STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

MICHAEL W. EASLEY,

Appellant,

v.

Case No. 96-FRN-10-0584
96-REM-11-0605

HAMILTON COUNTY GENERAL HEALTH DISTRICT,

Appellee.

ORDER

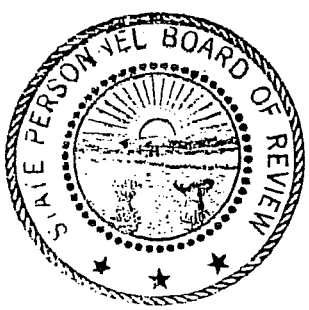
This matter came on for consideration this 10th day of September, 1997, on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Appellant's Motion to Quash Administrative Law Judge's Report and Recommendation, Motion Demanding a Hearing Before the full Board, Motion Demanding Removal of Administrative Law Judge from the Case at Bar, and Motion to Extend the Time to Respond to the Report and Recommendation by an Additional 90 Days are all DENIED.

Further, Appellant's September 5, 1997 fax filed Motion to Require Appellee to Immediately Remit Funds for Appellant's Unused Vacation Leave and to Pay Interest to Appellant on Said Funds is hereby DENIED. This Board lacks jurisdiction over the matters set forth therein by Appellant and Appellant should first address those concerns to Appellee.

Wherefore, it is hereby ORDERED that these appeals be DISMISSED, inclusive of Appellant's removal from his position of Director of Preventive Health of the Hamilton County General Health District, for lack of jurisdiction over their subject matter pursuant to Ohio Revised Code Sections 124.03(A) and 124.11(A)(28).



Hamilton - Aye
Lumpe - Aye
Batta - Aye

Patricia A. Hamilton

Patricia A. Hamilton, *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 the foregoing is (~~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, the 10th day of September, 1997.

Marcia Martin
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

Michael W. Easley,

Appellant

v.

Hamilton County General Health District,

Appellee

Case Nos. 96-FRN-10-0584
96-REM-11-0605

August 6, 1997

James R. Sprague
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came to be heard on July 22, 1997, for both prehearing and record hearing. Present at the hearing was Appellant, Michael W. Easley, who appeared *pro se*. Appellee was present at the hearing through its designee, Timothy Ingram, Health Commissioner for the Hamilton County General Health District (HCGHD), and was represented by Kathleen H. Bailey, Assistant Prosecuting Attorney.

This cause came on due to Appellant's October 31, 1996, filing of an appeal with this Board from an allegation that he had been forced to resign from his position of Director of Preventive Health with Appellee. Additionally, on November 14, 1996, Appellant filed an appeal from a no order removal from that same position. From the record, it appears that Appellant, for whatever reason, resigned from his position with Appellee on October 28, 1996. It further appears that on that same date, Appellant authored a letter withdrawing that resignation. Subsequently, in a single letter dated November 1, 1996, Health Commissioner Timothy Ingram appears to have both accepted Appellant's withdrawal of his resignation and removed Appellant pursuant to R.C. 124.11(A)(28), effective October 30, 1996. Since Appellee has asserted that Appellant's position fell within the unclassified service pursuant to R.C. 124.11(A)(28), Appellee did not agree to the jurisdiction of this Board ultimately over this matter.

STATEMENT OF THE CASE

At hearing, Appellee called two witnesses: Martin Allex, the Administrative Assistant to the Health Commissioner for the HCGHD; and Timothy Ingram, Health Commissioner for the HCGHD. Appellant offered testimony on his own behalf in direct examination in his case-in-chief and offered no additional witnesses. Appellee chose not to cross-examine Appellant following that narrative.

Appellee's first witness was Martin Allex, who indicated that he has served with the Hamilton County Board of Health for more than eight years as an Administrative Assistant. Mr. Allex indicated that he performs most of the functions of administrative support including managing and defending the General Health District's budget, maintaining all revenue and expenditure ledgers and reconciling those ledgers with the County Auditor's reports, purchasing, payroll, and at times pertinent to this appeal, performing most personnel functions. Mr. Allex indicated that the divisions of the HCGHD submit budgets to him which he lays out on a spreadsheet for nine sub-funds and for the health district as a whole and then submits, as a package, to the Health Commissioner.

Mr. Allex indicated that during times when Appellant was Director of the Division of Preventive Health for the health district, the division directors prepared their budgets for all items and submitted changes in personnel as well. Mr. Allex further indicated that he then prepared personnel spreadsheets, loaded the positions in, and figured out benefits thereon. He noted that division directors cannot make purchases on their own and that division directors and all other employees submit requests to the Health Commissioner. With the Health Commissioner's signature, then Mr. Allex will process requests for purchases. Mr. Allex reiterated that division directors maintained and watched over their own budgets.

Mr. Allex averred that Appellant was hired as the Director of Preventive Health and that the pay range for that position began at $40,180.00 and ended at $60,276.00. He also indicated that Terry Hull, who is the Division Director of Water Quality and Waste Management, was hired two years before Appellant and was receiving $56,243.00 at the time of Appellant's removal.

Mr. Allex elaborated that Appellant's salary was the third highest salary for the health district and that only Division Director Hull, who had more service than Appellant, and the Health Commissioner received higher salaries than did Appellant during Appellant's service with the HCGHD. Mr. Allex also stated that Appellant's mid-point in his pay range was $52,000.00 and that, at the time of Appellant's hire, only two individuals with the health district, Appellant and Mr. Hull, had been hired in at above the mid-point in the employee's pay range.

Mr. Allex identified Appellee's Exhibit 4 as a June 10, 1996, letter from Health Commissioner Ingram to James Lowry, Director of the Hamilton County Personnel Department, concerning a notification to the personnel department that the position of Director of Preventive Health, at that time vacant, had been authorized to be unclassified pursuant to R.C. 124.11(A)(28) and to Hamilton County Personnel Department Administrative Regulation Section 5-04. The letter further indicates that the position, through the nature of the specific job requirements, will be authorized to act for and in place of the Health Commissioner when the Commissioner is on vacation or out of State. Mr. Allex further indicated that he performed the research concerning the background for this letter and gave that material to Health Commissioner Ingram.

Mr. Allex further averred that Mary Sacco, the Director of Nursing (a position within the Preventive Health Division), had interviewed for the vacant position of Director of Preventive Health prior to Appellant's hire. Mr. Allex averred that Ms. Sacco indicated to him that she would be voluntarily removing herself from consideration for the Director of Preventive Health position, because she had been apprised in an interview for that position that the position would be unclassified.

Mr. Allex confirmed that he observed Appellant's general comings and goings and that it appeared Appellant came and went as he pleased. Mr. Allex indicated that Appellant usually arrived sometime after 8:30 a.m., whereas most employees usually arrived at 8:00 a.m. Mr. Allex further opined that Appellant would be in the office for a half an hour or one hour and be gone, or sometimes would be in the office all day. Mr. Allex further confirmed that Appellant's schedule and movements were not as restricted as the other directors of the health district, with the exception of Mr. Hull. Mr. Allex indicated that the usual schedule for most health district employees was 7:30 a.m. through 4:30 p.m. or 8:00 a.m. through 5:00 p.m. Mr. Allex stated that Division Director Hull had more evenings where meetings with the

community occurred and, accordingly, came into the office at 9:00 a.m. or after. He confirmed that Mr. Hull and Appellant had more latitude than other division directors or other health district employees to come and go as they pleased. He stated that all employees but those who were Federal Labor Standards Act overtime exempt filled out time sheets. He further elucidated that there had been times when the Health Commissioner had gone to Mr. Allex seeking Appellant's whereabouts because the Health Commissioner did not know where Appellant was, even after checking.

