

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Henry L. Horne,
Appellant,

Case Nos. 11-REM-01-0025
11-MIS-01-0026

v.

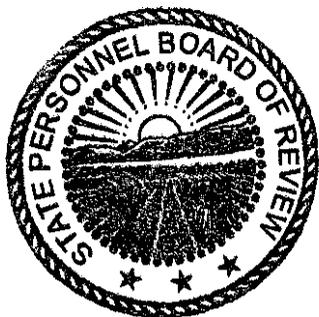
Department of Transportation,
Appellee

ORDER

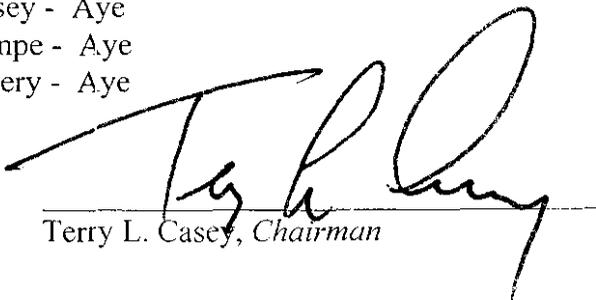
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

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 appeals be **DISMISSED** for lack of jurisdiction over the subject matter of this appeal, pursuant to O.R.C. § 124.03.



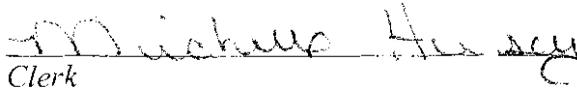
Casey - Aye
Lumpe - Aye
Tillery - Aye


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, June 2, 2011.


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**

Henry L. Horne,

Appellant

v.

Dept. of Transportation,

Appellee

Case No. 11-REM-01-0025

Case No. 11-MIS-01-0026

April 12, 2011

Christopher R. Young

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter comes on for consideration on April 12, 2011, upon the Appellee's Motion to Dismiss filed on March 18, 2011, upon the Appellant's Response to Appellee's Motion to Dismiss filed on April 4, 2011, and upon the Appellee's Reply in Support of Its Motion to Dismiss filed on April 8, 2011, and after a telephone conference was held on March 4, 2011, which among other things it was discussed by all parties whether this Board had jurisdiction over the Appellant's appeals allegedly denying his ability to "fallback" into a previously held position in the classified service.

For clarification, the Appellee, the Ohio Department of Transportation, through counsel, has respectfully moved this Board to dismiss the above captioned appeals for lack of jurisdiction. For background purposes, the Appellee employed the Appellant, Henry Horne, most recently, as a Labor Relations Officer 3, a position in the unclassified service of the state. On January 6, 2011, the Appellant requested to fall back into a previously held classified position, although that position was not named, as was revealed by the Appellant's notice of his appeal filed with this Board on January 19, 2011. On January 10, 2011, subsequent to the Appellant's request to fall back, the Appellee informed the Appellant that his unclassified appointment as a Labor Relations Officer 3 was being revoked.

Upon further review of the Appellant's employment history with the Appellee revealed that Mr. Horne in 1983 was hired in as an EEO Contract Compliance Officer, a position in the classified service of the state. In June 1984 Mr. Horne was promoted to employment relations, an unclassified position and in February 1986 he

was eventually appointed to the position as a Labor Relations Officer, also considered an unclassified position, the position he held at the time of his removal.

In the case at bar, the Appellant is appealing an alleged denial of his claimed ability to "fallback" into a previously held position in the classified service. However, it is the Appellee's assertion in its motion to dismiss that Ohio Revised Code Section 124.03 (A) is devoid of any language which confers jurisdiction upon this Board to hear an appeal based upon an alleged denial of fallback rights. Moreover, the Appellee also asserts that the Supreme Court of Ohio has stated that this Board does not have jurisdiction over such a claim such as fallback rights. *See Asti v. Ohio Dept. of Youth Services, 107 Ohio St.3d 262, 265, 2005-Ohio-6432, at paragraphs 18 through 19, see also State ex re. Glasstetter v. Rehab. Services Commission, 122 Ohio St.3d 432, 2009-Ohio-3507, at paragraph 16.*

On the other hand, the Appellant, has put forth the argument that Mr. Horne should retain rights to the classified service upon appointment to the unclassified service pursuant to Ohio Administrative Code Section 123: 01-05-03 which states:

A certified employee appointed to an unclassified position pursuant to division (D) of section 124.11 of the Revised Code on or after March 30, 1999, shall be subject to the following:

(A) Upon return to the classified service, an employee shall be placed back into the same classification from which the initial appointment to the unclassified service was made, or similar classification as provided in division (D) of section 124.11 of the Revised Code. The employee's total rate of pay shall be adjusted to reflect the compensation to which the employee would be entitled had he or she remained in the former classified position.

(B) An employee appointed to the unclassified service while serving a probationary period shall serve the remainder of the probationary period of the same or similar classification upon return to the classified service.

(C) Unclassified appointments made pursuant to division (D) of section 124.11 of the Revised Code may be rescinded by the

appointing authority at any time. An employee may request placement back into the classified service only in the following circumstances:

(1) The appointing authority demotes the employee to a pay range lower than the employee's current pay range; or

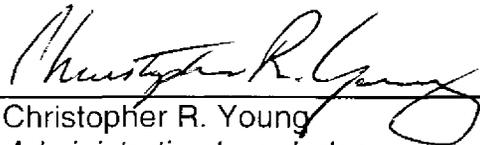
(2) The appointing authority revokes the employee's appointment to the unclassified service.

(D) Time spent in the unclassified service shall not count for the purposes of becoming permanent in the classified service in accordance with rule 123:1-10-01 of the Administrative Code

Further, the Appellant contends that section (C) (2) applies to himself, as he was a permanent employee which should be treated as a certified classified employee when he went from the classified service to the unclassified service in 1984. However, as was pointed out in Appellee's reply memorandum, Ohio Administrative Code Section 123:1-05-03, which Appellant cites in support of his claimed right to fall back into a classified position, states that only employees "**appointed to an unclassified position pursuant to division (D) of section 124.11 of the Revised Code on or after March 30, 1999,**" shall be entitled to fall back into a previously held position in the classified service. (Emphasis added). In this case the Appellant admits that his appointment to the unclassified service occurred prior to March 30, 1999, and thus Appellant's argument is without merit.

Consequently, as this Board has jurisdiction only over classified employees, and possesses only such powers and duties as conferred to it by the provisions of the enabling statute R.C. 124.03, I respectfully **RECOMMEND** that the State Personnel Board of Review **GRANT** Appellee's Motion to Dismiss and **DISMISS** this appeal for lack of jurisdiction over the subject matter of this appeal.

Henry L. Horne
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Christopher R. Young
Administrative Law Judge

CRY: