[Cite as *Ellison v. Hillsboro*, 2016-Ohio-1556.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

KIRBY ELLISON,	:	
Appellant-Appellee,	:	Case No. 15CA17
v.	:	
CITY OF HILLSBORO, ET AL.,	:	DECISION & JUDGMENT ENTRY
	:	
	:	Appellees-Appellants.

APPEARANCES:

Drew C. Piersall and Jonathan J. Downes, Zashin & Rich Co., LPA, Columbus, Ohio 43215, for appellants.

Henry A. Arnett, Livorno and Arnett Co., LPA, Columbus, Ohio 43215, for appellees.

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-31-16
ABELE, J.

{¶ 1} After the city of Hillsboro discharged Kirby Ellison, she appealed her termination to the Hillsboro Civil Service Commission, which determined that Kirby Ellison (1) served in an unclassified position with the city, (2) was employed at the pleasure of the mayor, and (3) was not covered by the civil service rules. Ellison appealed the commission's decision to the Highland County Common Pleas Court, which entered a judgment that found that the city had failed to meet its burden to prove that Ellison was terminated from an unclassified position, and ordered the city to reemploy her to her position with appropriate back pay. The city and its civil

service commission, mayor, and safety service director appeal from the common pleas court judgment.

{¶ 2} In their first assignment of error, the appellants assert that the common pleas court erred by finding that the city did not properly designate Ellison's position as one in the unclassified service. However, the common pleas court did not err in its application or interpretation of the law, and its decision is supported by a preponderance of the evidence as a matter of law. Based on the city's argument presented to the state personnel board of review that Ellison's position was as a secretary or clerk for the mayor, the common pleas court correctly ruled that there was no evidence to support that argument.

{¶ 3} Moreover, insofar as appellants attempt to raise for the first time that the city's safety service director had authority to appoint Ellison to the unclassified position based on Hillsboro Civil Service Rule 5-01(A), they forfeited this argument by failing to raise that issue in the proceedings below. While appellants are correct that a subject-matter jurisdictional objection is generally not subject to waiver or forfeiture, and that the civil service commission does not have jurisdiction to determine the rights of persons in the unclassified service, the commission has subject-matter jurisdiction to determine the status of an employee as classified or unclassified, and that determination is subject to res judicata.

{¶ 4} Furthermore, as appellants concede on appeal, the record of the commission's hearing on Ellison's status in the classified or unclassified service contains insufficient evidence that the duties of her position indicated that she was in the unclassified service. Because appellants had the burden to establish that Ellison's position was in the unclassified service, and they were given a fair opportunity to do so at the commission hearing which did not preclude

evidence concerning Ellison's duties, the common pleas court properly determined that the commission's decision finding that she was in the unclassified service was not supported by reliable, probative, and substantial evidence and was not in accordance with the law. No remand to give appellants a second opportunity to prove their case is warranted. Thus, we reject appellants' first assignment of error.

{¶ 5} In their second assignment of error, appellants contend that Ellison is estopped from asserting that she is a member of the classified service by virtue of her acceptance of markedly increased compensation at the time she was appointed to her unclassified position. However, appellants forfeited this defense by failing to raise it in the proceedings before the commission and the common pleas court. In addition, Ellison testified that her wage was not markedly higher, and that she never knew that the position that she accepted was unclassified. Consequently, we reject appellants' second assignment of error and affirm the judgment of the common pleas court.

I. FACTS

{¶ 6} In January 2012, the city of Hillsboro terminated Ellison's employment with the city. Ellison appealed her termination to the Hillsboro Civil Service Commission, and in February 2015, the commission conducted a hearing on the issue of the status of Ellison's position as being in the classified or unclassified civil service. The following pertinent evidence was adduced at the commission hearing.

{¶ 7} In December 1995, the city initially hired Ellison as an Administrative Assistant II after she passed a civil service examination. That position was in the classified civil service.