Mr. Allex also referred to a time when the pertinent union had put the agency on notice of a pending strike and the Health Commissioner had, as a result, canceled all leave. Mr. Allex recalled a conversation between himself and Appellant occurring at about the same time as this directive, where Appellant and Mr. Allex were discussing salaries and where Appellant asked Mr. Allex which of the general health district positions were overtime exempt and which fell in the classified service. Mr. Allex indicated that he reiterated to Appellant that the general health district had two unclassified positions at that time, Appellant's and Division Director Hull's. Appellant did not argue or seem surprised by that information, according to Mr. Allex.

On cross-examination, Mr. Allex indicated that his position falls within the classified service and indicated that Appellant's predecessor, Monica Alles-White, also held a position within the classified service. Mr. Allex further indicated that there was a change in probationary periods for all general health district positions included apparently Appellant's, as far as Mr. Allex knew, and that information had been sent to the Hamilton County Personnel Department.

Mr. Allex was also aware that during the tenure of Appellant, the position of Coordinator of Injury Surveillance Systems was filled and that that position, too, had been made unclassified. Mr. Allex indicated that he was not informed as to why that position was so designated.

He further indicated that the incumbent in that position reported to Appellant, during Appellant's tenure with the agency. Mr. Allex confirmed that, at the time of Appellant's removal, only three staff within the agency served within the unclassified service: Mr. Hull, Appellant, and the Coordinator of Injury Surveillance.

Mr. Allex indicated that the health district had five divisions, each headed by a division director. He declared that some of those directors were in the classified service and some were in the unclassified service. He further noted that the two directors in the unclassified service, Mr. Hull and Appellant, had positions falling within pay range 9. He noted that the other division directors, whose positions fell within the classified service, were within pay range 8.

Mr. Allex indicated that all division directors had the same purchasing and budget authority as far as submitting budget information, breakdown, or purchasing requests to Mr. Allex. He reiterated that no employee, except for Appellant and Mr. Hull, had been brought on higher than the mid-point at the time of Appellant's hire and that Lea Carrier was brought in after Appellant's date of hire. He could not confirm that her hire was at a point higher in the pay range than the mid-point. He further indicated that the position which Ms. Carrier came to fill, Public Health Nurse, was one for which Mr. Allex could not recall Ms. Carrier negotiating a salary. He further recalled that he and Appellant had discussed the pay range for the Public Health Nurse position and that the position may have been in the bargaining unit.

Mr. Allex was again directed to Appellee's Exhibit 4, the letter from the Health Commissioner to County Personnel Director James Lowry regarding exempting the Director of Preventive Health position from the classified service. Mr. Allex indicated that he did not believe Appellant was on board on July 10, 1996, or that Appellant had been offered the position before that. He further indicated that it was the Health Commissioner's call as to whom to copy on this letter.

Mr. Allex confirmed that he usually goes home at 4:00 p.m. and that there are times that he had seen Appellant at the office all day; he could not dispute that Appellant could have left at midnight on the days that he was in the office. Mr. Allex further indicated that he was aware that Appellant attended a lot of meetings at agencies and that might explain Appellant's comings and goings. Mr. Allex confirmed that the following positions did not submit time sheets: all directors; all Public Health Sanitarian 3s; public relations personnel; and the Coordinator of Injury Surveillance. He further noted that if any of those individuals came and went as they pleased, then it would be noticed by Mr. Allex and by most of the people on the floor.

On redirect, Mr. Allex confirmed that the previous Director of Preventive Health's position fell within the classified service but that that was prior to June 10, 1996 (when the Hamilton County Board of Health designated the position as unclassified at its evening meeting and authorized the position pursuant to R.C. 124.11(A)(28) to act for and in place of the Commissioner during times when the Commissioner was on vacation or out of State) (see Appellee's Exhibit 3). He noted that Terry Hull had been, at times, denominated as the Assistant Health Commissioner. He further indicated that after Appellant was hired, the position of Coordinator of Injury Surveillance was filled on July 22, 1996, at grade 8 with the salary in the mid-thirty thousands. He also indicated that when Ms. Carrier was hired, she was brought on at grade 7 at below the mid-point of that pay range.

Finally, Mr. Allex confirmed that he was in the car with Commissioner Ingram on the drive up to this Board for the instant record hearing. He also indicated that, for the majority of the drive, Mr. Ingram was reading the documents in his brief and that Mr. Ingram made a few general comments; but there was no comment or conversation regarding the testimony that Mr. Allex was to give at hearing.

Next to testify was Timothy Ingram, who indicated that he has been the HCGHD Commissioner since August 23, 1993. Mr. Ingram indicated that, in that capacity, he runs the day-to-day operations of the general health district, carries out rules and regulations of the Board of Health, and serves as the Chief Executive Officer and general secretary to the Board of Health. Mr. Ingram further indicated that the general health district is enabled, pursuant to R.C. Titles 37 and 39, and that the HCGHD comprises townships, villages, and contracting cities who do not have their own health districts.

Mr. Ingram identified Appellee's Exhibit 1 as a table of organization for the HCGHD and noted that the Director of Preventive Health position reports to Mr. Ingram. He also noted that the table of organization has on it a position for the Medical Director. Mr. Ingram indicated that that position is for a contract medical doctor serving in a consultation role particularly for contagious disease outbreaks and that that position reports to the Commissioner.

Mr. Ingram next identified Appellee's Exhibit 2 as a Hamilton County classification specification for the position of Director-Preventive Health, 51451. Commissioner Ingram noted that the Director of Preventive Health supervises four

programs: vital statistics; nursing; pediatric dental; and injury surveillance. He noted that the Director of Preventive Health supervises employees within those programs, sets work schedules, formulates and initially controls the budget, conducts performance evaluations, and serves for the Commissioner on various committees on which the Commissioner sits.

Commissioner Ingram next identified Appellee's Exhibit 3 as the minutes of the Board of Health for the June 10, 1996, evening meeting. Mr. Ingram reiterated that the Board of Health changed the Director of Preventive Health position status from classified to unclassified in this action on that evening. He also noted that the position of Director of Water Quality and Waste Management, currently encumbered by Terry Hull, also fell within the unclassified service. Mr. Ingram was next directed to Appellee's Exhibit 4, his letter to Mr. Lowry indicating that the status of the vacant Director of Preventive Health position had changed to unclassified pursuant to R.C. 124.11(A)(28) and to Hamilton County Personnel Department Administrative Regulation Section 5-04.

Mr. Ingram explained that in March, 1996, at a Board of Health retreat, a strategic plan had been considered. He averred that under certain scenarios, the general health district would now be handling a greater volume of confidential and sensitive material. If the Commissioner were unavailable, he stated, then the two director positions designated as unclassified would be handling the bulk of this material. Mr. Ingram considered the responsibilities of the two directors handling this confidential and sensitive material to be of a fiduciary nature.

He noted that some of this confidential and sensitive information had not previously been processed by the Board of Health, including specific information pertinent to the Injury Surveillance Program. He explained this material included information from in-patient records which was entered and would provide data concerning spatially located trends. He further stated that hospitals had signed confidentiality agreements with the Board of Health which had to be observed when handling this information. He further stated that Appellant's predecessor never handled this information and she was no longer an incumbent in the position when this information was made available to the Board of Health.

