Law, the Appellant reported directly to Ms. Belinda Cook, and Ms. Cook in turn reported to the witness. The witness explained that all of the PGOs are housed in Driscoll Hall on the main campus, but each PGO also has a second office at the particular college the PGO is associated with.

The witness was shown Exhibit 3, which he recognized as a job description of a PGO. The first essential job duty, as listed on Exhibit 3, of a PGO is to cultivate, solicit, and close donors of \$100,000 and above. The witness stated that the Appellant worked independently when performing this first essential job duty.

The witness was then shown Exhibit 5, which he recognized. The witness stated that all members of the advancement staff provide monthly activity reports, and Exhibit 5 contains activity reports for a period of time. Activity Reports allows the viewers to see whether the PGOs are identifying new prospects. The witness defined the term "qualification" as identifying what donors might be able to give. He then identified "cultivates" as the building of a relationship. The witness qualified this statement by explaining that the PGO must develop a relationship with the

donor to receive a gift because the donor must have some level of trust in the PGO to make a gift. The witness stated that this process can take six months to six years, as it is an on-going relationship, and is a delicate balance. The witness stated that cultivation was one of the Appellant's responsibilities and that PGOs attend events such as planned giving seminars, to cultivate relationships with potential donors.

The witness then identified Exhibit 1 as the offer letter from Human Resources, dated July 25th, 2008, that extended an offer of employment to the Appellant as a PGO. The witness was asked to read the fourth paragraph down, which states, in part, "The unclassified position of Principal Gifts Officer serves at the will of the appointing authority." The witness stated that the Appellant never talked to him as to what this sentence meant or what the unclassified service is, and she never asked him any questions as to what this statement meant. The witness described "at will" as, "If someone would come in someday and say, 'I don't like the way you're sitting, then you're gone.'" The witness had no reason to believe that the Appellant did not understand what this terminology meant, and he was sure the Appellant understood what the terminology meant.

The witness then read paragraph five in Exhibit 1, which states:

By accepting this offer of unclassified employment, you acknowledge this position falls within the unclassified civil service in the State of Ohio and as such does not create a property right to any position with the University or the State of Ohio. Signing this letter validates your understanding of this appointment and your acceptance of the policies and benefits of unclassified employment. If the meaning of unclassified civil service status is unclear, you are encouraged to contact the Human Resources Department for a full explanation.

The witness stated that he believed the signature on the second page to be that of the Appellant.

The witness, Vern Snyder, was then cross-examined by the Appellant's counsel. The witness acknowledged that there is no letter that states the position of PGO at the College of Nursing was an unclassified position because the Appellant was transferred to the College of Nursing.

The witness was shown Exhibit 4, which is a work chart, and stated that the chart is several years old. The witness said he developed the chart at the request of HR, and the witness reports directly to the president of the university. The witness stated that he has a working relationship with all of the deans, but does not officially report to them.

The witness described the difference between a Director of Development and a PGO as the responsibilities and the compensation received by each. The difference in responsibility is that a PGO has responsibility for \$100,000 gifts, but a Director of Development has responsibility for lower level gifts that may lead to bigger gifts. A Director of Development is usually a less experienced fundraiser. The witness stated that no PGO existed at the College of Nursing before the Appellant arrived.

The witness stated that the Appellant had independent duties. A PGO could go out to lunch and dinner without approval to meet with clients. However, long-distance travel required approval by either the witness or Mr. Howard Newman, the Appellant's immediate supervisor.

The witness was then shown the Activity Reports in exhibit 5 and asked where the reports are for the most recent six months. The witness stated that he had no idea. When asked if he was involved in the selection process of which Activity Reports to choose to present at the hearing, the witness answered in the affirmative, but he stated that he did not pick-and-choose which reports to supply.

The Appellee's next witness was the Appellant, Annie Sawicki, as if on cross examination. The Appellant began by stating that she ended her employment as the Director of Development for the College of Nursing. The Appellant said it was a gray area whether she was a PGO with the College of Nursing, or not. Ms. Sawicki stated that originally, though, she was a PGO with the College of Law, but asserted that her responsibilities changed dramatically when she moved to Nursing.

The Appellant was shown and identified Appellee's Exhibit 1, specifically paragraph two, which sets forth her duties. The Appellant stated that she understood her position in the College of Law was unclassified, but she thought all employees at UT were unclassified. The Appellant acknowledged that her signature of acceptance was on the second page of the document. The Appellant said she never asked for further clarification as to what unclassified meant. The Appellant

stated that she was familiar with the other PGOs, but had no idea whether they were unclassified, or not.

The Appellant testified that she has a Bachelor's degree in Biology from Saint Mary's College in Notre Dame, Indiana. Additionally, she holds a Master's degree in Education from the University of Toledo. The Appellant said she also did post-graduate work in Executive Management at the University of Notre Dame.

The Appellant confirmed that the letter in Appellee's Exhibit 1 stated that UT would provide her with a written 90-day notice before terminating her. The Appellant then confirmed that her actual termination letter, Appellee's Exhibit 7, conformed to the 90-day notice set forth in her offer letter.

