[Cite as *State ex rel. Barley v. Ohio Dept. of Job & Family Servs.*, 2011-Ohio-4205.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Chris Barley,	:	
Relator,	:	
v.	:	No. 10AP-186
Ohio Department of Job & Family Services and Douglas Lumpkin,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on August 23, 2011

Walter J. Gerhardstein, Jr., for relator.

Michael DeWine, Attorney General, *Nicole S. Moss*, and *Lisa G. Whittaker*, for respondent Ohio Department of Job & Family Services.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Chris Barley, has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Ohio Department of Job & Family Services ("ODJFS"), to reinstate him to his previous classified position.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a

decision which is appended to this decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. Relator has filed objections to the magistrate's decision.

{¶3} Relator sets forth six separate objections, as follows: (1) mandamus is appropriate to enforce fallback rights under R.C. 124.11(D); (2) res judicata is not applicable to the issue presented in this mandamus action; (3) the magistrate's decision that relator held an unclassified position in 1998 is contrary to the weight of the evidence; (4) the magistrate's finding that he was not "appointed" to the unclassified civil service conflicts with this court's previous decision; (5) the magistrate failed to rule on whether the statutory language in R.C. 124.11(D) and 124.09(C) requires the Director of Administrative Services to certify the previous classified position; and (6) the magistrate improperly denied his request to supplement the certified record.

{¶4} With regard to relator's first objection, we agree with relator that mandamus is appropriate to enforce fallback rights under R.C. 124.11(D), see *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, ¶18; however, we disagree that the magistrate ever indicated to the contrary. Therefore, this objection is without merit.

{¶5} We next address relator's fourth objection, as this objection relates to the threshold issue of whether he was ever "appointed" to an unclassified position from a classified position, so as to entitle him to fallback rights under R.C. 124.11(D). Although R.C. 124.11(D) did not provide for fallback rights until March 30, 1999, thereafter, R.C. 124.11(D) afforded the right to fallback to "a person who holds a certified position in the

classified service" who is "appointed pursuant to this division to a position in the unclassified service." R.C. 124.11(D).

{¶6} Relator contends that he held a classified position in 1998, and the position became unclassified in December 2004 when his work duties changed to include the handling of administrative appeals. The magistrate found that, even assuming the post-March 30, 1999 version of R.C. 124.11(D) applied, relator admitted in a March 13, 2008 letter to the ODJFS that he was never "appointed" to the unclassified service; therefore, his fallback rights were never triggered under R.C. 124.11(D).

{¶7} We agree with the magistrate that relator was never "appointed" to an unclassified position. Relator first contests the magistrate's reliance upon his March 13, 2008 letter, which relator characterizes in his objections as merely a former legal position he held strictly for purposes of the administrative appeal process. Although we cannot necessarily characterize relator's statement in this letter as a legally binding admission, it does cast relator's current contentions in the present action in a dubious light.

{¶8} Notwithstanding the March 13, 2008 letter, relator's present stance is still without support. We agree with ODJFS that the word "appointed" has legal significance. Although R.C. 124.11 does not define "appointed," Black's Law Dictionary defines "appoint" to include to designate, choose, select, assign, ordain, prescribe, constitute, or nominate. Black's Law Dictionary (6th Ed.Rev.1990). Here, ODJFS did not complete any act to assign a position; rather it merely assigned additional duties. R.C. 124.11 clearly speaks to the appointment of a person "to a position" and not the appointment of duties to a person. This is also evidenced by several sections in R.C. Chapter 124, including 124.01(D), which defines "appointing authority" as "the officer, commission, board, or

body having the power of appointment to * * * positions" and R.C. 124.27(B), which provides "the appointing authority shall fill the vacant position by appointment." Thus, as also illustrated by these two provisions, appointments are to positions. There is no evidence in the present case that, by assigning relator additional duties, ODJFS "appointed" relator "to a position." If the legislature had meant what relator contends herein, it could have easily drafted provisions that clearly set forth such.

{¶9} Relator counters that this court has already held that he was correctly "placed" in the unclassified service. Relator apparently equates the term "placed" with "appointed." He claims that, because this court has already found he was "placed" in unclassified service, the position stated in his March 2008 letter has been judicially determined to be wrong and this determination is binding. In support, relator relies upon the following passage from *Barley v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 09AP-386, 2009-Ohio-5019, ¶14:

> Both SPBR and the court of common pleas have determined that appellant was correctly placed in the unclassified service due to the nature and scope of his authority and job duties. That conclusion is no longer challenged in this appeal. If appellant is correctly placed in the unclassified service, appellant has not been deprived of a protected property interest.