{¶ 8} In January 2004, Mayor Richard Zink took office. Zink appointed Ralph Holt as

the new safety service director. After one employee retired, Holt issued a letter to the Hillsboro Civil Service Commission and appointed Ellison to partially replace the retired employee's position. In the letter, Holt stated that he was appointing Ellison from her classified position to an unclassified position:

> Please be advised that I am appointing Kirby Ellison from the Classified – Administrative Assistant II/Grant Writer position she presently holds to an unclassified position as an administrative assistant I/grant writer to partially replace Rebecca Creamer in the unclassified service, serving at the pleasure of the mayor. This appointment will be effective May 1, 2004. We do not intend to fill the vacated position until we evaluate the duties required of employees in our office upon the departure of Rebecca Creamer. Needless to say, Rebecca wore a number of hats and we cannot expect to employ anyone under her specific job description.

{¶ 9} Holt testified, however, that when he started his position as Hillsboro Safety Service Director, he had no government experience and that he did not know about civil service distinctions between classified and unclassified service. According to Holt, notwithstanding the language that he used in the letter, he intended that Ellison's appointment to her new position be temporary, that Ellison receive greater compensation to reflect the hard work that she had been doing, and that Ellison not lose her civil service protection as a classified employee (which prohibited her from being terminated without just cause). Also, Holt (1) did not give Ellison a copy of the letter, and (2) did not forward any job descriptions for this position to the commission. Ellison's position was also not listed as an unclassified position in any commission journal. Ellison testified that no one told her that she was being appointed to an unclassified position, and that she did not receive any document to indicate that she was unclassified. She stated that she did receive a small pay raise (50 cents per hour) when she was appointed to the new position in 2004.

{¶ 10} In January 2012, a new mayor took office. The new safety service director notified Ellison that her services would no longer be required and that she was discharged. Ellison was not provided any notice of charges against her or anything to indicate that her performance was unacceptable. In the city's response to the Office of Unemployment Compensation regarding Ellison's claim for benefits, the city noted that it did not discharge Ellison because of any disciplinary issue; instead, it terminated her because of the change in the city administration so that the city could "create [a] vacancy for [a] new political appointee."

{¶ 11} Fred Beery, the Hillsboro Law Director, testified that the current city safety service director asked him to give his legal opinion on the status of Ellison when she was terminated. Beery opined that the position that Ellison was appointed to in 2004 offered her more income for less job security. He testified that when Ellison was appointed to her position of Administrative Assistant I/Grant Writer, that would be considered a position of trust, but he did not testify about the nature of her job duties and he conceded that a question remained about whether Ellison was working in an unclassified or a classified position when she was terminated. Beery additionally admitted that he did not determine whether the city took the appropriate steps to make Ellison an unclassified employee.

{¶ 12} Ellison introduced into evidence the city's response to the State Personnel Board of Review that requested a copy of any decision or order that the city issued to resolve her appeal to the civil service commission. In that response, the city noted that it had not yet issued any order and claimed that Ellison was in an unclassified position because of Hillsboro Civil Service Rule 5-06(E), which authorized the unclassified service of the city to include the position of "[o]ne secretary of clerk for the Mayor."

{¶ 13} At the conclusion of the hearing, the commission issued a decision and found that Ellison "last served in an unclassified position with the City of Hillsboro; was employed at the pleasure of the Mayor, and not covered under civil service rules."

{¶ 14} A few weeks later, Ellison appealed the commission's decision to the common pleas court. The parties submitted briefs on the merits and agreed that the applicable standard of review is set forth in R.C. 2506.04. In the appellants' brief, they requested that the court affirm the commission's decision finding that Ellison was an unclassified employee who had no civil service protection. Appellants did not raise any argument that Safety Service Director Holt was authorized to appoint Ellison to an unclassified position because of Hillsboro Civil Service Rule 5-01(A). Appellants also did not raise any argument that Ellison was estopped from claiming classified civil service status.

