

ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel. Kay A. Kingsley,	:	
	:	
Appellant,	:	Case No. 2011-0441
	:	
v.	:	
	:	On Appeal from the Franklin
State Employment Relations Board,	:	County Court of Appeals,
	:	Tenth Appellate District
Appellee.	:	(Case No. 09AP-1085)

APPELLANT'S MOTION FOR RECONSIDERATION

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MOTION

Now comes Appellant, by and through counsel, pursuant to Sup. Ct. P.R. 11.2, who moves the Court to reconsider its decision on the merits filed 11/01/2011.


James R. Kingsley (0010/20)
Attorney for Appellant

MEMORANDUM IN SUPPORT

The decision of this Court should be considered for three reasons. The first reason is the Court misapplied RC §124.03(A). This Court found that section conferred jurisdiction upon SPBR construing “regardless of how they have been designated by their appointing authorities”. Until now, no case holds that SPBR can declare to be classified a position that the legislature has declared to be unclassified. There is an enormous difference between reclassification by DAS or the appointing authority and declassification by the legislature. The error of the Court is it states the legislature is the appointing authority which clearly it is not. This holding will open a flood gate for SPBR.

The second reason the decision of this Court is not correct is that it cites *State ex rel. Weiss v. Industrial Commission* (1992), 65 Ohio St.3d 470 as precedent that a facial constitutional challenge to declassification is subject to exhaustion of administrative appeal. It is not precedent for such a proposition. Counsel notes that the trial briefs in *Weiss* case are not available through Westlaw. Counsel has reviewed the actual pleadings of *Weiss* filed in the Supreme Court archive Briefs and Records Volume 423.

New hire, Carole Weiss, was told by the Industrial Commission that her position as Chief Hearing Officer was classified. A year later the commission requested DAS to review the position claiming erroneous classification because her duties made her position unclassified under the fiduciary exception. DAS agreed and declassified the position. She appealed to SPBR. Meanwhile, she suffered a reduction in duties which she appealed to SPBR. Her chief hearing officer duties were reassigned and she appealed a third time. She was then terminated from what IC claimed was an unclassified position. She appealed a fourth time. The SPBR administrative law judge decided only one of the appeals – her removal from the classified service. He found SPBR lacked jurisdiction over the DAS decision to change the status of the position. “Indeed, under R.C. §124.03 (Powers and Duties), The State Personnel Board of Review does not have the authority to issue declaratory judgments determining the classified or unclassified status of an employee’s position. There is no other statute in R.C. Chapter 124 which invests such jurisdiction in the State Personnel Board of Review.” The board affirmed.

She appealed to the Court of Common Pleas. The ALJ stayed the other three appeals pending the Common Pleas Court’s decision. Pending appeal (important to note), she filed an action in mandamus in this Honorable Court seeking to compel her reinstatement and payment of back wages. The unusual posture of the case was that the agency failed to timely answer and a default judgment was entered. It does not appear that there was any argument entertained. Notwithstanding a favorable default, the

court denied the writ of mandamus because she had adequate remedy in the ordinary course of law.

This Court somehow declared (counsel can find nothing in the record pertaining to this) “Apparently, she has decided to concede that SBPR has no jurisdiction over her appeal, without completing the appeal process she has begun”. “To justify her decision not to pursue further appeal, Weiss argues that R.C. 124.02 does not confer jurisdiction for SPBR to consider removals from the classified service...”. “Weiss’ removal from the classified service is not expressly covered by R.C. 124.0. However, this does not remove SPBR’s jurisdiction to consider that issue along with the other adverse job actions purportedly taken against her”. Weiss appealed everything everywhere. All appeals were pending at the time of mandamus denial. Was this Honorable Court trying to declare the doctrine of abatement? **THE DISTINCTION IS THAT WEISS INVOLVED A DAS RECLASSIFICATION AND NOT A LEGISLATIVE DECLASSIFICATION.**

To justify the statement that appeal from SPBR is adequate (we have reviewed at least three appeals from SPBR decisions in which jurisdiction was challenged on the ground that employees were not classified), this Court cited *Rarick v. Geauga Cty. Bd. of Commr’s* (1980), 63 Ohio St.2d 34, an agency classification case. That case involved the position of county building superintendent (Mr. Rarick) and assistant building service superintendent (Mrs. Rarick). It was unclear whether or not the positions were ever classified. The county commissioners had DAS declare them unclassified.