{¶10} We disagree that this court, in *Barley*, intended the term "placed" to have the same meaning as the term "appointed," as used in R.C. 124.11. Neither the SPBR nor the common pleas court used the term "placed" in their decisions. We used the term "placed" in our decision to mean the SPBR and the common pleas court determined relator's position was correctly "categorized" as unclassified. A review of the SPBR's and the common pleas court's decisions reveals clearly that neither of these tribunals made

any determination that could be construed as having found ODJFS "appointed" relator to his unclassified position or took an active step to "place" him in his unclassified position. Rather, the sole basis of both decisions is that relator's job duties at the time of his suspension fit the definition of unclassified service. For these reasons, we find this argument without merit. Therefore, relator's fourth objection is overruled.

{¶11} Because whether relator was "appointed" to an unclassified position is a threshold issue that relator failed to prove, any arguments and objections relating to whether relator held a classified position from 1998-2004 are moot. However, insofar as the magistrate did address relator's other arguments, we agree with the magistrate's determinations thereof, and we overrule relator's remaining objections. Therefore, relator's second, third, fifth, and sixth objections are overruled.

{¶12} After an examination of the magistrate's decision, an independent review of the evidence pursuant to Civ.R. 53, and due consideration of relator's objections, we overrule the objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

FRENCH and DORRIAN, JJ., concur.

_____

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Chris Barley,	:	
Relator,	:	
v.	:	No. 10AP-186
Ohio Department of Job & Family Services and Douglas Lumpkin,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on February 24, 2011

Walter J. Gerharstein, Jr., for relator.

Michael DeWine, Attorney General, and *Lisa G. Whittaker*, for respondent Ohio Department of Job & Family Services.

IN MANDAMUS

{¶13} Relator, Chris Barley, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Ohio Department of Job & Family Services ("ODJFS") to reinstate him to his previous classified position.

Findings of Fact:

{¶14} 1. Relator began working for ODJFS in 1989, received regular promotions, and assumed the duties of bureau chief of state hearings for ODJFS in 1998. (*Barley v. Ohio Dept. of Job & Family Servs.* (Sept. 24, 2009), 10th Dist. No. 09AP-386, ¶2.)

{¶15} 2. Relator's employment with ODJFS was terminated on March 6, 2006.

{¶16} 3. Since his termination, relator has pursued various legal avenues challenging his termination.

{¶17} 4. Relator filed an appeal to the State Personnel Board of Review ("SPBR")

{¶18} 5. Relator's appeal was heard before Administrative Law Judge ("ALJ") Jeannette E. Gunn.

{¶19} 6. In her February 14, 2008 report and recommendation, the ALJ identified the threshold issue which was whether relator was a classified employee or an unclassified employee.

{¶20} 7. After a two-day hearing during which time appellant testified and Robert Mullinax, ODJFS's chief legal counsel and relator's supervisor, also testified, the ALJ recommended that the SPBR find that relator "was an unclassified employee, pursuant to R.C. 124.11(A)(9)."

{¶21} 8. The SPBR adopted the recommendation of the ALJ and dismissed relator's appeal.

{¶22} 9. Relator appealed the order of the SPBR to the Franklin County Court of Common Pleas. Both relator and Mullinax presented testimony before the trial court. On March 24, 2009, the court issued its decision and entry affirming the order of the SPBR finding that relator had been employed in an unclassified position.

{¶23} 10. Relator appealed the trial court's decision and entry to this court. In a decision rendered September 24, 2009, this court overruled relator's sole assignment of error and affirmed the judgment of the Franklin County Court of Common Pleas upholding SPBR's dismissal of relator's appeal for lack of jurisdiction. This court identified relator's argument as follows:

> [Relator's] argument on further appeal to this court does not revisit the extensive factual disputes and subsequent conclusions by the SPBR and the court of common pleas that support their respective determinations that [relator] was, at the time of his initial suspension, an unclassified employee and thus without civil service protection or right of appeal to the SPBR. [Relator] instead argues that he was denied due process rights when, at some undetermined time and without notification to him, his conditions of employment must have changed from classified to unclassified during his tenure as bureau chief. This is purely legal question and we exercise our plenary review under *Univ. of Cincinnati College of Medicine* [*v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339].

Barley at ¶8.