{¶ 15} In October 2015, the common pleas court reversed the commission's decision. After the court determined that the proper standard of review is set forth in R.C. 119.12, it concluded "that the decision of the Civil Service Commission is not supported by reliable, probative or substantial evidence and is not in accordance with law." The court found that (1) former Safety Service Director Holt appointed Ellison to her position of Administrative Assistant I/Grant Writer on behalf of the mayor without authority to do so, (2) the appointment was not placed in the commission's journal, (3) the letter of appointment was not accompanied by a statement showing the fiduciary duties of the position, (4) Beery's opinion that Ellison's position was one of trust is not supported by any evidence in the record, and (5) there is no evidence that Ellison's position was as a secretary or clerk for the mayor under Civil Service Rule 5-06(E). Therefore, the court found that the city had failed to meet its burden to prove that Ellison was

terminated from an unclassified position, reversed the civil service commission's decision, and ordered the city to reemploy Ellison to her position with appropriate back pay. This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶ 16} Appellants assign the following errors for review:

> 1. THE TRIAL COURT ERRED IN FINDING THAT THE CITY OF HILLSBORO DID NOT PROPERLY DESIGNATE APPELLEE'S POSITION AS BELONGING IN THE UNCLASSIFIED SERVICE.
>
> 2. APPELLEE IS ESTOPPED FROM ASSERTING THAT SHE IS A MEMBER OF THE CLASSIFIED CIVIL SERVICE BY VIRTUE OF HER ACCEPTANCE OF MARKEDLY INCREASED COMPENSATION AT THE TIME SHE WAS APPOINTED TO HER UNCLASSIFIED POSITION.

III. STANDARD OF REVIEW

{¶ 17} Although the parties advocated for the application of the standard of review set forth in R.C. 2506.04 in Ellison's administrative appeal to the common pleas court, the court instead applied the R.C. 119.12 standard of review. However, the court erred in doing so because R.C. 119.12 deals primarily with appeals from *state* agencies. Appeals from municipal agencies, like civil service commissions, are outside that provision. *See MacDonald v. Shaker Hts. Bd. of Income Tax Review*, 144 Ohio St.3d 376, 2015-Ohio-3290, 41 N.E.3d 376, ¶ 12 ("R.C. Chapter 2506 generally provides for appeals to the common pleas court from administrative decisions by officers and agencies, including boards, of any political subdivision in Ohio"); *Safest Neighborhood Assn. v. Athens Bd. of Zoning Appeals*, 2013-Ohio-5610, 5 N.E.3d 694, ¶ 14-15; *Slusser v. Celina*, 3d Dist. Mercer No. 10-15-09, 2015-Ohio-3721, ¶ 24

("appeals from municipal civil service commissions are not typically within the purview of R.C. Chapter 119"); *Furnas v. Clay Twp. Trustees*, 2d Dist. Montgomery No. 11CV6149, 2012-Ohio-5408, ¶ 20, quoting *Madison Twp. Bd. of Trustees v. Donohoo*, 2d Dist. Montgomery No. 14007, 1994 WL 692929, *3 (Oct. 12, 1994) (" 'proper statutory scheme that governs appeal and review of this type of administrative decision is found in Chapter 2506 of the Revised Code' " instead of R.C. 119.12). We have similarly applied R.C. 2506.04 to administrative appeals from decisions of municipal civil service commissions. *See, e.g., Wallis v. Gallipolis*, 4th Dist. Gallia No. 00CA01, 2000 WL 33226176, *2.

{¶ 18} Nevertheless, we believe that the court's use of the incorrect standard of review is harmless because (1) the standards of review under both R.C. 2506.04 and 119.12 are substantially similar, and (2) we do not find, and the parties do not assert, that this error affected the substantial rights of the parties. *See Furnas* at ¶ 20, citing *Donohoo* at *4.