As a PGO, the Appellant said she maintained offices in both the College of Law and in Driscoll Hall. While at the College of Law, the Appellant said she worked in conjunction with then Dean Ray of the law school to oversee and implement activities toward the end of soliciting gifts for the College, as well as programs and other things for the College. Additionally, the Appellant was responsible for scheduling high-end donor meetings. The Appellant was asked to give examples of high-end donor meetings that she scheduled, and she named her involvement with donations in memory of Judge Melvin Resnick. The Appellant stated that she worked with Ms. Belinda Cook on this project. The Appellant understood Ms. Belinda Cook to be the Mr. Howard Newman of the main campus. The Appellant identified working with a family foundation that Prosecutor Bates is involved with. The Appellant's role was to talk to the Bates' Family Foundation, and to establish kids who wanted to be prosecutors. The Appellant said she was involved in these activities at the direction of Ms. Cook, and she was involved with these projects for about four (4) months. When asked if these projects were a success, the Appellant said she thought so, but she would have needed to be at that position for a year to eighteen (18) months to see the fruits of her labor.

The Appellant stated that from January 2009 through April 2009, she transitioned from the College of Law to the College of Nursing. The Appellant met with Dean Gaspar, the Dean of the College of Nursing, sometime in early 2009. By March 2009 and firmly into April, the Appellant stated that she was done working with the College of Law and had transferred to the Health and Science Campus. The Appellant testified that prior arriving at the College of Nursing, the PGO was a

new position with the College of Nursing and that she was located in the Collier building in the Health Science Campus.

The Appellant stated that at the College of Law, she identified, cultivated, and solicited donors, and closed the deals for four months. When asked if she did similar things at the College of Nursing, she said she did some of that at the request of Mr. Newman and under his direction, but she also did other things. For example, she worked on the simulation and transplant immunology projects. When asked to elaborate, the Appellant described her work with the inter-professional immersive simulation center, which is a three-story building where nurses and doctors were trained together. The Appellant planned events to take leaders of UT Medical Center (UTMC) to the Wright Patterson Air Force base in Dayton, Ohio to see what technology the military is using and see how it can be incorporated into UTMC. It was noted that although these people were not donors, it was part of cultivation. Also, the Appellant planned an event on April 21st, 2010 where the local community could visit and see what such a center would look like. Some of the guests were high-end donors. The Appellant stated that she never did any independent work on this project. The Appellant said she was successful in having high-end donors attend the event, but she does not know if the donors came through because she had a hip replacement on April 29, 2010 and was no longer in the loop.

The Appellant then described the transplant immunology project. The Appellant said that UT has world-renowned kidney specialists and under Mr. Newman's leadership, she was involved in getting people to give to this area who had not previously given. The Appellant stated she helped bring in the president emeritus of the University of Notre Dame, Father Malloy, who was a recent kidney donor, to be one of the top speakers. The Appellant said she did the event planning for this event, which included sending out the invitations, selecting the dinner for the dinner program, and getting people to attend the event. The ultimate goal was to have people to give money. This event took place on April 12, 2010.

When asked to describe any other projects that the Appellant worked on while at the College of Nursing, she said she did some traveling. For example, the Appellant, along with Dean Gaspar and a retired faculty member, travelled to Florida to look at retired UT nurses and their husbands as potential UT donors. They had 8-10 contacts during the course of the trip. They received lower level gifts, qualified one \$1MM donor and one \$500,000 donor, but the Appellant did not know if these

identified prospects ended up giving any money. The Appellant stated that she acted as an event planner for the Florida trip.

The Appellant discussed a list of 9,000 alumni that she was given at the College of Nursing but stated that she was not given a list of donors. The Appellant sorted through the list to determine potential donors, and she shrunk the list to 200.

The Appellant was shown Appellee's Exhibit 3 and said she never saw this paper before. The Appellant stated it is a position description but did not agree that it is the position description of a PGO. However, Ms. Sawicki agreed that the position description identified soliciting, cultivating, identifying, and closing deals, and she said she was partly engaged in these functions while at UT.

The Appellant was then shown Appellee's Exhibit 5, which are samples of Activity Reports that the Appellant was required to submit to Mr. Snyder. The Appellant submitted these reports every month on a monthly basis. The Appellant described her understanding of "qualification" as, "If you visit somebody and you think, okay, well they have eight polo horses versus one polo horse, you know that leads you to believe that maybe there's a financial capacity for a larger gift." The Appellant agreed that she must identify if a prospective donor is capable of giving a gift and what kind of gift that may be. When going through Appellee's Exhibit 5, the Appellant stated that she never had autonomy and had very little input. Moreover, Ms. Sawicki stated that it usually takes four (4) to six (6) meetings before receiving larger gifts.

The Appellant was then shown Appellee's Exhibit 2, which stated her salary as \$65,000, and the witness agreed that was correct. When questioned about her vacation, the Appellant stated that she was unaware that unclassified staff accrued vacation at a higher rate than classified staff, but was now aware.

Additionally, the Appellant stated after her transition to the College of Nursing, she was still submitting Activity Reports, just as she did as a PGO at the College of Law. Ms. Sawicki said that some of her work at the College of Nursing was still identifying prospects, cultivating contacts, and soliciting donations.