{¶24} 11. After noting that, ordinarily, the SPBR would not have jurisdiction to examine the circumstances and conditions of relator's prior removal from a classified to an unclassified position, and recognizing that relator's status as an unclassified employee was now uncontested, this court went on to consider relator's allegation of a "due process deprivation in the change in status of his position from classified to unclassified." This court concluded:

> * * * Both SPBR and the court of common pleas have determined that [relator] was correctly placed in the unclassified service due to the nature and scope of his authority and job duties. That conclusion is no longer challenged in this appeal. If [relator] is correctly placed in the unclassified service, [relator] has not been deprived of a protected property interest that, under the due process

> analysis set forth in [*Cleveland Bd. of Edn. v. Loudermill*, (1985), 470 U.S. 532, 105 S.Ct. 1487] would trigger the right to a pre-deprivation hearing. He can claim no deprivation from loss of his previous designation as classified, which did not reflect his actual status and could not control SPBR's review of his right to appeal. *Yarosh* [v. Becane (1980), 63 Ohio St.2d 5]. SPBR correctly found that it lacked jurisdiction and dismissed this appeal by an unclassified employee.

Barley at ¶14.

{¶25} 12. While relator was pursuing the appeal of SPBR's order affirming the February 14, 2008 report and recommendation of the ALJ, relator sent a letter dated March 13, 2008 to the then director of ODJFS requesting the following:

> I am writing to re-assert my fallback rights, as provided by Ohio Rev. Code 124.11(D). Although I was never appointed to the unclassified civil service, and was always considered and treated as a classified employee, I was removed as an unclassified employee during the Taft administration on March 6, 2006.

{¶26} 13. Lewis George, chief legal counsel for ODJFS, responded to relator in a letter dated March 31, 2008. The substance of that letter provided:

> In your letter, you assert that you are entitled to take advantage of fallback rights pursuant to two different versions of ORC 124.11(D). In support of your assertions, you state certain circumstances that you believe lend support to your entitlement to fallback rights. You have also asserted that *State ex rel. Asti v. Ohio Department of Youth Services,* 107 Ohio St.3d 262 (2005) supports your "unqualified right" to resume a previous position in the classified service. In addition, you have enclosed a letter from the Disciplinary Counsel of the Ohio Supreme Court, letters from two former co-workers, and a copy of a decision rendered by the Unemployment Compensation Review Commission.
>
> I have considered the positions set forth in your letter and have determined that you are not entitled to fallback rights. Therefore, it is my recommendation to the director that no reinstatement should be offered to you.

{¶27} 14. Relator again challenged his removal to the SPBR, and in a report and recommendation dated July 2, 2009, ALJ, Marcie M. Scholl, recommended that relator's appeal be dismissed because it had already been determined that relator was an unclassified employee and he was thereby collaterally estopped from relitigating that issue. SPBR adopted that recommendation.

{¶28} 15. On February 1, 2010, the Franklin County Court of Common Pleas dismissed relator's appeal:

> On September 24, 2009, the Court of Appeals decided the first of Mr. Barley's appeals from the State Personnel Board of Review ("Board") against him. That appeal appeared to be related to Mr. Barley's appeal herein. On September 25, 2009, Mr. Barley was directed to either file a supplemental memorandum setting forth any reason that *res judicata* did not apply to this appeal or to declare his intention to appeal to the Supreme Court of Ohio.

{¶29} 16. Mr. Barley has not appealed to the Supreme Court of Ohio.

{¶30} 17. On February 26, 2010, relator filed this mandamus action seeking a writ of mandamus ordering ODJFS to, in pertinent part:

> a. Reinstate Mr. Barley to his previously classified position of Bureau Chief of State Hearings; i.e., the Human Services Hearing Manager position, without the additional responsibilities of managing the administrative appeal process; and
>
> b. Pay Mr. Barley all back pay and lost benefits from the time he was unjustly removed from his Human Services Hearing Manager position which amounts will be made certain after discovery is completed[.]

{¶31} 18. The matter was submitted to this magistrate in November 2010.

{¶32} 19. On February 1, 2011, relator filed a request for leave to supplement the certified record with documents in an effort to establish that the present bureau chief of

state hearings has been placed in a classified position and no longer supervises the administrative appeal examiners or signs off on administrative decisions. Relator seeks to use this information to bolster his argument.

{¶33} 20. The matter is currently before the magistrate on the above motion and merits.

Conclusions of law:

{¶34} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

{¶35} In this mandamus action, relator continues to challenge the finding that he was employed in an unclassified position.