{¶ 19} Regarding the appropriate standard of review, in R.C. 2506.01 administrative appeals the common pleas court must consider the whole record and determine whether the administrative order is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." R.C. 2506.04. "The court weighs the evidence to determine whether a preponderance of reliable, probative, and substantial evidence supports the administrative decision, and if it does, the court may not substitute its judgment for that of the board." *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 13, citing *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207, 389 N.E.2d 1113 (1979). "If it does not, the court may reverse, vacate, or modify the administrative decision." *Id.*

{¶ 20} Under R.C. Chapter 2506 the standard of review for a court of appeals is even more limited. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000), citing *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). "The court of appeals reviews the common pleas court's judgment only on questions of law and does not have the same extensive authority to weigh the evidence." *Independence* at ¶ 14, citing *Henley* at 147, 735 N.E.2d 433. "Within the ambit of questions of law for appellate-court review is whether the common pleas court abused its discretion [and] [t]he court of appeals must affirm unless it finds, as a matter of law, that the trial court's decision is not supported by a preponderance of reliable, probative, and substantial evidence." *Independence* at ¶ 14.

{¶ 21} "In sum, the standard of review for courts of appeals in administrative appeals in designed to strongly favor affirmance. It permits reversal only when the common pleas court errs in its application or interpretation of the law or its decision is unsupported by a preponderance of the evidence as a matter of law." *Cleveland Clinic Foundation v. Bd. of Zoning Appeals of Cleveland*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 30. Accordingly, with that extremely restricted standard of review guiding our analysis, we now address the merits of appellants' assignments of error.

IV. LAW AND ANALYSIS

A. Classified and Unclassified Service

1. Improper Appointment

{¶ 22} In their first assignment of error, appellants assert that the common pleas court erred by finding that the city did not properly designate Ellison's position as belonging in the unclassified service. In *Chubb v. Ohio Bur. of Workers' Comp.*, 81 Ohio St.3d 275, 277-278,

690 N.E.2d 1267 (1998), the Supreme Court of Ohio explained the primary difference between classified and unclassified positions:

> Ohio's civil service scheme is embedded in the Ohio Constitution and enacted in R.C. Chapter 124. Civil service employees are divided into classified and unclassified positions. Unlike unclassified employees, those employed in the classified service may be removed for good cause only according to the procedures enumerated in R.C. 124.34 and related rules and regulations. The classified civil servant may appeal termination of employment whereas the unclassified employee is not affected by these statutory and regulatory procedures.

{¶ 23} "The jurisdiction of the Municipal Civil Service Commission is derived from Section 124.40 of the Ohio Revised Code." Hillsboro Civil Service Rule 4-01(A). Under R.C. 124.40, municipal civil service commissions shall prescribe rules consistent with R.C. Chapter 124 for the classification of positions in the civil service of the city, and exercise powers and perform duties as prescribed in the chapter and conferred upon the director of administrative services and the state personnel board of review. "Unless exempted from the classified service by ordinance, municipal charter provisions, or these rules, all positions in the service of the City or the City school district, are in the classified service." Hillsboro Civil Service Rule 4-01(B); *see also* Ohio Adm.Code 124-1-01(B). The appointing authority has the burden to prove the unclassified status of a public employee. *See Dept. of Youth Servs. v. Mahaffey*, 10th Dist. Franklin Nos. 14AP-389 and 14AP-396, 2014-Ohio-4172, ¶ 22, citing Ohio Adm.Code 124-7-04.

{¶ 24} In the case sub judice, the common pleas court concluded that the city of Hillsboro failed to prove that Ellison's position as Administrative Assistant I/Grant Writer was unclassified because, inter alia, (1) former Safety Service Director Holt appointed Ellison to the position on behalf of the mayor without authority to do so, and (2) there was no evidence that

Ellison's position was as a secretary or clerk for the Mayor under Hillsboro Civil Service Rule 5-06(E), which provides that the unclassified service shall include "[o]ne secretary or clerk for the Mayor." The common pleas court did not err in so concluding. The city had represented to the State Personnel Board of Review that Ellison was in an unclassified position based on Hillsboro Civil Service Rule 5-06(E), but no evidence was adduced at the commission hearing that in her position as an Administrative Assistant II/Grant Writer, Ellison was a secretary or clerk for the mayor.