The Appellee's next witness was Mr. Howard Newman, Associate Vice President for Development at the Health Science Campus. The witness described his duties as belonging to two sets. The first set involves supervising Directors of

Development and PGOs who work at the College of Health Sciences Human Services, Pharmacy, and Nursing. The other set of duties is to work with the PGOs to raise money for the College of Medicine and the UT Medical Center. The witness stated that he has held this position since January 2, 2008.

The witness testified that he knows the Appellant because of her work with the College of Nursing. The witness said that the Appellant was the PGO for the College of Nursing, and she was the only PGO for the College of Nursing. The Appellant reported to Mr. Newman, and Mr. Newman was the Appellant's supervisor the entire time that the Appellant worked at the College of Nursing.

The witness was shown Appellee's Exhibit 3, which is a job description of the Appellant's position. The witness identified the Appellant's principal duties as identifying, cultivating, soliciting, and closing gifts of philanthropic contributions for the College of Nursing. Additionally, the Appellant raised funds that were not of the major gift magnitude in her efforts to build a constituency of donors for the College of Nursing. Mr. Newman stated that there was a reorganization of roles within the Health Science Campus to give UT's Development Officers more exposure to the medical center and to certain specialty areas in medicine. Due to this reorganization, the witness stated that in addition to the College of Nursing, the Appellant was assigned to the simulation center and to the immunology and transplantation project.

The witness described "identify donors" as locating individuals, corporations, or philanthropic foundations that have an interest in, and the capability to, make donations to the College of Nursing. The witness said that a significant amount of discretion was given to the Appellant. For example, the Appellant had to start off with a base of 9,000 possible donors, and it required judgment to hone in on those who were more likely to make donations. The witness stated that some donors receive more priority, and the Appellant primarily made the determination as to who to focus on. Mr. Newman said that he would usually accept the Appellant's judgment. The witness was then asked to define "cultivation," which he did as building relationships.

The witness stated that the Appellant brought the idea of the "heart-to-heart" program to him. Mr. Newman considered this program the Appellant's program, but did not know if she conceived the idea of the program. The witness stated that the Appellant had extensive control of the program, as she worked independently to

implement the program, and the witness was not overseeing the program on a day-to-day basis.

The witness estimated that the Appellant met with a few dozen potential donors while with the College of Nursing. The witness stated that he did not attend the vast majority of the Appellant's meetings, and the Appellant was acting on behalf of UT when she attending meetings. The witness stated that the Appellant attended strategy meetings, as well. There are three kinds of strategy meetings: 1) one-on-one meetings, 2) small group of Development Officers who represent Health Science College, and 3) on Vern Snyder's level, there are institutional advancement development meetings that all Development Officers attend. The first two types of meetings were collaborative in nature.

The witness was then shown Appellee's Exhibit 5, which contains Activity Reports. The witness was asked what "stewardship visits" are in the April 2009 report. The witness characterized such visits as the retention or cultivation of an existing donor, and the witness stated that the PGO, the Appellant in this case, makes the determination as to who to visit each month.

The witness then described the Appellant's involvement in the simulation project. The Appellant worked closely with Ms. Pamela Boyers, the special assistant to provost Gold, in trying at first to understand what the project was all about. Part of the Appellant's role was to be involved in the inception of the project so that she could later explain it to donors. The Appellant worked closely with Dr. Boyers and arranged a trip to Wright State University, and the Appellant suggested people who would be powerful advocates for the program. The Appellant was never involved with major gift fundraising for the program, but she was involved, to some extent, with some smaller fundraising to help with the open house of the program. The Appellant became involved with the project in the spring of 2009, which coincided with her transition to the College of Nursing. The witness stated that the simulation center is closely tied to the College of Nursing, and the Appellant probably spent twenty (20) percent of her time working on the project.

The witness then described the Appellant's involvement with the transplant immunology project. The Appellant's greatest involvement was with the conference, where she brought the former president of Notre Dame as a spokesperson. The witness identified this conference as the Appellant's brain-child. The witness said the Appellant was the principle person leading the charge in the conference, and

the Appellant had a great deal of independent activity in planning and implementing the program.

On cross-examination, the witness was first asked if he ever gave the job description identified in Appellee's Exhibit 3 to the Appellant, and the witness answered in the negative. The witness then said that he cannot say that he has any information to believe that the job description in Appellee's Exhibit 3 was ever given to the Appellant.

In regards to the list of 9,000 potential donors that the Appellant was given when she transferred to the College of Nursing, the witness stated that the Appellant principally led the effort to shorten the list to 200, but she worked with Dean Gaspar in doing so, and there was a dotted-line relationship between the two individuals. When questioned about the heart-to-heart stethoscope project, the witness said the Appellant asked for approval because resources were in short demand. The witness stated that he and the Appellant talked and approved strategies, but she was given a great deal of latitude to implement the courses of action that she considered to be appropriate.

When asked about the Appellant's trip to Florida, the witness stated that he did not attend, and he was not aware of who made all the personal arrangements for the trip.

The witness then described three methods by which prospective donors are assigned to the College of Nursing: 1) individuals who were already donors are assigned, 2) the prospect research office may suggest potential donors, and 3) a prospect can be requested. The witness stated that the Appellant requested many prospects throughout her tenure, and she played an affirmative role in getting prospects. The witness stated that Dean Gaspar could not assign the Appellant prospects, but the witness could; Dean Gaspar could only suggest prospects.