Mr. Ingram also indicated that at the March, 1996, retreat, discussions were held concerning the fate of the pediatric dental clinics. It was decided that, in

today's atmosphere of managed care, it was necessary to bring the dental clinics up to satisfactory standards and offer certain services. Accordingly, Mr. Ingram noted that a high technical-quality individual was needed to carry out this function. He further stated that this decision was made at the March, 1996, retreat prior to even posting or advertising the position of Director of Public Health. Mr. Ingram testified that six persons interviewed for that position, none of the interviewees was a Board of Health employee, and one of the interviewees, Mary Sacco, was a general health district employee.

Mr. Ingram indicated that Ms. Sacco voluntarily withdrew her name from consideration. He noted that she was astounded when she heard that the position fell within the unclassified service and indicated that she would have to check with her husband, who is a Hamilton County Deputy Sheriff, concerning the best way to proceed on that information. Mr. Ingram indicated that he told all applicants, including Appellant, at the time of the first interview, that the position would be shortly placed in the unclassified service.

Mr. Ingram identified Appellee's Exhibit 5 as a page, the original of which has been submitted into the record, from his June, 1996, daily record of events for the day of Monday, June 10, 1996. Mr. Ingram indicated that he generally notes important personnel or other telephone conversations and staff questions of him in the log, as well as some other personal items. He further stated that, if at all possible, he makes the notations at the time he is talking to the individual or shortly thereafter and always on the same day.

The pertinent notation in Appellee's Exhibit 5 indicates:

> Mike Easley-Interview-2nd
> $52,000-exempt-unclassified-
> 360 day probationary period; look @ salary adj. in Dec.

Mr. Ingram indicated that the log references items, specifically salary, that he and Appellant negotiated and that they were still working out at that time a possible performance and salary review in December, 1996. He further indicated that he apprised Mr. Easley on June 10, 1996, that the position was exempt and was to become unclassified that evening through Board of Health action. He noted that Mr. Easley's response was, in essence: "Been there, done this, done that." It was not

going to be a problem if Mr. Ingram and Appellant did not get along because Mr. Easley would just quit, according to Mr. Ingram.

Mr. Ingram also identified Appellee's Exhibit 6 as the Tuesday, June 11, 1996, page from that same daily record of events book. The entry reads either 9:00 or 9:30 a.m.:

> 9:00 am car phone-telephone
> - offerred [sic] Easley the job
> - reiterated conditions
> - exempt, unclassified, salary of $52,000

Mr. Ingram indicated that he had utilized his car telephone in a conversation on June 11, 1996, with Mr. Easley on Mr. Ingram's way to Port Columbus International Airport to fly to a national convention in Seattle. Mr. Ingram noted that he had this conversation with Mr. Easley after Mr. Ingram had had an opportunity to talk to Ron Murray, Appellant's former employer, who had apparently convinced Mr. Ingram that there was nothing in Appellant's employment history from that employer to remove Appellant from consideration for the Director of Preventive Health position. Mr. Ingram indicated that the Board of Health had approved the change in status and authorization to hire the previous evening (*i.e.*, June 10, 1996, p.m.) and that Mr. Ingram knew that he reiterated to Mr. Easley that the position was exempt and unclassified and knew that Appellant was aware of this at that time.

Mr. Ingram averred that he was aware that he and Appellant had specifically negotiated Appellant's salary to be approximately $12,000.00 higher than the mid-point in Appellant's pay range and recalled that the pay range for the position began at $40,180.00. He further recalled that, at the time of Appellant's hire, Mr. Hull was making approximately $56,200.00. Mr. Ingram testified that, as of the Board of Health action on June 10, 1996, the positions encumbered by Mr. Hull and Appellant, respectively (*i.e.*, Director of Water Quality and Waste Management and the Director of Preventive Health), were the only two positions authorized to act for and in place of the Commissioner.

Mr. Ingram appeared to recall the salary negotiations that he held with Appellant and remembered Appellant beginning the negotiations asking for a salary in the $80,000's range, as certain employees with the Cincinnati Health Department made. Mr. Ingram remembered that he countered with $50,000.00, that Appellant thereafter countered with $55,00.00, and that they settled on the approximately $52,000.00 figure. Mr. Ingram also noted that only HCGHD unclassified employees have the capability to negotiate their salaries.

He further noted that only Commissioner Ingram, Appellant, and Ms. Carrier had access to identifiers concerning the confidential information received from hospitals pertinent to the confidentiality agreements and that even those were ultimately scrambled, once the health district had entered the data. He reiterated that Ms. Carrier was considered to be unclassified by Mr. Ingram and by Appellant and reported to Appellant. He also noted that Ms. Carrier handled highly confidential information and that, if she broke trust, the general health district required the capability to let her go immediately or break the trust with the hospitals signing onto the agreement. He further noted that Ms. Carrier started out at $37,000.00 or $37,500.00, but even she started below the mid-point. He additionally noted that approximately ninety percent of all general health district employees do start at the minimum in their pay range. He averred that the Public Affairs Specialist positions requiring certain qualifications do start several thousand dollars over the minimum, but they have no authority to negotiate concerning that salary.

Mr. Ingram exposited that Appellant's predecessor as the Director of Preventive Health received $44,000.00 per year and noted that Appellant's higher salary was indicative of the changes in duties and programs, especially the new programs required to be administered by the position. Mr. Ingram specifically referenced Appellant's managerial background, particularly in the area of dentistry, referenced Appellant's service as a previous Ohio Health Commissioner and previous disease control experience, and referenced the highly confidential nature of the Director of Preventive Health position. Further, Mr. Ingram stated that the Board of Health was worried of a situation where Mr. Ingram might not be available and of all the committees on which Mr. Ingram served. In other words, Mr. Ingram indicated the Board of Health believed that he needed some top level assistance.

Mr. Ingram also indicated that the Director of Preventive Health has to be an honest person with a high degree of fidelity and integrity. He testified that he talked with Appellant about the reorganization of the district and about alteration of employee work hours and assignments, and utilized Appellant as a sounding board and advisor.

Mr. Ingram also indicated that Appellant attended meetings along with Mr. Ingram for the Child Fatality Review Team, comprising a variety of individuals from Children's Hospital and various county and city agencies including law enforcement and safety personnel. The team reviews all child fatalities within Hamilton County to determine what could be done to prevent fatalities such as these from occurring or reoccurring.

Mr. Ingram indicated that, in order to serve on the team, each participant was required to sign a confidentiality agreement and, as a result, could review all pertinent files except those concerning open criminal investigations. Mr. Ingram indicated that Appellant attended all but one of these meetings and that Commissioner Ingram and Appellant were the only general health district employees on the Child Fatality Review Team.

Mr. Ingram indicated that Appellant had under the Division of Preventive Health: the Division of Nursing; the Division Vital Statistics; the Injury Surveillance Coordinator Unit; the Pediatric Dental Program Unit; and the Clerical Unit. Mr. Ingram indicated that the Division of Nursing encompassed six to eight nurses and that Appellant directly supervised Mary Sacco, the Director of that division. Mr. Ingram further indicated that Appellant directly supervised the Registrar of Vital Statistics who, in turn, supervised the Deputy Registrar. Mr. Ingram noted that Appellant directly supervised the Injury Surveillance Coordinator and supervised the contract dentists with the Pediatric Dental Program as well as a Dental Clerical Specialist, and, finally, directly supervised a Clerical Specialist. Mr. Ingram noted that, of the seven positions that Appellant supervised directly and of the fourteen to eighteen total positions within the Preventive Health Division, Appellant directed and solely assigned the work of those individuals and adjusted their work schedules as necessary.