Thereafter, the Raricks were terminated. They appealed to SPBR who found a hybrid relationship (fiduciary and administrative) and ruled no jurisdiction over an unclassified position. The board disaffirmed and ordered Raricks reinstated. The commissioners appealed to Common Pleas Court who reversed. The Court of Appeals reversed and reinstated finding a position of trust which did not involve special confidence and therefore, not fiduciary. This Court reversed and found their primary duties were purchasing supplies and supervising the staff which placed them in the exemption of administrative and fiduciary relationships. FN1 in *Rarick* cannot be overlooked and becomes an issue at bar. It states:

FN1. Appellees have not claimed that the procedure by which their positions were designated, after many years of service, to be in the unclassified service was in any way contrary to the civil service statutes or to the Due Process Clause. Neither have they claimed the terminations to be unconstitutional. See *Branit v. Finkel* (1980), 445 U.S. 507, 100 S. Ct. 1287, 63 L.Ed. 2d 574. As a consequence, the sole issue before this court is whether the duties assigned and performed by the Raricks for the commissioners who terminated their employment placed them within RC 124.11 (A)(9).

Weiss also cited *Yarosh v. Becane* (1980), 63 Ohio St. 2d 5, another agency classification case. "The State Personnel Board of Review has jurisdiction over appeals from removals of public employees if it determines that such employees are in the classified service, regardless of how they have been designated by their appointing authorities. *Yarosh* involved deputy sheriffs. The sheriff did not request DAS provisional appointments for his deputies. No competitive examinations had been administered. The sheriff fired the deputy claiming he had the absolute power to do so under R.C. §325.17 and that power was not subject to civil service rules contained in

R.C. Chapter 124. The deputy appealed to SPBR who found them to be classified and ordered reinstatement. The sheriff appealed. The Common Pleas Court reversed. The Court of Appeals reversed finding that deputy sheriff positions are in the classified service. This Court found deputies are protected by Chapter 124. The syllabus of the case states:

2. The State Personnel Board of Review has jurisdiction over appeals from removals of public employees if it determines that such employees are in the classified service, regardless of how they have been designated by their appointing authorities.

The issue at bar is what weight is to be given to this Court's statement (Moyer, Holmes, Wright and Brown) in Weiss:

Weiss maintains that *Rarick* is not controlling here because the employees in that case did not question, as she does, the authority for and constitutionality of their removal from the classified service. She apparently interprets *Rarick* to mean that these issues cannot be decided in a civil service appeal. The passage she quotes, however, suggests instead that the *Rarick* court would have considered these arguments had they been raised: (FN1 quoted)

After that comment, the decision of the court does not further address the defense of constitutionality. Does the phrase "the *Rarick* court would have considered these arguments" intended to mean that the *Supreme Court* would have considered constitutional arguments since they can be raised at any time or does it mean that SPBR could, or should have, heard them or does it mean SPBR is a necessary, futile, conduit to common pleas court? **APPELLANT CONTENDS THAT IT IS DICTA WITH NO PRECEDENTIAL VALUE.** See, *State v. Wilson* (1979), 58 Ohio St 2d 52 and *Kemp v. Matthews* (1962), 89 Ohio Law Abs 524.

What was the constitutional issue in *Weiss*? In her complaint, she alleged that she was entitled to notice that she was being removed from classified service.

Paragraphs 11 and 12 of the complaint state:

11. The United States and Ohio Constitutions, Chapter 124 of the Ohio Revised Code, Chapters 123 and 124 of the Ohio Administrative Code and Ohio common law, enjoin Respondents to keep Relatrix in the classified service unless and until Respondents fully comply with the pertinent constitutional, statutory, administrative and common law provisions.

12. Respondents' actions in removing Relatrix from the classified service were contrary to, and in direct contravention of, rights guaranteed to her under the United States Constitution, the Ohio Constitution, Chapter 124 of the Ohio Revised Code, Chapters 123 and 124 of the Ohio Administrative Code, and Ohio common law.

Ms. Weiss' application for default judgment at Page 15, argues that she had a property interest in her classified position which could be deprived only by according her due process of law which meant notice and opportunity to be heard prior to deprivation. She had a right to contest the change of her civil service status. Her constitutional argument was not addressed in the Court's decision.