The witness was shown Appellant's Exhibit A, which shows a vacancy in the Director of Development position for the College of Nursing when the witness arrived at his position. The witness stated that he only remembered there not being such a person when he arrived, but he did not remember there being a vacancy. The witness was then shown an organization chart for the College of Nursing as of March 2010. The witness stated that he had never before seen the chart, but the chart appeared to be correct. Mr. Newman was then shown Appellant's Exhibit K,

which he recognized as the memorandum that he wrote to Dean Gold and Mr. Vern Snyder proposing to create some additional assignments for the Development Officers who work in the Health Science Campus to better cover the fundraising opportunities on the campus that were not being addressed because of the way that coverage was assigned purely by college. The witness stated that new fundraising assignments were created in addition to the ones that already existed.

The witness stated that the Appellant had major involvement with the simulation center project, but her involvement in fundraising for the project was minor because the project was not yet ready for major fundraising. When asked about the transplant immunology event, the witness stated that he did not recall who named the event. Mr. Newman recalled that the Appellant had to get approval for the logos on the invitations, and she had to abide by university guidelines. The witness also stated that the donors chose where their money goes, not the Appellant. Furthermore, the witness stated that although the Appellant could have chosen the colors of the invitations on her own, it would have been wiser for her to get consensus from her boss.

On re-direct examination by Appellee's counsel, Mr. Newman was shown Appellant's Exhibit A, which is a work-chart, and Mr. Newman stated that a Director of Development is an at-will unclassified position in all colleges. The witness stated that Appellant's Exhibit K was a proposal to management to make some modifications of existing positions to take advantage of the talent of the people in those positions so they can be more productive for the university.

The Appellee's next witness was Ms. Connie Michalak, the Unit Director of Employment and Compensation at the University of Toledo. The witness stated that she has held her position since the end of June 2010. Prior to her current role, she was the Interim Compensation Manager from 2006 to June 2010. As Interim Compensation Manager, she redid the salaried compensation structure of UT. The witness then described her duties while Unit Director as managing the employment area, which includes all recruitment, overseeing the evaluation of newly created positions, and overseeing compensation. The witness stated that she is familiar with UT's hiring process, and only unclassified employees receive offer letters; classified employees receive welcome letters. When asked to describe the difference between the two letters, the witness stated that a welcome letter welcomes classified employees to UT. The letter confirms that they should report to work, and gives them the date of orientation. The letter does not contain salary

confirmation. In contrast, an offer letter to unclassified employees is an offer of employment that includes a salary and start date. The offer is subject to approval by the Board of Trustees, a background check, employment verification, and pre-employment verifications such as drug screens. The letter also contains a statement that the position is unclassified, and as such, the employee is an employee at-will. The letter states that the individual should contact Human Resources if he or she does not understand. Finally, the letter is signed by the appointed authority.

The witness was shown Appellee's Exhibit 1, which she identified as an offer letter to an unclassified employee. When asked how she knew this offer letter to be for an unclassified employee, the witness pointed out the following: 1) the first sentence says, "I am pleased to offer you a position..." 2) the second sentence in the fourth paragraph that discusses how unclassified positions are at-will, 3) the fifth paragraph refers to the position as being unclassified, and by accepting the position, the individual acknowledges that he or she is taking an unclassified position, and 4) the letter states there is to be ninety (90) days' termination notice, which is appropriate for unclassified employees, but classified employees only receive fourteen (14) days' notice.

When asked if UT would issue the Appellant a new offer letter if she transfers to another college to occupy a position as PGO, the witness said there should be offer letters if a person changes positions, but there are some areas that allow for redistribution as business needs arise. Historically, under the institutional advancement area, individuals are moved from College-to-College and assigned a new position number but do not receive new offer letters. The witness stated that she was aware that the Appellant moved from the College of Law to the College of Nursing and did not receive a new offer letter. The witness stated that the Appellant did not receive a new offer letter because Ms. Sawicki remained in the same area: institutional advancement.

The witness was then shown Appellee's Exhibit 2 and identified it as the Staff Personnel Action form, which is issued to place someone on the payroll. This form is specific to the Appellant. Under the Primary Employee Class, the form lists "U1 – Unclassified PSA FT." The witness stated that "U1" refers to the position being an unclassified position.

The witness was asked to explain vacation policy. The witness stated that vacation policy is broken down into different section based upon the employee's classification. For classified employees, vacation accrual is based on years of service. For unclassified employees, everyone accrues up to twenty-two (22) days per year with a maximum accrual of forty-four (44) days. The witness identified Appellee's Exhibit 6 as UT's current vacation policy, and stated that this policy was in effect while the Appellant was employed by UT. The witness stated that the Appellant received the same vacation compensation as an unclassified employee.

On cross-examination, the witness was shown Appellee's Exhibit 1, which specifically indicates that the job offer made to the Appellant is for the College of Law. The witness is unaware of any similar letter that indicates the Appellant is the PGO for the College of Nursing.

