

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

Cheryl Lilly,

*Appellant,*

Case Nos. 09-ABL-03-0145  
09-LAY-03-0146  
09-WHB-03-0147

v.

Summit County,  
Alcohol Drug Addiction and Mental Health Services,

*Appellee.*

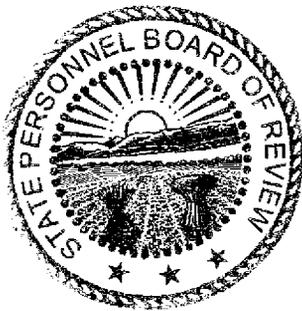
**ORDER**

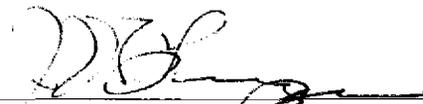
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

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

Wherefore, it is hereby **ORDERED** that the abolishment and resultant layoff (Case Nos.: 09-ABL-03-0145 and 09-LAY-03-0146) be **DISAFFIRMED**, pursuant to O.A.C. § 123:1-41-10; and the whistleblower appeal (Case No.: 09-WHB-03-0147) be **DISMISSED** as moot.

Lumpe - Aye  
Sfalcin - Aye  
Tillery - Aye

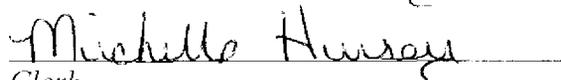


  
J. Richard Lumpe, *Chairman*

**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 13, 2010.

  
Michelle Hunsay  
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**

Cheryl Lilly

*Appellant*

v.

Summit County Alcohol Drug Addiction  
& Mental Health Services

*Appellee*

Case Nos. 09-ABL-03-0145  
09-LAY-03-0146  
09-WHB-03-0147

December 10, 2009

Marcie M. Scholl  
*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause comes on for consideration on December 10, 2009. This Board issued a Procedural Order on September 22, 2009, ordering Appellee to respond to a Show Cause Order. After several extensions of time, Appellee filed its response to the Procedural Order on November 10, 2009. Appellant filed a Memorandum Regarding September 3, 2009 Procedural Show Cause Order on November 17, 2009.

The Show Cause Order asked the Appellee to show why the cases filed by Appellant Lilly should not be dismissed due to the non-compliance of the notice letter provided to Appellant Lilly. In its response, Appellee admitted it did not follow the statutory requirements in providing notice of the abolishment to Appellant Lilly. Appellee stated:

The employer submits that it incorrectly followed the County of Summit Human Resource Commission procedure when abolishing the Appellant's job and as such cannot demonstrate that the statutory and administrative requirements set forth in section 124.321 through 124.328 of the Ohio Revised Code were followed in the job abolishment herein.

The Appellee then continued to argue, however, that their non-compliance did not result in any prejudice to Appellant Lilly and that even if the notification would have been in compliance with the law, the result would have been the same. Appellant Lilly argued in her response to Appellee that the notice provisions as

provided for in the Ohio Revised Code and the Ohio Administrative Code were enacted to ensure employees receive due process. Appellant Lilly also argues case law has made provision for some flexibility on the appointing authority's part by holding the employer to a substantial compliance standard, but that Appellee did not even meet that standard, as the notice letter provided no compliance with the law. Appellant Lilly's arguments are persuasive.

Ohio Administrative Code section 123:1-41-10 sets out, in detail, what is required to be in the notification of layoff or displacement, listing nine mandatory items. Appellee's notice to Appellant Lilly omitted seven of the nine items, including the absence of her retention points; her right to appeal; her displacement rights, if any; her reinstatement or reemployment rights; the availability of the pertinent laws; her responsibility to maintain a current address; and her right, if any, to convert her accrued leave.

The case of *State, ex rel. Potten v. Kuth* (1980), 61 Ohio St.2d. 321, held that "In order for a layoff of an employee in the classified state service to be effective, the appointing authority must substantially comply with the procedural requirements promulgated by the director of administrative services pursuant to R.C. section 124.32." While the term "substantial compliance" is not defined in statute, it is something more than minimal. Black's Law Dictionary, Sixth Edition (copyright 1990) defines the term "substantial compliance" as "Compliance with the essential requirements, whether of a contract or of a statute."

In applying that definition to the instant case, Appellee did not provide the essential requirements of the administrative rule in the notice provided to Appellant Lilly. The omissions were noted above and without knowing what her retention points were or if she had any displacement rights, or even what the provisions of the law are, her right to challenge the Appellee's action are severely compromised. The Ohio Supreme Court, in the case of *Penrod, Ohio Dept. of Adm. Servs.*, (2007) 113 Ohio St.3d 239, 2007-Ohio-1688, looked at the rationale provided to employee Penrod and held that the rationale as presented to her "failed to apprise Penrod of the true reasons why her position was abolished." The Ohio Supreme Court discussed the case of *Potten v. Kuth*, supra, in its discussion of compliance and continued to uphold the substantial compliance requirement. The Court also stated in *Penrod*, paragraph 40, that "An employee who faces the abolishment of his or her position has a right to expect fair treatment from the appointing authority. The appointing authority has a corresponding duty of candor to the employee."

In the instant case, the Appellee did not provide such candor to the employee. Appellant Lilly was not apprised of her retention point calculation nor her displacement rights. In its argument to this Board, the Appellee made a concluding statement that Appellant Lilly had no displacement rights nor reemployment rights, but that may or may not be true. Without knowing what her retention points were, there is no way to ascertain if she could or could not have displaced another employee. Appellant Lilly should be able to review that information and not rely on Appellee's self-serving assertions. Therefore, since Appellee failed to substantially comply with the notice provisions as per Ohio Administrative Code section 123:1-41-10, Appellant Lilly's abolishment and resultant layoff should be disaffirmed.

Appellant Lilly also filed an appeal under the whistleblower statute, section 124.341 of the Ohio Revised Code, alleging that her abolishment was retaliatory. Since the abolishment and resultant layoff are being disaffirmed for Appellee's failure to substantially comply with the notice requirements, Appellant Lilly's whistleblower appeal is moot.

Therefore, it is my **RECOMMENDATION** that Appellant Lilly's abolishment and resultant layoff be **DISAFFIRMED** for Appellee's admitted and proven failure to substantially comply with the notice provisions as required by the Ohio Revised and Ohio Administrative Codes. It is further **RECOMMENDED** that Appellant Lilly's whistleblower appeal be **DISMISSED** as moot.

  
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Marcie M. Scholl  
Administrative Law Judge

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