{¶36} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶37} Relator first argues that his "appointment" to the unclassified service guarantees him the right to return to his previous position. As stated in his brief, the first argument which relator asserts follows:

> A person appointed to the unclassified service under R.C. 124.11(D) holds the legal right to begin his previous classified position again.
>
> On March 6, 2006, the date Mr. Barley was removed without just cause, R.C. 124.11(D) read:
>
> An appointing authority whose employees are paid directly by warrant of the auditor of state may appoint a person who holds a certified position in the classified service within the

> appointing authority's agency to a position in the unclassified service within that agency. A person appointed pursuant to this division to a position in the unclassified service shall retain the right to resume the position and status held by the person in the classified service immediately prior to the person's appointment to the position in the unclassified service. (Effective 10-10-2000)

(Relator's brief, at 7.)

{¶38} In response, ODJFS makes two arguments to relator's position: (1) this court must consider relator's rights to fall back under the version of R.C. 124.11 in existence in March 1998 when he was promoted to the position of bureau chief; and (2) even if this court applies the later version of R.C. 124.11, relator would not be entitled to fall back because he was never "appointed" to that position.

{¶39} The version of R.C. 124.11 in effect in 1998 did not contain any fallback provisions. This is not in dispute. R.C. 124.11 was changed effective March 30, 1999 to include fallback rights. Specifically, R.C. 124.11 was amended to include section (D) which provides in pertinent part:

> An appointing authority * * * may appoint a person who holds a certified position in the classified service within the appointing authority's agency to a position in the unclassified service within that agency. *A person appointed pursuant to this division to a position in the unclassified service shall retain the right to resume the position and status held by the person in the classified service immediately prior to the person's appointment* to the position in the unclassified service, regardless of the number of positions the person held in the unclassified service. * * *

(Emphasis added.)

{¶40} As above indicated, there is no dispute that the version of R.C. 124.11 in effect at the time that relator was promoted to bureau chief, did not provide for fallback rights. Further, even if this court were to accept relator's argument that the later version

of R.C. 124.11 applies, by his own statements, relator admitted as follows in his March 13, 2008 letter when he reasserted his fallback rights:

> I am writing to re-assert my fallback rights, as provided by Ohio Rev. Code 124.11(D). *Although I was never appointed to the unclassified civil service*, and was always considered and treated as a classified employee, I was removed as an unclassified employee during the Taft administration on March 6, 2006.

(Emphasis added.)

{¶41} In *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, the Supreme Court of Ohio considered R.C. 124.11(D) with regard to an employee who had been appointed from a classified position to an unclassified position determined that the event that triggers fallback rights for classified employees who are appointed to unclassified positions is the initial appointment to an unclassified position. The court further found that an employee who accepts additional unclassified positions does not waive entitlement to fall back to their qualified position because, "R.C. 124.11(D) specifies that the right continues 'regardless of the number of positions the person held in the unclassified service.' " See also *State ex rel. Glasstetter v. Rehabiliation Servs. Comm.*, 122 Ohio St.3d 432, 2009-Ohio-3507. Because he admits he was never appointed, this argument of relator fails.

{¶42} Relator next argues that he was a classified employee until December 2004 when he was assigned additional duties. To that extent, relator argues: (1) that R.C. 124.11(D) requires the director of administrative services to certify an unclassified employee's previous classified position; (2) his initial job duties were originally determined to be in the classified service; and (3) the duties the ALJ relied on, besides his

administrative appeals, are insufficient on their own to place relator in the unclassified service. For the reasons that follow, the magistrate disagrees.

{¶43} In making his first argument, relator argues that because the position at issue was, at some point in time, *designated* as a classified position, he became certified as an employee in a classified position.[1]

{¶44} To the extent that certification was or is provided to an employee, relator does not disagree with the fact that certification only applies to an employee serving in a classified position. In support of his argument that he truly was employed in a classified position, relator presented certain documents indicating that, at one point in time, his position was noted to be "classified."

{¶45} Relator raised this argument in his administrative appeal and before the common pleas court. Relator had testified that, throughout his personnel records, he was referred to as a "classified" employee. To the extent that the common pleas court rejected that argument, relator could have raised that issue in his appeal to this court. To the extent that he did, this court rejected his argument.