2. Forfeiture of Claim

{¶ 25} Appellants counter by raising, for the first time, that Safety Service Director Holt had authority to appoint Ellison to the unclassified position based on Hillsboro Civil Service Rule 5-01(A), which requires each principal appointive officer to designate up to two positions as unclassified positions.

{¶ 26} As a general rule, an appellate court will not consider any error that a party complaining of the trial court's judgment could have called, but did not call, to the court's attention at a time when the court could have avoided or corrected such error. *Risner v. Ohio Dept. of Nat. Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.2d 718, ¶ 26, citing *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. Courts, including this court, have applied this general rule of forfeiture or waiver to administrative appeals. *See, e.g., Harr v. Jackson Twp.*, 2012-Ohio-2030, 970 N.E.2d 1128, ¶ 32 (10th Dist.); *Hogan v. Mansfield Planning Comm.*, 5th Dist. Richland No. 2008CA0099, 2009-Ohio-1342, ¶ 25; *Steinway v. Chillicothe City Schools*, 4th Dist. Ross No. 98CA2418, 1999 WL 1604, *2 (Dec. 23, 1998); *see also State v. Quarterman*, 2014-Ohio-4034, 19 N.E.3d 900, ¶

15, quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (" 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right" ' "). It has also been applied to administrative appeals from a municipal civil service commission. *See Martucci v. Akron Civ. Serv. Comm.*, 194 Ohio App.3d 174, 2011-Ohio-1782, 955 N.E.2d 404, ¶ 15 (9th Dist.).

{¶ 27} Here, appellants contend that this general rule of forfeiture or waiver should not apply to their claim because it challenges the subject-matter jurisdiction of the Hillsboro Civil Service Commission, which has jurisdiction only to hear appeals from persons terminated from the classified service, not the unclassified service. *See, e.g., State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, ¶ 39 ("Nor can waiver apply to a challenge to the subject-matter jurisdiction of a court"). For administrative agencies, "[w]hen an administrative agency renders a decision without subject-matter jurisdiction, the order is void and subject to challenge at any time." *In re Complaint of Pilkington North America, Inc.*, __ Ohio St.3d __, 2015-Ohio-4797, __ N.E.3d __, ¶ 22. "In contrast, a wrong decision made by an agency with subject-matter jurisdiction is not void, but merely voidable. That is, errors in the exercise of jurisdiction can be waived and must be challenged on appeal." *Id.*

{¶ 28} Appellants are correct that in general, municipal civil service commissions do not have jurisdiction to determine the rights of an unclassified public employee. *See State ex rel. Donaldson v. Athens City School Bd. of Edn.*, 69 Ohio St.3d 145, 149, 624 N.E.2d 709 (1994) (civil service commission has no jurisdiction to consider employee's claim seeking to enforce his rights as an unclassified administrator). Also, under Hillsboro Civil Service Rule 4-02(A), the commission "shall hear appeals, as provided by law, of employees in the *classified service* from

final decisions of appointing authorities relative to * * * discharge." (Emphasis added.) Here, however, to determine whether it could exercise its jurisdiction over Ellison's appeal from her termination, the commission had to first determine whether she was in the classified or unclassified service. This determination is within the commission's exclusive jurisdiction. Hillsboro Civil Service Rule 4-01(B), like Ohio Adm.Code 124-1-01(B) for the State Personnel Board of Review, expressly provides that the Hillsboro Civil Service "Commission has jurisdiction to determine whether any position is exempt from provisions of these rules." *See* Ohio Adm.Code 124-1-01(B) ("The board has jurisdiction to determine whether any position, not specifically exempted, falls within the general exemptions set forth in division (A) of section 124.11 of the Revised Code").