Is *State ex rel. Weiss v. Industrial Commission, supra*, good precedent that an appeal through SPBR, who lacks jurisdiction to rule on constitutional defenses, is an adequate remedy depriving the mandamus remedy? Under the law of precedent, it is not. *Rarick v. Geauga Co. Bd. of Commr's, supra*, cited for such authority in *Weiss* specifically in FN1 stated no constitutional issue was before the court. Unless an issue is decided upon the merits there is no precedential value, *State v. Payne* (2007), 114 Ohio St 3d 502. Yet, that case was relied upon by this Court using a leap of faith- FN 1

“suggests” (assumes) the constitutional arguments would have been considered-had they been raised. That suggestion/assumption simply is untenable in light of the fact that this Court did not consider the constitutional arguments raised by Ms. Weiss. There is no binding precedent when default was granted and the issue not addressed. The case at bar is one of first impression.

It is not proper to cite Weiss for the proposition that SPBR must issue a final determination that Ms. Kingsley was wrongfully excluded from employment in order for mandamus to lie. Such proposition can not be applied to a constitutional defense that is beyond the power of SPBR to decide. SPBR can not decide whether or not Ms. Kingsley was wrongfully excluded from employment because that determination depends upon whether or not Am HB 1 was logrolling which only a court can decide. That is, SPBR is without jurisdiction to render the required final determination. As a result, such an appeal is futile.

Third, *State ex rel. Glasstetter v. Rehab. Servs. Comm'n* (2009), 122 Ohio St.3d 432 is not controlling precedent. This Court's citation to this case demonstrates its misunderstanding of the crucial issue which is SPBR can not decide facial constitutional issues and a court of common pleas cannot create jurisdiction from nothing. Glasstetter accepted a position with Rehabilitation Services Commission as Human Resources Administrator 3 posted as a classified position. Her boss claimed erroneous classification. She agreed to the reclassification upon the written assurance she had fall back rights to her former position - the same position but classified. She was

terminated. Rehabilitation Services denied her fall back rights. SPBR found no jurisdiction. She filed mandamus. The court of appeals granted summary judgment finding no fall back rights. This Court found she was never appointed to a position in the unclassified service (it is not clear how this was found to be true as she claimed fallback to a classified position). Fallback rights did not apply to a status re-designation of the same position. She remained in the same position so there was nothing to fall back to. No clear right so no mandamus. Her pending appeals to SPBR could determine her claim she was involuntarily reclassified and therefore remained a classified employee was an adequate remedy. **THAT CASE DID NOT INVOLVE A LEGISLATIVE RECLASSIFICATION. NO CONSTITUTIONAL DEFENSE WAS RAISED.** Cases that address reclassification due to erroneous classification or any defense short of a facial constitutional challenge do fall within the purview of SPBR.

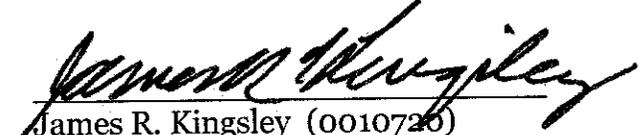
CONCLUSION

This Court did not analyze Appellant's claims under a separation of powers analysis. A facial challenge to legislation is solely within the province of the judiciary. Mandamus in the Court of Appeals is the proper procedure to challenge the constitutionality of a statute. Legislative unclassification cannot be overridden by SPBR. When SPBR lacks original matter jurisdiction, the Court of Common Pleas must correspondingly lack appellate jurisdiction. An appellate court cannot create subject matter jurisdiction to hear an issue over which the agency below lacked jurisdiction to hear. The decision of this Court overrides those legal axioms.

This case will create a legal nightmare for employees who will now be required to file their termination claims before SPBR, even though the parties below acknowledge they were never in the classified service. If one follows text book law, the precedents cited were of no precedential value.

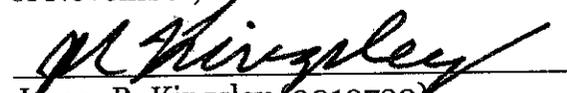
This Court has unwittingly put the cart before the horse. When declassification is unconstitutional, that issue (the horse) must be placed in front of the cart (no final determination).

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief was sent by ordinary U.S. mail from Circleville, Ohio to counsel for Appellee, Michael C. McPhillips and Reid T. Caryer, Ohio Attorney General's Office, Employment Law Section, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215-3400, on the 7 day of November, 2011.


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