Mr. Ingram identified Appellee's Exhibit 9 as an interoffice memorandum from Appellant to Mr. Ingram, dated October 15, 1996, regarding a proposal to change

a variety of staff from a thirty-five to a forty hour work week. Mr. Ingram noted that Appellant conducted performance evaluations concerning these positions.

Mr. Ingram identified Appellee's Exhibit 10 as an interoffice memorandum from Appellant to Mr. Ingram, dated July 18, 1996, concerning granting leave without pay requests for Susan Bolton, a then-recently hired employee. Mr. Ingram indicated that Appellant granted Ms. Bolton leave without pay without Mr. Ingram's knowledge, but not in excess of Appellant's authority.

Mr. Ingram stated that for 1996 the Preventive Health Division had an annual budget of $750,000. He noted that it was the responsibility of the division director to ensure that the activities did not overshoot the budget and that expenditures were not to obtain fruitless gimmicks or gadgets. He stated that within Board of Health established guidelines, the division directors were completely free to prepare budget revisions. He further noted that he, as Health Commissioner, merely rubber stamped purchase orders after the fact and checked to make sure that there was sufficient money in the accounts to pay for these. He opined that, for a vast majority of the division directors' requests, he would merely rubber stamp them without even conducting this review. He indicated that, as such, in this area particularly, Appellant had a high degree of discretion.

In reference to Appellant's lack of set work hours, Mr. Ingram indicated that Appellant understood his duties and understood the plight that the general health district had faced in 1992 through 1993. Indeed, Mr. Ingram noted that Appellant, himself, had conducted the HCGHD audit under the "peer procedure" established by the Ohio Department of Health. Thus, Mr. Ingram indicated, Appellant could set his own hours, attend any meetings he wanted, and that Mr. Ingram merely wanted to know of and approve any out of State travel for Appellant.

Mr. Ingram indicated that he was aware that, in addition to Appellant's duties at the general health district, Appellant also ran an ongoing international health consultation business, sat as an active member of the Fluoridation Committee for the American Dental Association, and was frequently called on to testify as an expert on fluoridation in front of State legislatures.

Mr. Ingram exposited that Appellant made a variety of policy and program changes during Appellant's tenure at the general health district. Mr. Ingram

identified Appellee's Exhibit 11 as an interoffice memorandum from Appellant to all employees of the Preventive Health Division, dated August 21, 1996, regarding requests for leave. Attached to the memorandum is a new request for leave form which Appellant required to be completed by all Division of Preventive Health employees prior to approving leave. Additionally, it established therein that no employee's leave could be approved without that employee ensuring that the individual's position and duties were covered during that employee's pertinent shift. Mr. Ingram noted that Appellant instituted this change without either prior approval or any consultation at all. Mr. Ingram considered this addendum to establish a policy within Appellant's division.

Mr. Ingram identified Appellee's Exhibit 12 as an interoffice memorandum from Appellant to Rebekah Harlow, Vital Statistics Registrar and Mary Ann Robertson, Vital Statistics Deputy Registrar, dated August 28, 1996, regarding abolishing casual days on Friday. Mr. Ingram indicated that he was aware that Appellant was thinking about abolishing casual days for these two individuals but had not been aware, prior to the fact, that Appellant had done so and did not provide Appellant with any prior approval to do so. Mr. Ingram indicated that he did not necessarily have a problem with the policy change and indicated that it was, in fact, Appellant's division.

Mr. Ingram identified Appellee's Exhibit 14 as an interoffice memorandum from Appellant to Mr. Ingram, dated July 5, 1996, regarding appointing an acting director for the week of July 8 through 15, 1996. The memorandum reads:

> As you are aware, I will be on vacation in Alaska from Monday, July 8, 1996, through Monday, July 15, 1996 (I will return to the office on Tuesday, July 16, 1996).
>
> During my absence, Ms. Mary Sacco will serve as Acting Director of Preventive Health.
>
> cc: Ms. Mary Sacco

Mr. Ingram stated that Appellant was provided with the management of his own schedule. Mr. Ingram indicated that he apprised Appellant that Appellant was to build the best Preventive Health Division in Ohio. Mr. Ingram further indicated

that Appellant was aware of the desired change in direction of the general health district away from providing health services and more toward providing information particularly concerning disease trends, to empower the people in the community to make changes themselves. Mr. Ingram indicated that Appellant could come and go as he pleased and that only Mr. Hull had shared that degree of latitude. Mr. Ingram further confirmed that many times he did not know where Appellant was. Mr. Ingram also confirmed that all classified employees were expected to work forty hours on set schedules of either generally 7:30 a.m. to 4:30 p.m. or 8:00 a.m. to 5:00 p.m.

Mr. Ingram identified Appellee's Exhibit 15 as an interoffice memorandum from Appellant to Mr. Ingram, dated September 18, 1996, concerning "Heads Up." The text of this memorandum reads:

> I spent about 45 minutes on the phone early this morning (before coming into work) with legal representatives of the British Dental Association, the British Fluoridation Society, and the University of Liverpool School of Dental Medicine. It looks like it is highly likely that I will be called as an expert scientific witness in a court case in London either late this year or early next year. I am going to attempt to work with them long distance by feeding them lots of information that they can use with local witnesses in order to diminish the possibility that I have to appeal in person. *Unfortunately, there are not many people in the world who do what I do, so I may not be able to avoid the call.* (Emphasis added)

Mr. Ingram indicated that in this situation, Appellant might be called to London as a fluoridation expert and that Appellant was away from the office for his outside employment, for consultations, and for vacations. Mr. Ingram indicated that he understood, when he and Appellant were negotiating for Appellant's hire, that some of these activities would probably have to take place during normal work hours and that that would not be a problem. Mr. Ingram indicated that such activities would be prohibited to a classified employee.

Mr. Ingram identified Appellee's Exhibit 16 as an interoffice memorandum form Appellant to Mr. Ingram, dated September 26, 1996, regarding "Commitments/Scheduled Event During October." Mr. Ingram indicated that all of the activities indicated within this memorandum and arrangements made were without Mr. Ingram's knowledge or approval and that the memorandum was a courtesy to Mr. Ingram.

Mr. Ingram also indicated for background that bargaining unit negotiations occurring at this time were very confidential in nature and the only management privy to these negotiations was Mr. Hull, Appellant, and Mr. Ingram. Mr. Ingram indicated that he consulted with Appellant concerning the bargaining unit negotiations and then Appellant proposed ideas. Mr. Ingram also indicated that as the strike deadline approached, he began to ask Appellant and Mr. Hull more for their schedules; since approximately three-quarters of the health district's staff would be out on strike, if one occurred, and since media and public attention had picked up concerning these negotiations.

Mr. Ingram opined that Appellant was very good at applying for grants and that Appellant must be able to and was able to write very well and, perhaps, equally importantly, had contacts to smooth the road and say what was coming concerning the grant application process. In that regard, Mr. Ingram identified Appellee's Exhibit 17 as a confidential interoffice memorandum from Appellant to Mr. Ingram, dated July 5, 1996, regarding a dental grant from the Ohio Department of Health. The memorandum contains a background and analysis of the grant application process and a detailed recommendation concerning that process. Mr. Ingram opined that this was another example of Appellant's job requirements and activities constituting those above ordinary technical competency requirements for a position.