{¶ 29} In *Cho v. Denton*, 10th Dist. Franklin No. 78AP-712, 1979 WL 209341, *3 (Sept. 25, 1979), the appellate court noted that any error by the agency making the determination of whether an employee was in the classified or unclassified service had to be timely asserted or it was waived:

> As to the Board's subject matter jurisdiction to hear the case, the Supreme Court has held in *State, ex rel. Stough, v. Bd. of Edn.* (1977), 50 Ohio St. 2d 47, that the State Personnel Board of Review has subject matter jurisdiction over an appeal by one claiming classified status. *The determination of whether or not the claimant is entitled to the protections of civil service is a determination of the claimant's status and eligibility which becomes res judicata if not appealed. Therefore, the status of the relator in this case as a classified or unclassified employee does not determine the subject matter jurisdiction of the Board* but, rather, can be likened to personal jurisdiction which is waived when not timely asserted at trial or as an assignment of error on appeal if improperly determined upon objection at trial. The *Ogan* case provides the respondent in this case the right to challenge the "personal jurisdiction" determination of the State Personnel Board of Review to the extent that it is arbitrary, unreasonable, or unlawful. If the determination of the Board of Review is found to be arbitrary, unreasonable, or contrary to law, the order is not void ab initio, but only voidable as per *Stough*.

(Emphasis added.) *See also State ex rel. Ohio State Univ. v. State Personnel Bd. of Rev.*, 10th Dist. Franklin No. 83AP-99, 1983 WL 3639, *1 (Aug. 9, 1983) ("While it is true that the Board has jurisdiction to hear appeals only in regard to employees in the classified state service, R.C. 124.03(A), it is necessary for the Board to determine the status of an employee, as classified or unclassified as a preliminary determination to the exercise of its subject matter jurisdiction"); *Crosser v. Ottawa Cty. Sheriff*, 6th Dist. Ottawa No. OT-94-047, 1995 WL 326414 (June 2, 1995) ("the SPBR did have authority to consider at the outset the issue of whether or not Appellant was a classified employee or was exempt under R.C. 124.11(A). Determination of the employee's classified status is essential to invoke SPBR's jurisdiction over the subject matter").

{¶ 30} Appellants rely on *Brice v. Oregon*, 111 Ohio App.3d 7, 675 N.E.2d 545 (6th Dist.1996), but that case is inapplicable because it is not an administrative appeal and it involved a contention that the lower court (not a municipal civil service commission) lacked subject-matter jurisdiction. Therefore, we need not address the claim based on Hillsboro Civil Service Rule 5-01(A) because appellants forfeited it by failing to raise it before the commission or the common pleas court. Moreover, nor do they assert plain error, so we need not consider it. *See Faulks v. Flynn*, 4th Dist. Scioto No. 13CA3568, 2014-Ohio-1610, ¶ 35.

3. Insufficient Evidence of Duties

{¶ 31} The common pleas court further determined that the city failed to satisfy its burden to prove that Ellison was terminated from an unclassified, as opposed to a classified, position because (1) the appointment was not placed in the commission's journal, (2) the letter of appointment was not accompanied by a statement showing the fiduciary duties of the position,

and (3) Law Director Beery's opinion that Ellison's position was one of trust was not supported by any evidence in the record.

{¶ 32} "[A] position's status as classified or unclassified cannot be determined without considering the duties associated with the position. This is consistent with our longstanding precedent that the job title or position classification used by the appointing authority is not dispositive on the issue whether a public employee is in the classified or unclassified service and that the true test requires an examination of the duties actually delegated to and performed by the employee." *State ex rel. Barley v. Ohio Dept. of Job and Family Servs.*, 132 Ohio St.3d 505, 2012-Ohio-3329, 974 N.E.2d 1183, ¶ 22.

{¶ 33} Therefore, based on *Barley*, and notwithstanding how the city titled Ellison's job or classified her position, her actual duties in that position were dispositive of her proper status. Thus, the city had the burden to establish that her position was unclassified, and not subject to the civil-service protections of R.C. 124.34, including not being discharged in the absence of just cause. As the trial court determined, however, and as appellants concede on appeal, the record contains no reliable, probative, and substantial evidence concerning the duties associated with Ellison's Administrative Assistant I/Grant Writer position.

