

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

MICHELLE CUNNINGHAM,

Appellant,

v.

Case No. 11-FRN-12-0424

BOARD OF SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY,

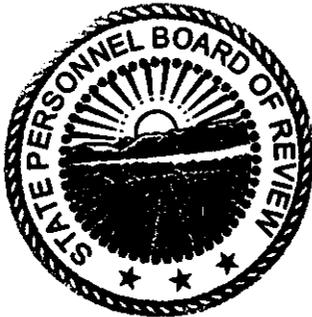
Appellee

ORDER

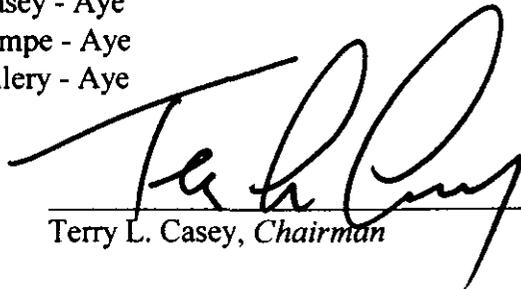
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including 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 is **DISMISSED** for lack of jurisdiction over the parties.



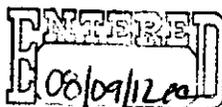
Casey - Aye
Lumpe - Aye
Tillery - Aye

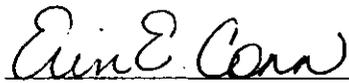

Terry L. Casey, *Chairman*

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, August 09, 2012.




Erin E. Conn
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**

Michelle Cunningham,

Case No. 11-FRN-12-0424

Appellant

v.

June 22, 2012

Board of Speech-Language, Pathology
and Audiology,

Appellee

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter comes on for consideration pursuant to Appellee's Motion to Dismiss, filed with this Board on January 19, 2012. Appellee asserts that this Board is without jurisdiction to consider the above-referenced appeal because Appellant was an unclassified employee pursuant to R.C. 124.11(A)(9) and further asserts the affirmative defense of waiver and estoppel. Appellant filed a *memorandum contra* on February 29, 2012 arguing that Appellant did not accept the benefits of her position knowing that they arose from its unclassified status, and requesting that the Board proceed to a duties hearing. The Appellee filed a Reply Brief on March 22, 2012, and Appellant filed a Sur-Reply on June 11, 2012.

Based upon a review of the evidence contained in the record, I make the following findings of fact:

Appellant was employed by Appellee as a Licensing Administrator from December 1, 2009 through December 2, 2011. Based upon her job duties, Appellant was deemed an unclassified employee by Appellee.

Upon acceptance of her position in 2009, Appellant executed an acknowledgment stating that she knowingly and voluntarily accepted a position in the unclassified service and agreeing that she had no protection under the civil service laws of the State of Ohio. The acknowledgment further indicated that Appellant served at the pleasure of Appellee. Appellant earned a higher salary than Appellee's classified staff. Appellant also accrued and used compensatory time,

and participated in management training; neither of these benefits were available to Appellee's classified employees.

On December 2, 2012, Appellant resigned from her position. During her tenure of employment, Appellant was never suspended or removed from employment by Appellee.

CONCLUSIONS OF LAW

Appellant alleges that she was forced to resign her position with Appellee, thereby resulting in a *de facto* removal from employment. This Board does not possess subject matter jurisdiction over the removal of an unclassified employee since R.C. 124.03 limits this Board's jurisdiction to actions concerning classified employees.

Appellee argued that Appellant occupied a position which was statutorily exempted from the civil service pursuant to R.C. 124.11(A)(9), and provided evidence to assert the affirmative defense of waiver and estoppel. The Supreme Court discussed the application of waiver and estoppel in *Chubb v. Ohio Bureau of Workers' Compensation* (1998), 81 Ohio St. 3d 275, noting that the State may assert the defense if an employee has accepted the benefits of an unclassified position, regardless of whether the employee's actual job duties fell within a classified status. Further, the court in *Chubb* held that if a public employee served in an unclassified position and enjoyed the benefits of the unclassified service, then as a matter of equity and fairness, the employee should be precluded from claiming classified status in order to receive the statutory benefits afforded classified civil servants. If the employee knowingly and voluntarily accepted an appointment into an unclassified position and reaped the benefits, the employee has voluntarily relinquished the statutory rights and protections of civil service status.

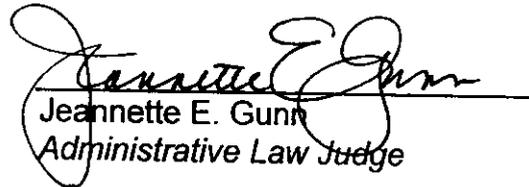
In the case at hand, Appellant knew when she accepted the Licensing Administrator position that it was considered by Appellee to be unclassified. She signed an acknowledgment form noting this, as well as noting that she served at the pleasure of the appointing authority. The Appellant also waived her right to assert in the future that her position was, in fact, classified.

Appellant argues that she was not aware that her salary or benefits were different than those provided to classified employees, or that they were based upon

her employment as an unclassified civil servant. Appellant does not dispute, however, that she did accept such salary and benefits. She asserts that both classified and unclassified employees are eligible under Ohio law to earn compensatory time and that both exempt classified and unclassified employees were eligible to participate in the management training course she took (OCPM). However, both the accrual and use of compensatory time and participation in the OCPM program require not only eligibility, but also prior approval by the appointing authority. Evidence presented by Appellee indicates that its approval was granted based upon Appellant's unclassified status and that approval was not granted for employees in the classified service.

The evidence contained in the record clearly indicates that Appellant knowingly and voluntarily accepted an appointment to the unclassified service and reaped the benefits of that appointment, thereby relinquishing the statutory rights and protections of the classified civil service. Case law does not support the assertion that an employee is required to knowingly associate those specific benefits with his or her status. Accordingly, I find that Appellant is thereby estopped and/or waived from asserting that she was a classified employee over which this Board may exercise jurisdiction.

Because Appellant is so estopped it is unnecessary for the Board to hold a duties hearing to determine whether the duties performed by Appellant were consistent with the designation of the position as unclassified. See *Chubb v. Ohio Bureau of Workers' Compensation* (1998), 81 Ohio St. 3d 275, 278. Therefore, I respectively **RECOMMEND** that the instant appeal be **DISMISSED** for lack of jurisdiction over the parties.


Jeannette E. Gunn
Administrative Law Judge

JEG: