

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

HARRY C. TURNER III,

Appellant,

v.

Case No. 08-MIS-01-0003

DEPARTMENT OF REHABILITATION AND CORRECTION,
OHIO STATE PENITENTIARY,

Appellee.

ORDER

This cause comes on due to Appellant's January 3, 2008 filing of an appeal with this Board as a result of the Court of Appeals for the 10th District's issuance of a Magistrate's Decision on December 27, 2007 in *State, ex rel. Turner v. State Personnel Board of Review et al.*, (Court of Appeals Case No. 07AP-888, Stephanie Bisca Brooks, Magistrate) (Attached hereto.). Magistrate Brooks' Decision addresses Appellant's filing of an original action in the Court of Appeals for the 10th District seeking a writ of mandamus to compel Appellee and this Board to vacate Appellant's transfer and return him to his former position, asserting that this Board abused its discretion when it terminated its investigation concerning allegations Appellant had made regarding his transfer. (SPBR Case No. 06-INV-11-0455)

In the instant notice of appeal, Appellant requests that this Board conduct a hearing regarding Appellant's transfer/appointment, which was effective February 19, 2006. For the three reasons that follow, this Board lacks jurisdiction to further consider this appeal and, accordingly, it should be dismissed.

First, the transfer/appointment that Appellant alleges form the underlying basis for his instant appeal were matters that either have been or could have been reviewed by this Board. Accordingly, Appellant's appeal is barred since this Board has previously addressed these matters in SPBR Case Nos. 06-REC-10-0424, 06-RED-10-0425, 06-INV-11-0455, and 06-MIS-11-0462.

Second, an appeal from a transfer/appointment must be filed with this Board on or before thirty calendar days after a party receives notice of the action. As noted above, Appellant's transfer/appointment became effective on February 19, 2006. Appellant was reinstated to the pertinent position upon his return from military service on or about October 15, 2006. Clearly, both of those dates fall well outside of the thirty-day time parameters for filing an appeal from such actions and, thus, Appellant's appeal is untimely filed.

1-7-08

Third, in the instant notice of appeal, Appellant misconstrues pertinent language set forth in Magistrate Brooks' Decision, both in her Findings of Fact and her Conclusions of Law, to justify his current filing with this Board. It is noted that Appellant mischaracterizes his allegations made before the Court of Appeals as fact. Moreover, Magistrate Brooks never determined that, ". . . Appellant's appointment and transfer to the Ohio State Penitentiary was void *ab initio* and would constitute a continuing violation of state law under R.C. Chapter 124." Magistrate Brooks, at page 6 of her Decision, *did* determine that Appellant's three previously filed civil service appeals raised the identical issues that Appellant raised in his request for investigation.

Significantly, in her Conclusions of Law at pages 6 and 7, Magistrate Brooks indicates:

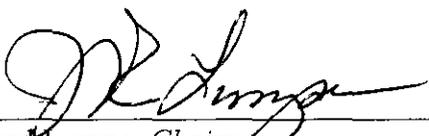
As indicated in the findings of fact, relator has filed three civil service appeals, all of which raise the issues which relator raised in his request for investigation. Pursuant to R.C. 124.56, relator was entitled to an investigation after he requested one. SPBR did conduct an investigation. Nothing in the statutory framework requires that SPBR find that a violation occurred. Further, even if SPBR had found a violation, the only remedy permitted by law is a report to the appropriate authority. *Relator is not entitled to be returned to his former position of employment following the investigation, which is the remedy he has requested in the present case.* (Emphasis added.)

Further, relator has a plain and adequate remedy at law by way of the filing of a civil service appeal. In the present case, *relator has availed himself of that avenue* and, after a decision is made, relator has the option of challenging those decisions. As stated previously, relator's appeals raise the identical issues that he raised in his request for an investigation. (Emphasis added.)

For all the foregoing reasons, it is this magistrate's conclusion that respondents are entitled to judgment in their favor and this court should grant summary judgment in favor of respondents and relator's action should be dismissed.

Wherefore, it is hereby **ORDERED** that the instant appeal be **DISMISSED** for lack of subject matter jurisdiction.

Lumpe – Aye
Booth – Aye

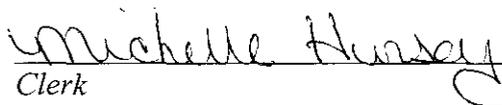


J. Richard Lumpe, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitute ~~(the original)~~ a true copy of the original order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, January 7, 2008.



Clerk

NOTE: Please see the reverse side of this Order **or** the attachment to this Order for information regarding your appeal rights.

IN THE COURT OF APPEALS OF Ohio
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2007 DEC 27 PM 12:20
CLERK OF COURTS

State of Ohio ex rel. Harry C. Turner, III, :
Relator, :
v. :
State Personnel Board of Review and Ohio :
Department of Rehabilitation and Correction, :
Respondents. :

No. 07AP-888

(REGULAR CALENDAR)

MAGISTRATE'S DECISION

Rendered December 27, 2007

Harry C. Turner, III, pro se.

Marc Dann, Attorney General, and Katharine Adams, for respondent State Personnel Board of Review.

Marc Dann, Attorney General, and Timothy M. Miller, for respondent Ohio Department of Rehabilitation and Correction.

IN MANDAMUS
ON MOTIONS TO DISMISS

Relator, Harry C. Turner, III, has filed this original action requesting that this court issue a writ of mandamus ordering respondents State Personnel Board of Review ("SPBR") and Ohio Department of Rehabilitation and Correction ("ODRC") to vacate relator's transfer and to return him to his former job, asserting that SPBR abused its discretion when it terminated its investigation concerning allegations relator had made regarding his transfer.

Findings of Fact:

1. In November 2006, relator filed a request for an investigation with SPBR regarding his transfer from Trumbull Correctional Institution to The Ohio State Penitentiary ("OSP"), pursuant to R.C. 124.56. Relator alleged that he was fraudulently induced to accept the transfer, the transfer did not comply with R.C. 124.32(B), the new position was a "ghost position" which did not really exist, and his employer violated Chapter 124. of the Ohio Revised Code by failing to allow all citizens of the United States to apply for the new position.

2. Relator acknowledges that, in addition to the request for investigation, he filed three appeals with SPBR all relating to his transfer. Relator filed a reclassification civil service appeal and a reduction civil service appeal with SPBR in October 2006. Relator also filed a miscellaneous civil service appeal with SPBR in November 2006. Relator also filed a petition for a writ of mandamus with the Supreme Court of Ohio in December 2006 and a complaint with the Ohio Court of Claims in January 2007.

3. With regard to his request for investigation, which is the subject matter of this mandamus action, the record indicates that a hearing officer for SPBR issued a report and recommendation on February 27, 2007. The hearing officer set out the substance of relator's request for investigation as follows:

[Relator] alleges the following: 1) [Respondents] abused their powers of appointment by engaging in a conspiracy to fraudulently induce [Relator] to transfer to the Administrative Assistant 2 position at OSP; 2) [Relator's] transfer to the Administrative Assistant 2 position was not in compliance with O.R.C. 124.32(B); 3) the Administrative Assistant 2 is a "ghost position" on paper, therefore, he was appointed to a position that was not viable under O.R.C. 124.321; and 4) [Respondents] violated Chapter 124. of the Ohio Revised

Code by not allowing all citizens of the United States to apply for the Administrative Assistant 2 position at OSP.

The hearing officer made the following conclusions: (1) relator initiated the process that led to his transfer in February 2006 when he sent an email to the Deputy Warden of Administration at Trumbull Correctional Institution expressing his dissatisfaction with his current position, his dissatisfaction with his subordinates, and his desire to change positions and requested that he be considered for a promotion during his absence on military leave; relator was provided two options, a transfer to the Administrative Assistant 2 position at OSP or become a compliance officer; (2) on February 7, 2006, relator signed a letter agreeing to a voluntary transfer to the Administrative Assistant 2 position at OSP; (3) relator agreed to the transfer without first determining the job duties he would be performing in that new position; (4) the effective date of relator's transfer was February 19, 2006; (5) from February 21 to March 3, 2006, relator was on approved leave and never worked at OSP prior to his activation in the United States Navy; (6) on September 29, 2006, relator was honorably discharged and immediately provided written notice requesting that he be reinstated to his position of Administrative Assistant 2 pursuant to R.C. 124.29 and Ohio Adm.Code 123:1-34-05(B); and (7) relator was reinstated to the Administrative Assistant 2 position at OSP on October 15, 2006.