The witness stated that Appellee's Exhibit 2, the Staff Personnel Action form that is used to place someone on payroll, is not a document that the Appellant would have seen.

The witness was then shown Appellee's Exhibit 6, which is UT's vacation policy. The witness stated that she never gave this document to the Appellant. The witness said this document was changed in August 2009 by the senior leadership and was posted for two thirty-day timeframes for all employees to view and comment on before being signed by Dr. Jacobs, UT's president. The witness stated that since her employment in 2006, and prior to the change in August 2009, the accrual rates by unclassified employees was at a higher rate of accrual than for classified employees. The witness then said that Appellee's Exhibit 1, the Appellant's offer letter, does not indicate that the vacation policy extended to the Appellant.

The witness stated that the Events Coordinator position is classified. However, the witness said the Appellant did not occupy the position of Events Coordinator at UT. The witness then read the fifth paragraph of Exhibit 1, which reads: "Signing this letter validates your understanding of this appointment and your acceptance of the policies and benefits of unclassified employment."

The Appellant, Annie Sawicki, was the last witness to appear and was questioned as on direct examination. When asked what she did for the last six (6) months of her employment, the Appellant responded that she was an event planner.

The witness then listed examples of when she acted as an event planner: she made the reservations and arranged the trip to Florida, she sent out the invitations for the simulation project in April, as well as selected the dinner menu and picked up the speaker from the airport, and she organized the actual the transplant immunology and simulation event. The Appellant stated that she spent at least three (3) days per week working on the simulation project and the transplant immunology and simulation event, she spent one full day in meetings, and she spent the remaining time chatting with people and cultivating relationships.

The Appellant stated that her job duties changed when she went to the College of Nursing, and the transplant immunology and simulation projects were not designed by her nor solely pursued by her. The Appellant testified that she was told to focus on those programs, and she had to seek approval for everything she did for those two projects. The Appellant said that the times she did not seek approval, she was punished. When asked for examples, the Appellant said that she had to change the title "Transplantation and Gift of Life" because the school did not want to reflect Catholic stigma or values that are associated with such a title. Ms. Sawicki stated that she also had to change the font in which Dr. Jacobs' name was printed and how it was presented. The Appellant also had to create a twenty (20) page program summary of the event, and she had to give the program summary to Mr. Newman for approval.

The Appellant stated that she thought she had three bosses: Dean Gaspar, Howard Newman, and at some level Vern Snyder. The Appellant said she worked with Dean Gaspar almost every day, at least four times per week. When asked if there were any specific job duties that she did not have to receive prior approval for, the Appellant answered in the negative. She elaborated by saying that everything she did required approval of one of her three bosses. The Appellant said that she was not allowed to pick colors for invitations; she only brought invitations to her bosses after graphic designers approved the invitations..

Ms. Sawicki was shown Appellee's Exhibit 6, which was a copy of the Appellant's vacation policy. The Appellant stated she never saw the vacation policy before, nor received a copy of the policy. Next, the Appellant said she never received a copy of the position description in Appellee's Exhibit 3. The Appellant then said she had never seen Appellee's Exhibit 2, which is a Staff Personnel Action form. Lastly, the Appellant said she does not have any documentation that her position with the College of Nursing was an unclassified position. The Appellant

said she never requested a job audit of her position while employed in the College of Nursing. However, the witness testified that she did ask for clarification after going to the College of Nursing regarding her position but did not have anything in writing to evidence the same.

Under re-cross examination, the Appellant was asked to look at Appellee's Exhibit 9, which she identified as absence reports. The Appellant agreed that she was professional staff, she was checked as professional staff on all the reports, and her signature was on all of these reports.

The witness stated that everything she did had to be approved when in the College of Nursing, including her identification of potential donors. For a potential donor to be approved, the Appellant said she had to fill out paperwork that had to be approved by another division. The Appellant said she could bring names forward to be approved by other people, such as Chris Spengler, the Director of Advancement Relations. The Appellant said she did some, but not all, of the research and footwork to identify individuals to pursue. The Appellant identified Dean Gaspar, Howard Newman, Vern Snyder, and emeriti professors as others with whom she would work.

The Appellant said going to dinner, breakfast, or lunch with potential donors had to be approved in advance. The Appellant then elaborated on the list of 9,000 potential donors that she was given when she came to the College of Nursing. The Ms. Sawicki stated it was her job to coordinate the whittling down of that list to 200. She said the list was brought to her, she was told who to look at, and she facilitated the process. The Appellant said Mr. Newman made suggestions to her, but Mr. Newman did not do the groundwork.

FINDINGS OF FACT

1. On August 18, 2008, the Appellant began working for the University of Toledo as the Principle Gifts Officer for the College of Law.
2. The first essential job duty of a Principle Gifts Officer, as listed on the Appellant's offer letter and on the Professional Staff Position Description, is

to cultivate, solicit, and close high potential prospective donors. High potential donors are those donors capable of giving \$100,000 and up.