Mr. Ingram identified Appellee's Exhibit 18 as a memorandum from Appellant to Mr. Ingram, dated August 20, 1996, regarding Family and Children First Council, Executive Committee Meeting of August 15, 1996. The memorandum indicates at paragraph one: "This summarizes some of topics of discussion and actions of the Executive Committee at their recent meeting (in which I represented you)." Mr. Ingram confirmed that Appellant represented him at the meeting.

Mr. Ingram identified Appellee's Exhibit 19 as the résumé of Appellant, Appellee's Exhibit 20 as the "Summary of Accomplishments" of Appellant, and

Appellee's Exhibit 21 as the Curriculum Vitae of Michael W. Easley. At the beginning of Appellee's Exhibit 20, it is noted that Appellant received a Doctor of Dental Science degree in 1974 from the Ohio State University College of Dentistry and a Masters in Public Health in 1979 from the University of Michigan School of Public Health.

Mr. Ingram stated that he had seen some of these documents at the first interviews and some later. He also indicated that he had asked for a writing sample from each of the applicants for the Director of Preventive Health position at the first interview; it was on that basis that he determined who would make the first cut out of those six applicants.

On cross-examination, Mr. Ingram was again directed to Appellee's Exhibit 1 and indicated that the table of organization did not indicate which of the division directors was unclassified or classified and that the Division of Preventive Health did not supervise the Medical Director. In reference to Appellee's Exhibit 2, Mr. Ingram was questioned as to why the classification specification had not been revised from its September 6, 1994, date of adoption, if the duties of the Director of Preventive Health had changed so substantially with: the advent of new programs and confidentiality; the change in R.C. 124.11(A); and the pertinent Board of Health minutes and official status change of the Director of Preventive Health's position. Mr. Ingram responded that he believed that Rank 2 of the specification substantially covered the new activities that had been referenced previously during testimony, particularly considering his opinion that accidents and injuries are a form of disease. He also reiterated that the Board of Health had desired to have a second individual to serve in the Commissioner's absence and that the Injury Surveillance Program was only a concept in 1994, when the classification specification was adopted. He further noted that an updated "position description" had not been written subsequent to the Board of Health's June, 1996, actions.

Mr. Ingram agreed that other division directors did manage their budgets but indicated that Ms. Carrier did not manage her budget for her unit. Mr. Ingram agreed that all supervisors at the general health district conduct performance evaluations, but he continued to insist that the supervisors themselves and not the Health Commissioner sign off on the performance evaluations.

Mr. Ingram was directed to Appellee's Exhibit 3, the minutes from the June 10, 1996, Board of Health meeting. Mr. Ingram agreed that the minutes had not been provided to Appellant prior to Appellant's accepting the position, since the meeting had occurred only the evening before Appellant had accepted the position. Mr. Ingram was directed to Appellee's Exhibit 4, the letter from him to James Lowry regarding designating the vacant Director of Preventive Health position as unclassified pursuant to R.C. 124.11(A)(28). Mr. Ingram agreed that Appellant did not get this letter but indicated it did not matter if Appellant had gotten it, because, Mr. Ingram commented, Appellant was not on board at the time the letter was authored and had not been offered the position at the time the letter was authored.

Mr. Ingram reiterated that at the June 10, 1996, Board of Health meeting (where the status of the position was changed from classified to unclassified), the Board of Health considered the confidential and sensitive material that the position would be handling and the responsibility of the new hire to ensure that important programs impacting on the future of the general health district were meeting expectations, including directing the employees in their best efforts to do so. He also confirmed that certain hospitals had desired not to provide any identification on their records presented to the general health district, that Ms. Carrier actually entered this data, and that Appellant would have access to this data if she failed to do so.

Mr. Ingram was also questioned concerning changes in the pediatric dental clinics. Mr. Ingram indicated that Appellant's predecessor did oversee the administrative aspects of the program but indicated that, based upon the managed care trend, someone was needed in the position with Appellant's capabilities to ultimately determine whether the program should be continued and altered to meet those managed care needs, or conversely, whether it should be terminated. Mr. Ingram also indicated that Appellant and a Dr. Hill had volunteered to evaluate the program several years previously.

Mr. Ingram agreed that Appellant had never been provided with a specific opportunity to act for the Health Commissioner at a time when the Health Commissioner was out of State or on vacation, since, at the one time when that action was necessary during Appellant's tenure, Appellant was on unpaid leave for two weeks in Alaska. Mr. Ingram did note that the position was still authorized to and could have so acted for and in place of the Health Commissioner under the

appropriate scenario. Mr. Ingram indicated that the position of Deputy Health Commissioner did not exist on the table of organization and that the general health district had a very flat hierarchy, with the Director of Preventive Health and the Director of Water Quality and Waste Management reporting to the Health Commissioner.

There was additional discussion regarding Mr. Ingram's claim that he had apprised Appellant several times of the unclassified status of the Director of Preventive Health position prior to Appellant's hire. Mr. Ingram did not agree with Appellant's assertion that Mr. Ingram offered Appellant the position on June 10, 1996. Mr. Ingram reiterated that he and Appellant conditionally worked out the final details of the position, subject to a change in status and approval by the Board of Health, on the evening of July 10, 1996.

Mr. Ingram conceded that a probationary period had been attached to Appellant's position and indicated that he was not aware that a probationary period might be at odds with the unclassified status of a position. He indicated that both hourly and salaried employees of the general health district had probationary periods but indicated that "quite frankly" a probationary period for unclassified employees was unnecessary since they serve at will.

There was also further discussion on cross regarding the confidential nature of information provided to the general health district. Mr. Ingram again referenced the Injury Surveillance Program and the information received in regard to that program and indicated that the Health Commissioner, Appellant, and Ms. Carrier are all unclassified employees and, in Mr. Ingram's opinion, were the only employees who had access to that information. Mr. Ingram also indicated that the Vital Statistics Unit had access to confidential information at the bottom portion of birth certificates, which portion is confidential and not subject to public records requests. Mr. Ingram did confirm that both the Vital Statistics Registrar and the Vital Statistics Deputy Registrar are classified employees who fell under Appellant's supervision.

Directing Mr. Ingram to Appellee's Exhibit 9, the October 15, 1996, memorandum regarding staff working hours, Appellant questioned whether he was not merely asking for permission to proceed in the memorandum. Mr. Ingram responded that there was no question posed in the memorandum and Appellant

never asked Mr. Ingram for permission to proceed and that that was "fine," since this was authority granted to Appellant. Mr. Ingram indicated that one problem here was that several employees in the bargaining unit were to be designated to be switched from thirty-five hour to forty hour weeks and that the general health district had just completed negotiations for a new collective bargaining agreement without a strike. Mr. Ingram indicated that he also understood that it was not a "done deal" in regard to public health nurses, since both parties were bound by the new collective bargaining agreement in place regarding those positions. Mr. Ingram further indicated that he did not say that this change was implemented without his approval since, by law, only the Health Commissioner could sign the collective bargaining agreement.