{¶ 34} Appellants, however, contend that "the purpose of the [civil service commission] hearing was to determine whether or not [Ellison] had been properly appointed to an unclassified position," and not whether her duties established that she was in an unclassified position. They assert that a remand for the commission to conduct a hearing, at which they can present evidence on Ellison's duties, is required. We disagree with appellants. The commission hearing was not limited to determining whether Ellison was properly appointed to an unclassified position. A

representative for the city noted at the hearing's outset that it "would proceed to submit evidence and hearing on behalf of the City as to whether her status was in the classified or unclassified Civil Service." A board member noted that the proceeding was "to determine the status of Ms. Ellison as a city worker, whether she is covered under the Civil Service Regulations or not, according to her present position[.]" The commission did not prevent the parties from submitting evidence concerning Ellison's duties in her position to determine her status as a classified or unclassified employee.

{¶ 35} The primary case appellants cite in support of their request for a remand for a new evidentiary hearing is distinguishable because in that case, the public employer did not have a fair opportunity to produce evidence in support of its contention that the employee held an administrative or fiduciary position because the employer had requested a duties hearing before the State Personnel Board of Review that it did not receive. *Dept. Of Youth Servs.*, 2014-Ohio-4172, at ¶ 9-10, 31. Here, however, nothing prevented the city from presenting evidence concerning Ellison's duties in order to prove that her position was unclassified. Thus, because appellants had the burden to establish that Ellison's position was in the unclassified service, and that they had the opportunity to do so at the hearing before the civil service commission, they are not entitled to a second opportunity to argue and to support their position.

{¶ 36} Consequently, after our review we believe that the common pleas court properly determined that the commission's decision that found that Ellison was in the unclassified service was not supported by reliable, substantial, and probative evidence, and was not in accordance with the law.

{¶ 37} Accordingly, we hereby overrule appellants' first assignment of error.

B. Estoppel

{¶ 38} In their second assignment of error, appellants claim that Ellison is estopped from asserting that she is a member of the classified service by virtue of her acceptance of markedly increased compensation at the time she was appointed to her unclassified position.

{¶ 39} In a R.C. 124.34 appeal by a terminated public employee who claims classified status, the state may assert defenses of waiver and estoppel if the employee has accepted appointment to a position designated as unclassified, and also has accepted the benefits of that unclassified position, regardless of whether the employee's actual job duties fall within the classified status." *Chubb*, 81 Ohio St.3d 275, 690 N.E.2d 1267 (1998), syllabus; *see also Wallis*, 2000 WL 33226176, at *3.

{¶ 40} Here, however, appellants forfeited this defense by failing to raise it in the proceedings before the commission and the common pleas court. Moreover, Ellison testified that her wage was only 50 cents more, so the premise of appellants' second assignment of error is incorrect. Further, the evidence is uncontroverted that Ellison was not informed that the position she was being promoted to in 2004 was unclassified. *See Wallis* at *3 (rejecting claim based on estoppel because the employee never signed any agreement acknowledging his unclassified status).

{¶ 41} Thus, we hereby overrule appellants' second assignment of error.

V. CONCLUSION

{¶ 42} After our very limited and deferential standard of review in this matter, we believe that the common pleas court did not err in its application or interpretation of the law, and its decision is not unsupported by a preponderance of the evidence as a matter of law.

{¶ 43} We acknowledge and recognize that Ellison's initial employment with the city in a classified position occurred in 1995, and that the events that formed the basis of this controversy occurred in 2004. Obviously, the passage of time and the numerous individuals who participated in some way in this matter are different from the current city officials and their representatives. Although we do not question the sincerity or the intention of the city's officers, we must decide this matter based upon the evidence in the record and the trial court's judgment, not the current expression of intent or desire of various interested individuals.

{¶ 44} Accordingly, having overruled appellants' assignments of error, we hereby affirm the trial court's judgment that reversed the civil service commission's decision and ordered the city to reemploy Ellison to her position with back pay.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment & Opinion
McFarland, J.: Concurs in Judgment Only

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.