3. The differences between a Director of Development and a Principle Gifts Officer are the responsibilities and the compensation received by each. A Principle Gifts Officer has responsibility for \$100,000 gifts, but a Director of Development has responsibility for lower level gifts that may lead to bigger gifts. A Director of Development is usually a less experienced fundraiser.
4. Both a Director of Development and a Principle Gifts Officer are unclassified positions that serve at the will of the appointing authority.
5. Only unclassified employees receive offer letters at the University of Toledo, and the Appellant received an offer letter. An offer letter to unclassified employees is an offer of employment that includes a salary and start date. The offer is subject to approval by the Board of Trustees, a background check, employment verification, and pre-employment verifications such as drug screens. The letter also contains a statement that the position is unclassified, and as such, the employee is at-will. The letter states that the individual should contact Human Resources if he or she does not understand. Finally, the letter is signed by the appointed authority. In contrast, a welcome letter to a classified employee welcomes the classified employees to the University of Toledo. The letter confirms that the individual should report to work, and gives the individual the date of orientation. The letter does not contain salary confirmation.
6. The Appellant signed an offer letter to be a Principle Gifts Officer at the School of Law.
7. The offer letter signed by the Appellant stated, "By accepting this offer of unclassified employment, you acknowledge this position falls within the unclassified civil service in the State of Ohio and as such does not create a property right to any position with the University or the State of Ohio. Signing this letter validates your understanding of this appointment and your acceptance of the policies and benefits of unclassified employment. If the meaning of unclassified civil service status is unclear, you are encouraged to contact the Human Resources Department for a full explanation."

8. The Appellant never contacted the Human Resources department for an explanation of what “unclassified” meant.
9. The Appellant transitioned from the College of Law to the College of Nursing during the period of January 2009 through April 2009.
10. When the Appellant transferred from the College of Law to the College of Nursing, she did not receive a new offer letter. In fact, no letter exists that states the position of Principle Gifts Officer at the College of Nursing is an unclassified position.
11. The Appellant understood that her position in the College of Nursing was an unclassified position.
12. A 90-day termination notice is appropriate for unclassified employees at UT, but classified employees only receive a 14-day notice. The Appellant’s termination letter conformed to the 90-day notice that was set forth in her offer letter, which was the required notice for an unclassified employee.
13. No Principle Gifts Officer position existed at the College of Nursing prior to the Appellant’s arrival.
14. The Appellant never saw the Professional Staff Position Description of a Principle Gifts Officer as it appears in Appellee’s Exhibit 3.
15. After the Appellant’s transition to the College of Nursing, she continued to submit Activity Reports, just as she did while a Principle Gifts Officer at the College of Law.
16. At least some of the Appellant’s work at the College of Nursing was identifying, cultivating, and soliciting prospective donors.
17. After the Appellant’s transfer to the College of Nursing, she was assigned to the Simulation Center and the Immunology and Transplantation projects in addition to the College of Nursing.
18. The Staff Personnel Action Form, Exhibit 2, lists the Appellant’s Primary Employee Class as “U1 – Unclassified PSA FT.” “U1” refers to the position

being an unclassified position. This document, however, is not a document that the Appellant would have seen.

19. The Appellant received the same vacation compensation as an unclassified employee. For unclassified employees, everyone accrues up to twenty-two (22) days per year with a maximum accrual of forty-four (44) days. In contrast, vacation accrual is based on years of service for classified employees.
20. The Appellant's offer letter did not indicate that the unclassified vacation policy extended to the Appellant.

CONCLUSIONS OF LAW

The determination of the Appellant's status as a classified or unclassified employee while employed by the University of Toledo will mandate the outcome of this appeal. As was previously stated, the Appellant was removed as an unclassified employee pursuant to Ohio Revised Code § 124.11(A) (7) (a), 124.11(A) (9), and 124.11(A) (30). The burden is on the Appellee to prove, by a preponderance of the evidence that the Appellant was serving in the unclassified service at the time of her termination. If the Appellee meets this burden, then the case will be dismissed because this Board has no subject matter jurisdiction over unclassified employees. If, however, the Appellee fails to meet its burden, then the Appellant must be reinstated because she was not removed in accordance with the procedures governing the removal of classified employees.

Employment with the State of Ohio is divided into the classified and unclassified service. The division between these two groups of public employment is delineated in R.C. 124.11(A), which describes a variety of positions within the public sector that are located within unclassified service. The first issue is whether the Appellant was serving in the unclassified service of the State of Ohio pursuant to R.C. 124.11(A)(7)(a). The Appellee in this matter claims that the Appellant, Annie Sawicki, was employed in the unclassified service under the provisions of R.C. 124.11(A)(7)(a). R.C. 124.11(A)(7)(a) reads as follows:

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:

(7)(a) All presidents, business managers, administrative officers, superintendents, assistant superintendents, principals, deans, assistant deans, instructors, teachers, and such employees as are engaged in educational or research duties connected with the public school system, colleges, and universities, as determined by the governing body of the public school system, colleges, and universities;

With respect to the options listed in R.C. 124.11(A)(7)(a), I find that the testimony presented, and the evidence contained within the record, indicated that the “administrative officer” option was the only option that was potentially applicable in this case. Since the term “administrative officer” is not defined within the context of R.C. 124.11(A)(7)(a), and since case law has not directly addressed the issue of what constitutes an “administrative officer” under this Code provision, this Board should apply the ordinary meaning of the term “administrative officer” to determine whether the Appellant held an administrative officer position pursuant to R.C. 124.11(A)(7)(a).