Mr. Ingram was directed to Appellee's Exhibit 10, the July 18, 1996, memorandum regarding initial approval of a leave without pay request for Susan Bolton. Mr. Ingram indicated that Appellant had approved this leave request. He further indicated that, as a matter of course, Appellant recommended leave to him and Mr. Ingram rubber stamped it.

Mr. Ingram reiterated his position concerning Appellant's budget authority and stated that Appellant had considerable latitude concerning purchasing requests. He further stated that Appellant could have signed purchase requests in the Health Commissioner's place and initialed for approval. Mr. Ingram indicated that only the Health Commissioner can approve purchase requests in accordance with the rules of the Hamilton County Auditor.

Mr. Ingram was directed to Appellee's Exhibit 11, the August 21, 1996, memorandum regarding requests for leave and the attached new addendum to request for leave form (with the accompanying requirement to ensure that one's shift and duties were covered prior to leave being granted). Mr. Ingram indicated that he considered this a policy change and had no problem with Appellant using whatever tools he wanted to build the best preventive health division in the county and the State. Mr. Ingram referenced page two, particularly, as a change in policy where the employee was required to assume full responsibility for shift coverage. Mr. Ingram indicated that this was not a bad policy and that it showed that Appellant could do as he pleased.

Mr. Ingram was directed to Appellee's Exhibit 12, the memorandum regarding abolishing casual days for the Vital Statistics Unit. Mr. Ingram indicated that there were several meetings at which the directors had discussed the dress code and that it was the division directors' responsibility to enforce and follow the Board of Health policy regarding establishment and utilization of casual days.

Mr. Ingram was directed to Appellee's Exhibit 14, the memorandum whereby Appellant appoints Mary Sacco to serve as Acting Director of Preventive Health during Appellant's time in Alaska. Mr. Ingram indicated that he was not asked concerning this appointment and that Appellant did it on a Friday, so there would have been no opportunity to discuss the appointment with Appellant. Mr. Ingram indicated that Appellant did have the authority to do so and that it was a standard procedure to appoint a substitute for a division director when the division director was out. Mr. Ingram also indicated that the division directors who are classified seek Mr. Ingram's approval regarding appointments of substitutes. Mr. Ingram also stated that Mary Sacco had served as Acting Director of Preventive Health during the interim time between the term of Appellant's predecessor and Appellant and that Ms. Sacco was qualified to serve in that capacity.

Regarding schedules and travel, Mr. Ingram indicated that Appellant could come and go as he pleased. He further indicated that it was the County Auditor who required that travel be approved outside of the county, only for purposes of reimbursement. Mr. Ingram indicated that Appellant could go outside the county on his own or on county business but that Mr. Ingram had to sign Appellant's travel requests for out of county business, in order for Appellant to be reimbursed, in accordance with the Auditor's rule.

Mr. Ingram was directed to Appellee's Exhibit 15, the Heads Up memorandum regarding Appellant's possible need to testify as an expert witness in a court case in London, England. Mr. Ingram indicated that he did not know and it did not matter whether the memorandum was written on health district scheduled time, as long as Appellant was not compensated by the county for that time, and that it appeared that the call was not made on county time, according to Mr. Ingram.

Mr. Ingram was directed to Appellee's Exhibit 16, the September 26, 1996, memorandum regarding Appellant's October schedule. Mr. Ingram indicated that he did not believe there was anywhere in the memorandum which requested that

Mr. Ingram approve the schedules or the travel. Mr. Ingram noted that the strike notice had targeted the last week in September and the first or second Monday in October. Appellant questioned Mr. Ingram as to whether the memorandum, in fact, indicated that Mr. Ingram would need to tell Appellant as soon as possible if Mr. Ingram wanted to amend Appellant's October schedule. Mr. Ingram also indicated that he did not remember exactly but believed that Appellant was on county pay at an environmental health conference at about this time and was on county pay through the end of October, 1996.

Mr. Ingram was directed to Appellee's Exhibit 17, the confidential memorandum concerning the Ohio Department of Health dental grant. Mr. Ingram indicated that grant writing was reserved for a very select few, although he did indicate that Appellant's predecessor did grant writing. Mr. Ingram indicated that no one else was as good as Appellant at writing and at securing funds.

Mr. Ingram was directed to Appellee's Exhibit 18, the August 20, 1996, memorandum on the Family and Children First Council Executive Committee meeting. Mr. Ingram indicated that he was not able to go to that meeting and that Appellant was there to act on Mr. Ingram's behalf. Mr. Ingram indicated that he did not know if only the statutorily designated representatives to the council have voting authority, but did know that Appellant was there and later gave Mr. Ingram information on the business at hand.

Upon redirect, Mr. Ingram indicated that even he, as Health Commissioner, had to fill out and submit travel requests for reimbursement for any out of county travel. He reiterated that Appellant scheduled himself as Appellant wanted.

In regard to Appellee's Exhibit 11, Appellant's memorandum on leave requests and the new form for leave requests, Mr. Ingram indicated that policy and the coverage requirement did not apply to anyone outside of Appellant's division and that it was a policy change. In regard to Appellee's Exhibit 14, the memorandum regarding appointment of Mary Sacco as the Acting Director of Preventive Health, Mr. Ingram indicated that he did not object to Ms. Sacco serving in that capacity but that the decision was made by Appellant and, even if Appellant wanted to appoint someone else, that would have been Appellant's call. In regard to Appellee's Exhibit 16, Appellant's September 28, 1996, memorandum regarding his October schedule, Mr. Ingram stated that Appellant did not do one of these schedules in July.

for his August dates, or in August for his September dates. The only time Appellant submitted schedules for all of his outside events, Mr. Ingram averred, was at the time of the pending strike, due to the need to be aware of where key management employees were. Mr. Ingram then indicated that Appellant had attended similar outside non-work functions in other months during Appellant's tenure and that there was never any prior notice to Mr. Ingram except, perhaps, when Appellant apprised Mr. Ingram in the hallway in their passing, as a courtesy.

Appellant testified on his own behalf at record hearing. Appellant indicated that during his first interview for the Director of Preventive Health position, he was not told that the position would be in the unclassified service, neither was he told during the second interview, nor when he was offered and accepted the position. Appellant indicated that he was not told in any call from Mr. Ingram on June 11, 1996, that the position was unclassified. He further indicated that the mid-interview process letter did not state that the position was going to be unclassified, nor did the classification specification, identified as Appellee's Exhibit 2. Appellant additionally indicated that the newspaper advertisement to which he responded did not indicate that the position would fall within the unclassified service. Appellant indicated that it was not until his conversation with Mr. Allex, several weeks after Appellant's hire, that Appellant learned that the position had been designated as unclassified.

Appellant indicated that only Mr. Ingram could sign off on purchase requests and budget reimbursements. Appellant indicated that he could not hire but only recommend and that he could not set salaries but only recommend. He further indicated that he could not sign travel authorizations but only recommend and could only recommend concerning leave requests.

Appellant indicated that he did not have free reign to travel at will. He further indicated that the memorandum that he sent Mr. Ingram regarding his October schedule (Appellee's Exhibit 16) was not the only memorandum that he sent to Mr. Ingram and that he provided Mr. Ingram with information on trips taken from day one. Appellant referenced his memorandum regarding two weeks of leave in Alaska and his appointment of Mary Sacco as his replacement during that time, as one example (Appellee's Exhibit 14).

Appellant indicated that his position was directed by Mr. Ingram and that he had no authority or privilege different than any other division director. Appellant

indicated that his pay may have been a little different but that that may have been due to the fact that he negotiated better than other employees.