Relator filed several motions pertaining to the investigation with SPBR. One of those motions requested that his request for reconsideration be consolidated with his other three appeals. The hearing officer denied this motion in a procedural order dated January 10, 2007.

The hearing officer recommended that relator's request for an investigation be terminated for the following reasons: (1) relator's reduction appeal will resolve all the relevant issues raised in his request for investigation; (2) relator was not fraudulently induced to transfer and the actions of the respondents did not constitute an abuse of their powers of employment; (3) relator's transfer was voluntary and, as such, was not in violation of R.C. 124.32(B); (4) the Administrative Assistant 2 position at OSP is not a "ghost position" as relator alleges—instead, the former employee in that position performed a variety of duties and the job description itself describes a range of duties that may be performed by any employee assigned to that position; and (5) OSP's decision to fill the position through a transfer did not violate Chapter 124. of the Ohio Revised Code.

4. Thereafter, relator filed the instant mandamus action in this court raising the identical issues which he raised in his request for an investigation and which were determined by the hearing officer.

5. Counsel for SPBR filed a motion to dismiss and counsel for ODRC filed a motion for summary judgment in November 2007.

6. The magistrate issued an order indicating that both motions would be treated as motions for summary judgment and the matter was placed on the motion docket.

7. The matter is currently before the magistrate for determination.

Conclusions of Law:

For the reasons that follow, it is this magistrate's opinion that this court should grant respondents' motions for summary judgment.

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.

A motion for summary judgment requires the moving party to set forth the legal and factual basis supporting the motion. To do so, the moving party must identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. Accordingly, any party moving for summary judgment must satisfy a three-prong inquiry showing: (1) that there is no genuine issue as to any material facts; (2) that the parties are entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, which conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

R.C. 124.56 pertains to investigations and provides as follows:

When the state personnel board of review * * * has reason to believe that any officer, board, commission, head of a department, or person having the power of appointment, layoff, suspension, or removal, has abused such power by making an appointment, layoff, reduction, suspension, or removal of an employee under his or their jurisdiction in violation of this chapter of the Revised Code, the board * * * shall make an investigation, and if it finds that a violation of this chapter, or the intent and spirit of this chapter has occurred, it shall make a report to the governor[.] * * * The officer or employee shall first be given an opportunity to be publicly heard in person or by counsel in his own defense.

* * *

Ohio Adm.Code 124-1-03(F) supplements R.C. 124.56 as follows:

Investigation requests shall be filed, in writing, within six months of knowledge of the alleged violations of Chapter 124. of the Revised Code. This time period may be extended within the discretion of the board where the violation is ongoing or there is a pattern of violation over an extended period of time.

Further, R.C. 124.03 sets forth SPBR's jurisdiction as follows:

The state personnel board of review shall exercise the following powers and perform the following duties:

(A) Hear appeals, as provided by law, of employees in the classified state service from final decisions of appointing authorities or the director of administrative services relative to reduction in pay or position, job abolishments, layoff, suspension, discharge, assignment or reassignment to a new or different position classification, or refusal of the director, or anybody authorized to perform the director's functions, to reassign an employee to another classification or to reclassify the employee's position with or without a job audit under division (D) of section 124.14 of the Revised Code. * * * The board may affirm, disaffirm, or modify the decisions of the appointing authorities or the director, as the case may be, and its decision is final. * * *

As indicated in the findings of fact, relator has filed three civil service appeals, all of which raise the issues which relator raised in his request for investigation. Pursuant to R.C. 124.56, relator was entitled to an investigation after he requested one. SPBR did conduct an investigation. Nothing in the statutory framework requires that SPBR find that a violation occurred. Further, even if SPBR had found a violation, the only remedy permitted by law is a report to the appropriate authority. Relator is not entitled to be returned to his former position of employment following the investigation, which is the remedy he has requested in the present case.

Further, relator has a plain and adequate remedy at law by way of the filing of a civil service appeal. In the present case, relator has availed himself of that avenue and, after a decision is made, relator has the option of challenging those

decisions. As stated previously, relator's appeals raise the identical issues which he raised in his request for an investigation.

For all the foregoing reasons, it is this magistrate's conclusion that respondents are entitled to judgment in their favor and this court should grant summary judgment in favor of respondents and relator's action should be dismissed.



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).