

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

Kimberly Henry,

Appellant,

v.

Case No. 10-REM-10-0288

Fairfield County Clerk of Courts,

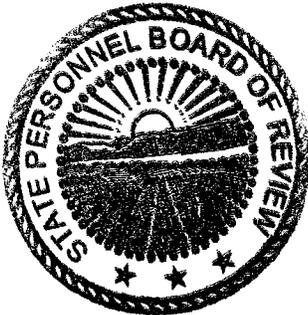
Appellee.

ORDER

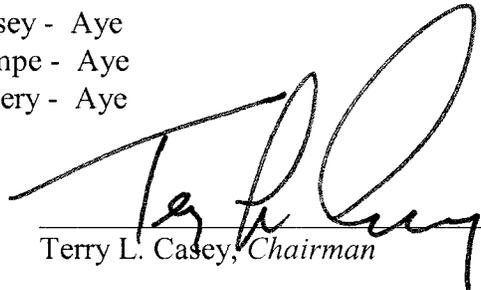
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 due to the finding that Appellant has waived her right to argue that she was a classified employee and that she is estopped from doing so, pursuant to O.R.C. §§ 124.03, 124.11(A)(9) and (A)(10).



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 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, April 6, 2011.


Clerk

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

4-6-11mH

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

Kimberlee Henry

Case No. 10-REM-10-0288

Appellant

v.

January 31, 2011

Fairfield County Clerk of Courts

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on for consideration upon Appellant Henry's October 13, 2010 filing of an appeal of her removal, effective October 11, 2010 and Appellee's December 3, 2010 response to a questionnaire issued by this Board. Appellant Henry had the option of filing a reply to the responses of the Appellee within ten (10) days of receiving Appellee's response, but to date, Appellant Henry has not filed an optional reply.

Through Appellee's response to this Board questionnaire and pursuant to the documents which were attached to the questionnaire response, Appellee is alleging Appellant Henry was an unclassified employee at the time of her removal. In response to question numbers (1) and (3), Appellee states Appellant Henry held the position of Deputy Clerk of Courts as an unclassified employee under sections 124.11(A)(9) and (10) of the Ohio Revised Code.

This Board does not possess jurisdiction over unclassified employees. Unlike a court of general jurisdiction, this Board has only the authority and jurisdiction granted to it by statute. Section 124.03 of the Ohio Revised Code limits this Board's jurisdiction to classified employees. The pertinent part of that statute states as follows:

(A) The state personnel board of review shall exercise the following powers and perform the following duties:

(1) **Hear appeals, as provided by law, of employees in the classified state service** from final decisions of appointing authorities

or the director of administrative services relative to reduction in pay or position, job abolishments, layoff, suspension, discharge, assignment or reassignment to a new or different position classification, or refusal of the director, or anybody authorized to perform the director's functions, to reassign an employee to another classification or to reclassify the employee's position with or without a job audit under division (D) of section 124.14 of the Revised Code. As used in this division, "discharge" includes disability separations. (Emphasis added).

When an employee does not agree that he or she was serving in an unclassified position at the time of removal, it is usually necessary to hold a hearing to examine the job duties of the employee and determine if those duties place the employee into the unclassified service. If the determination is "yes", then this Board has no choice but to dismiss the appeal since the Board has no jurisdiction to hear the appeal of an unclassified employee.

There are several exceptions to the necessity of holding a hearing and one of those exceptions is when the employee has waived his or her right to argue that his or her unclassified status is in error. The Ohio Supreme Court in the case of *Chubb v. Ohio Bur. of Workers Comp.*, 81 Ohio St.3d 275; 690 N.E.2d 1267(1998), held:

that the Appellee " . . . may assert defenses of waiver and estoppel if the employee has accepted appointment to a position designated as unclassified and also has accepted the benefits of that unclassified position, regardless of whether the employee's actual job duties fall within the classified status.

The appellate court set out a test to determine if the concept of waiver and estoppel applies and the Ohio Supreme Court agreed with the lower court's test. The test enumerated by the appellate court is:

A civil service employee, who knowingly and voluntarily: (1) accepts appointment to a position designated as unclassified, (2) accepts the benefits of that unclassified position, and (3) waives the protections of the classified service, cannot later claim the benefits of the classified service, regardless of whether the employee's actual job duties fall within the classified service. *Chubb* at 277.

The documents attached to Appellee's questionnaire response establish a waiver and estoppel argument sufficient to hold that Appellant Henry was an unclassified employee at the time of her removal; therefore, this Board does not possess jurisdiction to hear her appeal.

Attached to the questionnaire response is a copy of a document entitled "Appointment of Deputy Clerk of Courts" and it was signed by Appellant Henry on January 21, 2009. The "ACCEPTANCE" portion of that document is signed by Appellant Henry and it states in the first paragraph:

I, Kimberlee Henry, acknowledge that the position of Deputy Clerk which I occupy is exempted in the unclassified service per Section 124.11(A)(10) of the Ohio Revised Code. I acknowledge that I serve at the pleasure of the appointing authority and have no protection under the civil service laws.

Also attached to the questionnaire response was another form titled "Unclassified Service Acknowledgment Form" which is also signed by Appellant Henry on January 21, 2009. It states:

I, Kimberlee Henry, acknowledge that the position of title Clerk Deputy that I occupy in the Lancaster Office is exempted in the unclassified service per Section 124.11 (A) (____) of the Revised Code. I also acknowledge that I serve at the pleasure of the appointing authority, and understand that I have no protection under the civil service laws.

Lastly, Appellee's questionnaire response also contained a document titled "Fairfield County Clerk of Courts Job Description Receipt", which was signed by Appellant Henry on January 21, 2009. The pertinent paragraph states as follows:

I have received and reviewed the provided statement of my job description related to my duties while serving as Deputy Clerk or Chief Deputy Clerk, Legal or Title, for the Fairfield County Clerk of Courts. I understand that my position as Deputy Clerk or Chief Deputy Clerk, Legal or Title, is unclassified (exempt), in accordance with the Ohio Revised Code Section 124.11 (A)(10) (regarding Deputy Clerks), and/or Section 124.11(A)(10), (A)(9) (regarding Chief Deputy Clerks).

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As can be seen from reading the attached documents containing the above-quoted paragraphs, Appellant Henry falls under the waiver and estoppel doctrine espoused in *Chubb*. She accepted the appointment to the position of Title Clerk Deputy, which was clearly designated as being in the unclassified service. She accepted all the benefits commensurate with that position, including her pay. She waived the protections of the classified service, as she signed the statement which specifically stated such waiver.

Inasmuch as Appellant Henry meets all of the requirements to show waiver and estoppel, she cannot now argue that her position was a classified position entitling her to appeal her removal before this Board. It is clear that she voluntarily and knowingly gave up that right when she signed the numerous documents stating such.

Therefore, it is my **RECOMMENDATION** that this appeal be **DISMISSED** due to the finding that Appellant Henry has waived her right to argue that she was a classified employee and that she is estopped from doing so. Therefore this Board is without subject matter jurisdiction to hear this appeal.



Marcie M. Scholl
Administrative Law Judge

:mms