FINDINGS OF FACT

Based upon the testimony presented and evidence admitted at hearing, I make the following Findings:

I find that the Hamilton County General Health District is a general health district formed under the laws of the State of Ohio (R.C. 3709.01, *et seq.*) and that its membership is composed of villages and townships within Hamilton County, as well as other contracting municipalities who do not have their own district boards of health. I find that for times pertinent to this appeal, Timothy I. Ingram served, and continues to serve, as the Health Commissioner for the HCGHD. In that capacity, Mr. Ingram serves as the Chief Executive Officer and General Secretary for the Board of Health and is responsible for carrying out the day-to-day operations of the general health district.

I further find that, on March 5, 1996 (effective date), House Bill 194 was enacted into law which, *inter alia*, designated general health districts to fall within the parameters of the unclassified service set forth in R.C. 124.11(A)(28).

I find that on June 10, 1996, Appellant and Mr. Ingram had a conversation in which they conditionally agreed to the terms of hire for Appellant to the position of Director of Preventive Health, subject to approval by the Board of Health and subject to the change in status of the position from the classified to the unclassified service.

I further find that, on the evening of June 10, 1996, the Hamilton County Board of Health designated the position of Director of Preventive Health to fall within the unclassified service pursuant to R.C. 124.11(A)(28) and to act for and in place of the Health Commissioner during times when the Health Commissioner was on vacation or out of State.

I additionally find that by letter dated June 10, 1996, Health Commissioner Ingram apprised the Director of the Hamilton County Personnel Department, James

Lowry, that the Commissioner wished to exempt the Director of Preventive Health position from the classified service pursuant to R.C. 124.11(A)(28) and to Hamilton County Personnel Department Administrative Regulation Section 5-04 (Appellee's Exhibit 4).

I find that on the morning of June 11, 1996, Mr. Ingram had a telephone conversation with Appellant wherein he formally offered Appellant the position of Director of Preventive Health and at which time Appellant accepted. I additionally find that in his initial and secondary interviews for the position of Director of Preventive Health, Appellant was apprised that the position's status would be changed to fall within the unclassified service and was further so apprised in his June 10, 1996, conversation with Mr. Ingram. I further find that Appellant was again apprised of the finalization of that status change in his June 11, 1996, conversation with Mr. Ingram.

I additionally find that only three individuals within the HCGHD, aside from the Health Commissioner, himself, had been designated as unclassified: the Director of Water Quality and Waste Management; the Director of Preventive Health; and the Coordinator of the Injury Surveillance Unit. I further find that, at the time of Appellant's hire, only he and the Director of Water Quality and Waste Management had been hired at salaries above the mid-point.

Aside from the Health Commissioner and Mr. Hull, Appellant was the highest paid employee at the HCGHD. It also appears that only HCGHD employees designated as unclassified are allowed to negotiate the terms of their salaries. Indeed, it appears that only Appellant and Director of Water Quality and Waste Management Terry Hull were able to do so and not even the Coordinator of the Injury Surveillance Unit was able to negotiate salary terms.

Finally, I find that the annual budget in 1996 for the Division of Preventive Health was in the neighborhood of $750,00.00 and that the division has between fourteen and eighteen positions within it, all of which were either directly or indirectly supervised by Appellant during his tenure.

I find that, as the Director of Preventive Health, Appellant oversaw: the Division of Nursing and directly or indirectly all of its employees; the Vital Statistics Program and directly or indirectly all of its employees; the Injury Surveillance

Program and directly or indirectly all of its employees; the Pediatric Dental Program and directly or indirectly all of its employees; and the additional administrative staff in the Division of Preventive Health.

I find that the Director of Preventive Health has access to and is responsible for a variety of confidential and sensitive information. That information includes: information, data, and other records obtained on in-patients from a variety of area hospitals; vital statistics information including that not public record on birth certificates; injury surveillance data; medical data concerning prevention and treatment of specific injuries, illnesses, or accidents; special data concerning accidents and disease; and data regarding the Child Fatality Review Team.

Appellant also had the authority to: conduct performance evaluations; effectively control work schedules; set and administer policies, including policies concerning leave requests and dress code; appoint an Acting Director of Preventive Health in Appellant's absence; effectively recommend purchases which were only periodically checked after the fact for funds availability; and set and control the budget of his division within broad parameters established by the Board of Health.

I also find that Appellant had significant latitude in setting his own schedules. This authority provided Appellant with great flexibility and autonomy in not only conducting his duties at work, but also in structuring his time so as to be able to engage in a variety of extra curricular activities ranging from serving as an international scientific expert and consultant to running his own international consultation agency.

I further find that Appellant holds a Doctor of Dental Surgery degree from the Ohio State University College of Dentistry and a Masters in Public Health from the University of Michigan School of Public Health.

I find that the Hamilton County Board of Health and the Hamilton County Health Commissioner wished to change the direction of several programs administered by the HCGHD. Programs impacted by that direction change included the Pediatric Dental Program, which the Board of Health and the Health Commissioner wished to raise to an acceptable quality standard in an environment of increased managed care scrutiny. Those programs and requirements also included a significant expansion of special injury and disease data; and an effort

away from offering care and toward offering useful and valuable information to the public to allow communities to make their own health care decisions and determinations. I find that the Board of Health, through its Health Commissioner, had charged Appellant specifically with carrying out these tasks and that Appellant was seen as the primary determinant for the success or failure of these tasks.

CONCLUSIONS OF LAW

This case presents this Board with the question of whether Appellant's position fell within the unclassified service pursuant to R.C. 124.11(A)(28), exempting the subject matter at issue herein from the jurisdiction of this Board? For the reasons set forth below, we must answer this question in the affirmative and, so, must grant Appellee's motion and dismiss these appeals for lack of jurisdiction over their subject matter.

R.C. 124.11(A)(28) was amended by the legislature, effective March 5, 1996, to include, *inter alia*, within the unclassified service:

> For cities, counties, civil service townships, city health districts, **general health districts**, and city school districts, the deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals or holding a fiduciary relation to their principals. (Emphasis added)

Prior to March 5, 1996, R.C. 124.11(A)(28) had not contained a provision including general health districts within its ambit. Previous to that time, the question of the classified or unclassified status of an employee of a general health district had been determined by R.C. 3709.13, which provided that all employees of the general health district, except for its Commissioner, fell within the classified service.

Based upon the nature and interaction of R.C. 3709.13 and R.C. 124.11(A)(28) as of March 5, 1996, it must be presumed that the unclassified provisions of R.C. 124.11(A)(28) prevail for either of several reasons. First, one may argue that, while R.C. 3709.13 deals with more general provisions of appointment regarding health commission positions, R.C. 124.11(A)(28) (although

dealing with a variety of unclassified positions) specifically deals with the unclassified positions within the general health district. Accordingly, pursuant to R.C. 1.51 (Ohio Rules of Construction), the special or local provision would appear to prevail.

Second, even if one were to assert that the provisions of 3709.13 were, in fact, the special or local provision and the provisions of R.C. 124.11(A)(28) were the general provision, it is imminently sensible to argue that the legislature, by specifically targeting general health districts among several other entities within this change to R.C. 124.11(A)(28), and knowing of the provisions contained at that time within R.C. 3709.13, clearly manifested its intent that the provisions of R.C. 124.11(A)(28) prevail. This is the only logical way to view this conflict, if one were to reasonably assume that the legislature was aware of the contents of all Revised Code provisions dealing, *inter alia*, with general health districts. Accordingly, for either of these two rationales, the pertinent unclassified provisions of R.C. 124.11(A)(28), which were enacted subsequent to the pertinent provisions of R.C. 3709.13, must prevail over those contained within R.C. 3709.13 in regard to general health district employees.

