

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Frank E. Rayl, Jr.,

Appellant,

v.

Case No. 11-REM-02-0038

Department of Transportation,

Appellee.

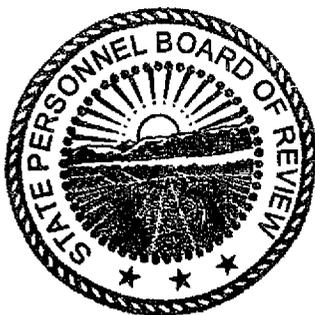
ORDER

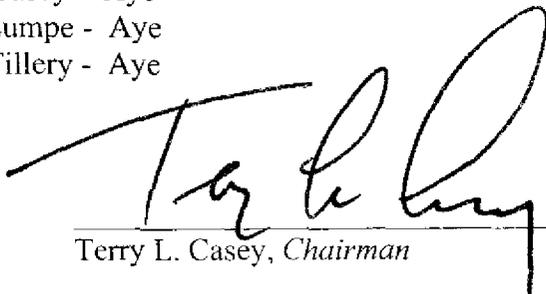
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 over its subject matter, pursuant to O.R.C. § 124.27.

Casey - Aye
Lumpe - Aye
Tillery - Aye

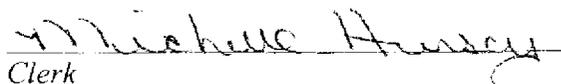



Terry L. Casey, *Chairman*

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**

FRANK E. RAYL, JR.,

Case No. 11-REM-02-0038

Appellant

v.

April 29, 2011

DEPARTMENT OF TRANSPORTATION,

JAMES R. SPRAGUE

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter comes on due to Appellant's February 3, 2011 filing of an appeal from a removal from his position with Appellee, Ohio Department of Transportation (ODOT). Appellant received notice of his removal via letter on January 28, 2011 and the removal was effective on January 29, 2011. No R.C. 124.34 Order of Removal was issued in this case because ODOT asserts that Appellant was serving in a probationary period at the time of his removal.

There is essentially no dispute regarding the actual facts of this case. Accordingly, I find that Appellant was appointed to the unclassified position of Deputy Director (DD) 5 with ODOT effective March 19, 2007. This was Appellant's first position with ODOT; thus at that time Appellant had never served in a classified position with ODOT. Further, Appellant was appointed to a classified Transportation Manager (TM) 2, 61922, position with ODOT effective November 7, 2010. This would be a position the appointment into which would ordinarily carry a 180-day probationary period.

Because this Board lacks jurisdiction to consider an appeal filed by an employee removed during an initial probationary period, the question arose as to whether Appellant had to serve a probationary period in his TM 2 position. As a result, on April 4, 2011, Appellee filed Appellee's Motion to Dismiss and on April 11, 2011, Appellant filed Appellant's Response to Motion to Dismiss.

We begin by noting that R.C. 124.27 (C) indicates that all original and promotional appointments (including appointments made pursuant to R. C. 124.30, but not intermittent appointments) are to include a probationary period. R.C. 124.27

goes on to give the range of the length of pertinent probationary periods with the specific range to be fixed by rules of the Director of the Department of Administrative Services. In Appellant's case, the TM 2 classification is assigned a 180-day probationary period.

Appellee argues that Appellant's appointment to the TM 2 position qualified as an original appointment because this was the first position that Appellant held in the classified service with ODOT. As such, Appellee continues, Appellant must serve a probationary period and his removal during same is not subject to review by this Board.

Conversely, Appellant argues that Appellant's appointment to the TM 2 position was a reduction and not an original appointment as he was already serving in a position with ODOT. As such, Appellant continues, Appellant does not need to serve a probationary period and any dispositive action that ODOT contemplated taking must be effectuated pursuant to the requirements set forth in R.C. Chapter 124 (e.g. removal via R.C. 124.34, abolishment via R.C. 124.321).

Ohio law does not provide us with clear direction on this question. Yet, from a policy perspective, it seems sensible to begin with the proposition that anyone who serves in a classified position must at some point serve a probationary period. As noted, in this case, Appellant began with ODOT in an unclassified position (DD 5) and his TM 2 position was the first opportunity he would have had to serve in a probationary period. Thus, it can be argued that his assumption of the TM 2 position was, in fact, an original appointment.

Further, since Appellant carried no previous certification (or even service) in this classification or class series, it cannot be said that he should have immediately garnered permanent status upon his assumption of the TM 2 position. Thus, it would appear that Appellant would need to serve a probationary period in the TM 2 position just as would any other person who had no prior service in the classified service and who was appointed to such a position.

Accordingly, I find that Appellant was serving in a probationary period at the time of his removal. Thus, this Board lacks jurisdiction over the subject matter of his removal and Appellee's motion to dismiss this appeal should be granted.

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **GRANT** Appellee's motion and **DISMISS** the instant appeal for lack of jurisdiction over its subject matter, pursuant to R.C. 124.27.


JAMES R. SPRAGUE
Administrative Law Judge