The Appellee also asserted that the Appellant served as an unclassified employee pursuant to R.C. 124.11(A)(30), which reads as follows:

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:

(30) Employees appointed to administrative staff positions for which an appointing authority is given specific statutory authority to set compensation;

With respect to R.C. 124.11(A)(30), I find the testimony presented and the evidence contained within the record to indicate that the Appellee was simply asserting that Annie Sawicki was appointed to an administrative staff position for which the appointing authority had specific authority to set its compensation. Again, since the term “administrative staff” is not defined within the context of R.C.

124.11(A)(30) and since case law has not directly addressed the issue of what constitutes an “administrative staff” under this code provision, this Board should apply the ordinary meaning of the term “administrative staff” to determine whether the Appellant held an administrative officer position pursuant to R.C. 124.11(A)(30).

Webster’s Third New International Dictionary (Unabridged 1971) defines the term “administrative” as: “of, belonging to, proceeding from, or suited to administration or an administration: EXECUTIVE.” The term “officer” is defined as: “a *obs* one charged with a duty: AGENT.” The term “staff” is defined as: “1: of, relating to, or constituting a staff (work)(officers)(personnel) 2: having an auxiliary or advisory relationship to the stated objective of an organization.”

The above definitions indicate that an “administrative officer” would be an employee charged with duties involving the implementation of specific functions, programs, or goals of an organization. Thus, an “administrative officer” would be noted as an agent of the administration, which would have a significant level of authority to initiate action and would perform duties, the nature of which would require the organization to rely upon the employee’s personal judgment and leadership abilities.

The testimony revealed that Annie Sawicki’s first essential job duties while a Principle Gifts Officer at the College of Law is to cultivate, solicit, and close high potential prospective donors. PGOs are expected to fundraise, on average, \$5MM per year. PGOs work with the highest donors in order to secure six-plus figure gifts. PGOs are responsible for identifying, soliciting, and closing gifts.

The Appellant’s duties that she performed as they related to her being the PGO at the College of Law allowed her to have a wide variety of discretion and autonomy in the performance of her duties. While at the College of Law, the Appellant worked in conjunction with then Dean Ray of the law school to oversee and implement activities toward the end of soliciting gifts for the College, as well as programs and other activities for the law school. Additionally, the Appellant was responsible for scheduling high-end donor meetings. For example, Sawicki was involved with donations in memory of Judge Melvin Resnick, and the Appellant worked with the Bates’ Family Foundation to establish kids who wanted to be prosecutors. Thus, Ms. Sawicki’s superiors relied upon her skills while at the College of Law, and the Appellant occupied an “administrative officer” position pursuant to R.C. 124.11(A)(7)(a).

After Ms. Sawicki's transition to the College of Nursing, UT's records indicate that she was the PGO for the College of Nursing, but the Appellant did not receive a new offer letter stating that she was the PGO for the College of Nursing. Furthermore, no letter exists that states the position of Principle Gifts Officer at the College of Nursing was an unclassified position. The issue is whether Ms. Sawicki's job duties were really those of a Principle Gifts Officer, or if her job duties changed so dramatically that she was really acting as an Events Coordinator, which is a classified position.

While at the College of Nursing, Sawicki at least partially continued to perform the job duties of identifying, cultivating, and soliciting donors. For example, while at the College of Nursing, Sawicki was given a list of 9,000 alumni, which she sorted through to determine potential donors. The Appellant shrunk the list to 200, but the facts are in dispute as to the degree of independence given to Sawicki when narrowing down the list. In addition to identifying, cultivating, and soliciting donors, Sawicki also worked on other projects while at the College of Nursing. For example, the Appellant worked with the Inter-Professional Immersive Simulation Center and took leaders of the University of Toledo Medical Center (UTMC) to the Wright Patterson Air Force base in Dayton, Ohio to see what technology the military is using and how such technology can be incorporated into UTMC. The people on this trip were not donors. Further, the Appellant planned an event for April 21, 2010 where the local community could visit and see what the Simulation Center would look like. The Appellant's involvement in fundraising for the Simulation Center was, at most, minor. The degree of independence given to the Appellant when performing these job duties is in dispute. Ms. Sawicki also worked on planning the Transplant Immunology event for April 12, 2010 and getting people to give to this area who had not previously given. The Appellant acted as an Event Planner for this event, which included sending out the invitations, selecting the dinner for the dinner program, and getting people to attend. The Appellant helped bring the *president emeritus* of the University of Notre Dame, Father Malloy, who was a recent kidney donor, to be one of the top speakers at the event. Once again, however, the facts are in dispute as to the degree of independence given to Ms. Sawicki in planning and implementing this Transplant Immunology event. Further, the Appellant travelled to Florida to look at retired UT nurses and their husbands as potential UT donors. Mr. Newman, the Appellant's supervisor, testified that he was unaware of who made the personal arrangement for the trip to Florida, which leads to the conclusion that the Appellant had some degree of discretion and autonomy

when arranging this trip. Additionally, the Appellant worked on a “Heart-to-Heart” program while at the College of Nursing, which was designed to raise money in order to provide stethoscopes to nursing students.