It would further appear that R.C. 3709. empowers the Health Commissioner to act as the Chief Executive Officer and Principal Executive Officer of the Board of Health, not only acting as the Secretary for the Board of Health, but also administering any day-to-day operations of the general health district. Accordingly, it is reasonable to consider the Health Commissioner to be the principal executive officer under the provisions of R.C. 124.11(A)(28).

I have also found, above, that the position of Director of Preventive Health was, as of June 10, 1996, designated both by the Board of Health and by the Health Commissioner as a position exempted from the classified service pursuant to R.C. 124.11(A)(28) and authorized to act for and in place of the Health Commissioner (see Findings of Fact, above, for the specific circumstances and parameters of that authority). Since Appellant was duly appointed to the position of Director of Preventive Health and since that position has been duly exempted from the classified service and has clearly been authorized to act for and in place of the principal executive officer, namely the Health Commissioner, it may not be necessary to proceed further with our inquiry. This is because any individual

occupying the position of Director of Preventive Health under those circumstances would likely, as a matter of law, encumber a position falling within the unclassified service.

Let us assume, however, for the sake of argument, that additional analysis may be necessary on this issue. Accordingly, let us now review both whether Appellant acted for and in place of his principal and/or whether he held a fiduciary relationship to that principal. Appellant attended meetings and represented the Health Commissioner at those meetings. Appellant utilized a wide latitude regarding his division's budget. Appellant effectively approved leave, had the authority to sign the Health Commissioner's name in his absence on purchase orders, signed purchase orders with only the Health Commissioner's cursory periodical review after the fact, and could act for and in place of the Health Commissioner regarding critical processing and dissemination decisions concerning a variety of confidential and sensitive data which pervaded the general health district, most of which data was under Appellant's direct or indirect control. It would appear, then, that not only was Appellant expressly authorized to act for and in place of his principal but Appellant did, in fact, utilize that authority.

Let us, next, turn our inquiry to the issue of whether Appellant held a fiduciary relation to the Health Commissioner. Cases involving the parameters of R.C. 124.11(A)(28) are generally cases of first impression. Yet, the term "fiduciary" has been defined many times over by the courts and, in summary, the term requires the employee to complete the assigned job duties with a high degree of trust, competence, reliance, integrity, and infidelity above and beyond the technical competence required to complete the job. *State, ex rel. Charlton v. Corrigan* (1998), 36 Ohio St.3d 68, 71. See, also, O.A.C. 124-1-02.

In the instant appeal, and in the absence of any case law to the contrary, the undersigned Administrative Law Judge has chosen to analogize the "fiduciary" provision of R.C. 124.11(A)(28) with the "fiduciary" analysis contained within case law pertinent to various versions of R.C. 124.11(A)(9). Based upon the testimony presented and evidence admitted, it appears that the duties that Appellant actually performed required Appellant to hold a fiduciary relation to the Health Commissioner, since Appellant's duties and responsibilities were clearly characterized by those requiring a high level of trust, confidence, integrity, reliability,

and expertise well above those that would ordinarily be required for a particular position of this nature.

Appellant's access to and administrative control over sensitive and confidential data, his wide latitude and degree of discretion in controlling his division and its employees and their funds, his nearly unfettered ability to create and maintain his own schedule and agenda, his representation of the Health Commissioner at various functions, and the Health Commissioner's reliance upon Appellant's discretion, counsel, and judgment, are all indicative of the fiduciary relation that Appellant held with the Health Commissioner, Timothy I. Ingram. Accordingly, it appears that Appellant's duties and responsibilities also meet the second test to determine whether his position falls within the unclassified service pursuant to R.C. 124.11(A)(28), namely that he held a fiduciary relation to his principal.

Thus, I have found, above, that Appellant not only was authorized to (and did) act for and in place of his principal, the Health Commissioner, but also held a fiduciary relation to his principal, the Health Commissioner. Satisfaction of either of these two tests would be sufficient to exempt Appellant's position from the classified service and from the jurisdiction of this Board. Appellant's job duties and position have satisfied both.

Appellee also argues that Appellant should be estopped from claiming the privileges and benefits of the classified service. Estoppel, a judicially created doctrine, was principally constructed to ensure that equity prevailed in determinations of whether a position fell within the classified or unclassified service. The general thread running through a variety of case law on the subject is that employees must "reap what they sow." In most recent cases, the doctrine has been used to estop an employee, who knowingly accepts an offer of employment for an expressly unclassified position and thereafter enjoys the benefits and privileges of the unclassified service, from later being allowed to claim that the position, in fact, fell within the classified service.

In the instant case, I have found that Appellant's position did fall within the unclassified service and it is not necessary to proceed further with this analysis. However, since the parties have spent a considerable amount of time presenting evidence on this issue, it seems only fair that the issue be considered within this Report and Recommendation.

Based upon the findings above, it appears that Appellant did know, prior to and as of his first day of hire, respectively, that the position of Director of Preventive Health would be falling and was, in fact, on June 10, 1996, designated to fall within the unclassified service pursuant to R.C. 124.11(A)(28). Further, as found above, the Board of Health and the Health Commissioner filed the requisite documents to ensure that designation was proper and appropriate.

Additionally, it appears that Appellant enjoyed a variety of benefits and privileges not enjoyed by the average employee of the general health district nor, indeed, by any other division director except, perhaps, Mr. Hull. Appellant was the third highest paid employee at the general health district, even including the Health Commissioner. Appellant was one of only two employees at the time of his hire appointed at a salary higher than mid-point within his pay range. Appellant was only one of two employees during his tenure who was allowed to thoroughly negotiate not only his salary but other terms of his employment. Appellant was the only employee, other than Mr. Hull, who was specifically designated with the authority to act for and in place of the Health Commissioner during the Commissioner's absence under certain circumstances.

Appellant had tremendous latitude in his own scheduling, coming in and out as he pleased, so long as he fulfilled his job duties. Appellant, further, was allowed to continue with the variety of extra curricular activities, both apparently paid and unpaid, which, by the very testimony of the Health Commissioner, would have been prohibited for a classified employee. All of these things, in conjunction with Appellant's knowledge from the inception of the unclassified nature and designation of the position, should estop Appellant from being able to claim that the position fell within the classified service, and I so find.

In summary, then, I have found that Appellant's position is exempted from the classified service pursuant to R.C. 124.11(A)(28) in that he was authorized to act for and in place of his principal, the Health Commissioner, and in that he held a fiduciary relation to his principal, the Health Commissioner. Further, I have found that Appellant should be estopped from claiming the benefits and privileges associated with the classified service; for he enjoyed many benefits and privileges of unclassified service that certainly would have been prohibited to him had his position fallen within the classified service.

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review grant Appellee's motion and **DISMISS** these appeals, inclusive of Appellant's removal from his position of Director of Preventive Health for the Hamilton County General Health District, for lack of jurisdiction over their subject matter pursuant to R.C. 124.03(A) and R.C. 124.11(A)(28).

James R. Sprague
Administrative Law Judge

JRS:jca