{¶46} Once a competent tribunal enters a final judgment on the merits of a claim, res judicata precludes the relitigation of a point of law or fact that was at issue in the former action between the same parties. *State ex rel. Kroger Co. v. Indus. Comm.* (1998), 80 Ohio St.3d 649. Res judicata applies not only to those claims and defenses actually litigated in the first case, but to any claim which may have been properly

[1] A distinction between provisional and certified employees in the Ohio Revised Code existed for many years. Provisional employees include employees who had not taken and passed a civil service examination for their present classification within a two-year period. The revised code provided that, after the employee had been performing the job for two years, and in the absence of the offering of a civil service examination for the classification, that employee became automatically certified in his classification.

adjudicated. Id. Further, in *Glasstetter*, the court considered the employee's argument that the agency had erroneously designated her as a classified employee and thereby changed her designation. The court rejected this argument stating:

> And as the federal district court further noted, Glasstetter's contentions also fail "from a practical perspective":
>
> "If, as [Glasstetter] contends, 'fallback rights' applied not only to an 'appointment' to a different position, but also to a status re-designation of the same position, the effect would be to make any erroneous designation as 'classified' a permanent and binding one. Once an employee's status was described as 'classified,' a public employer could never effectively 'correct' the mis-designation, because an employee could always 'fall back' to a classified status in the very same position the employee had always occupied. An outgoing administration could hamstring the incoming one simply by designating all its political appointees as 'classified.' When the incoming administration attempted to replace them, the appointees could claim to 'fall back' to classified status in the very same high-ranking policy-making jobs they had occupied moments before." *Glasstetter*, 2008 WL 886137, at *9.

Id. at ¶21-22. As such, this argument fails.

{¶47} Relator also argues that it was not until December 2004 that his position truly became an unclassified position. In support, relator has submitted the affidavit of Robert L. Mullinax from May 11, 2010. In that affidavit, Mullinax offers "testimony" to support relator's argument that he became a certified classified employee and that it was not until December 2004 that he was given additional responsibilities which made him an unclassified employee. Relator asks this court to reconsider whether or not he became an unclassified employee in December 2004.

{¶48} For the following reasons, this court should reject this argument. First, the Mullinax affidavit dated May 11, 2010, was not presented to ODJFS for consideration at any of the hearings. Further, to the extent that the Mullinax affidavit reiterates testimony

he made before ODJFS, that information was considered and utilized in determining that relator was, in fact, serving in an unclassified position. In addition, these are arguments which could have been raised in relator's appeals. And, to the extent that he did, the issues have been addressed. To the extent that relator is approaching the same issue from a different position, relator likewise could have approached this issue from that position originally and cannot be permitted to re-litigate the same issue over and over. Res judicata applies and this argument should likewise be rejected.

{¶49} Relator also contends that the duties relied on by the ALJ, besides the administrative appeals, are insufficient on their own to place him in the unclassified service. Clearly, this argument could have been raised. As such, res judicata applies; relator had an adequate remedy at law and, to the extent that he failed to utilize that, mandamus is not appropriate.

{¶50} Relator next contends that ODJFS has now implemented a policy indicating that all future bureau chiefs will be hired as unclassified employees. Relator argues that this policy is contrary to the current state of the law which provides that an employee's status as classified or unclassified is determined by their job duties and not their job title. In the event any bureau chiefs hired under this policy have an issue, relator is correct that ODJFS's designation as "unclassified" is not determinative if the bureau chiefs' job duties actually place them in the classified service. This argument has nothing to do with relator's situation and, to the extent that relator has attached later decisions from ALJs of ODJFS, none of that is binding upon this court. This argument should also be rejected.

{¶51} Lastly, relator contends the doctrine of laches should bar ODJFS from asserting that he was an unclassified employee. This magistrate disagrees.

> In *Connin v. Bailey* (1984), 15 Ohio St.3d 34, the court explained:
>
> * * * "Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. It signifies delay independent of limitations in statutes. It is lodged principally in equity jurisprudence." *Smith v. Smith* (1957), 107 Ohio App. 440, 443-444 * * *.
>
> In order to invoke the doctrine of laches, the following, as set forth in *Smith v. Smith* (1959), 168 Ohio St. 447 * * *, paragraph three of the syllabus, must be established:
>
> "Delay in asserting a right does not of itself constitute laches, and in order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim." Accord *Kinney v. Mathias* (1984), 10 Ohio St. 3d 72.

Id. at 35-36.

{¶52} Relator's laches argument is clearly an attempt on his part to circumvent the Supreme Court's determination in *Glasstetter* that the erroneous designation of a position as classified is permanent and binding. Because of the court's findings in *Glasstetter*, relator's laches argument necessarily fails.

{¶53} Based on the foregoing, it is this magistrate's decision that relator cannot demonstrate that he has a clear legal right and that ODJFS had the clear legal duty to reinstate relator to his last held classified position and this court should deny his request for a writ of mandamus. Further, relator's request for leave to file supplemental evidence is denied.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).