As revealed by the evidence and testimony, although the Appellant’s job duties expanded after her transfer to the College of Nursing to include some event planning, the Appellant continued to cultivate, solicit, and close prospective donors, albeit not for high potential donors as was the case at the College of Law, but for smaller donations in the effort to build a constituency of donors for the College of Nursing. While at the College of Nursing, the Appellant met with approximately a few dozen potential donors, and she continued to submit Activity Reports to her superior, just as she did while a Principle Gifts Officer at the College of Law. The Appellant’s supervisor at the College of Nursing, Mr. Newman, did not attend the vast majority of these meetings, and the Appellant was acting on behalf of the university when she attending these meetings. Mr. Newman did not oversee the Appellant on a day-to-day basis. Thus, the Appellant had some degree of discretion and autonomy in the performance of her duties while at the College of Nursing, and the Appellant’s superiors relied on her skills. Therefore, the Appellant occupied an “administrative officer” position pursuant to R.C. 124.11(A)(7)(a). Furthermore, the Appellant stated that she believed she was a Director of Development at the College of Nursing at the time of her termination from UT, however the evidence revealed that the Director of Development position is also an unclassified position.

With regard to the “administrative staff” exemption set forth in R.C. 124.11(A)(30), it is noted that this exemption is applicable to employees appointed to administrative staff positions for which an appointing authority is given specific statutory authority to set compensation. While the evidence presented at the record hearing was devoid on how the organizational structure was set up by the University of Toledo, R.C. 3364.03 states:

The board of trustees of the University of Toledo shall employ, fix the compensation of, and remove, the president and such number of professors, teachers, and other employees as may be deemed necessary...

Thus, the UT Board of Trustees is the appointing authority that is given specific authority to set compensation as required by R.C. 124.11(A)(30). Consequently, I find that R.C. 124.11(A)(30) may be considered in this case

because the evidence supports the conclusion that the Appellant was a UT staff member. The analysis of the Appellant's job duties, along with the conclusion that the Appellant held an "administrative officer" position, support the conclusion that Ms. Sawicki held an "administrative staff" position pursuant to R.C. 124.11(A)(30) and thus could be considered as serving in an unclassified position.

The Appellee also alleged that the Appellant was unclassified pursuant to R.C. 124.11(A)(9), which reads as follows:

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:

(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 and those persons employed by and directly responsible to elected county officials or a county administrator...

An "administrative relationship" as defined by Ohio Administrative Code § 124-1-02(C) generally means 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 occupies an administrative relationship to another is a question of fact to determine by this Board.

Further, "fiduciary relationship," as defined within Ohio Administrative Code § 124-1-02(I), generally means 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 this Board.

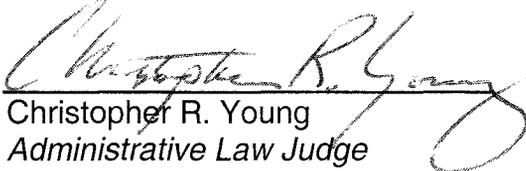
In the case at hand, while it has already been concluded that the Appellant was an administrative officer and/or an administrative staff within the context of the above noted conclusions, it is clear that the University of Toledo relied upon the Appellant to perform duties that were not delegated to the average employee, and consequently, the Appellee established that the Appellant did occupy a position pursuant to R.C. 124.11(A)(9).

The Appellee argues that, in the alternative, the Appellant waived her rights to invoke the protection of the classified civil service. The doctrine of the defense of *waiver* should be applied in this matter. The evidence and testimony revealed that the Appellant did knowingly accept a position as a Principle Gifts Officer with the College of Law as an unclassified employee, although the Appellant contends that she did not understand what such a position was. However, the acceptance letter stated that the Appellant signed stated that Sawicki was to contact Human Resources for a full explanation if the meaning of unclassified civil service status is unclear, and Sawicki never asked for clarification. As a result, the Appellee can assert a defense of *waiver*.

In addition, R.C. 124.03(A)(1) states, "In determining whether an employee is in the unclassified civil service, the State Personnel Board of Review shall consider the inherent nature of the duties of the employee's classification during the two-year period immediately preceding the appointing authority's appealable action relating to the employee." As such, the evidence revealed that Ms. Sawicki was a Principle Gifts Officer for the College of Law from August 18, 2008 to January 2009. Further, the evidence revealed that Ms. Sawicki transitioned from the College of Law to the College of Nursing from January 2009 to April 2009, and she was entirely with the College of Nursing by April 2009. Consequently, Ms. Sawicki's duties during the entire time of her employment with the University of Toledo are relevant to the case at hand because she was employed less than two (2) years.

CONCLUSION

Therefore, I respectfully **RECOMMEND** that the instant appeal be **DISMISSED** for lack of subject matter jurisdiction because the evidence established that the Appellant, Ms. Anne Sawicki, as a Principal Gifts Officer at the University of Toledo, was in the unclassified service pursuant to Ohio Revised Code § 124.11(A)(7)(a), 124.11(A)(9), and 124.11(A)(30). Additionally, the Appellee should be allowed to assert the defense of *waiver*, as well.


Christopher R. Young
Administrative Law Judge

CRY: