

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

Shelba Bradley,

Appellant.

v.

Case No. 09-REID-02-0073

Department of Job and Family Services,

Appellee.

ORDER

This matter came on for consideration 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 timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that the instant appeal be **DISMISSED** as there are no remaining legal issues to resolve and is 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, September 18, 2009.



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**

Shelba Bradley,

Case No. 09-RED-02-0073

Appellant

v.

July 30, 2009

Dept. of Job & Family Services,

Christopher R. Young

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter comes on for consideration on July 30, 2009, upon the Appellant's motion to disaffirm filed on May 5, 2009, upon the Appellee's response to Appellant's motion to disaffirm filed on May 14, 2009, upon the Appellant's reply to Appellee's memorandum contra Appellant's motion to disaffirm and upon Appellee's motion for leave to file a sur-reply *instanter* filed on June 10, 2009, along with the Appellee's sur-reply filed on June 10, 2009, as well. Also this matter comes on for consideration after a status conference was completed on May 18, 2009, where only the respective counsels were present. It should be noted that Appellee's motion for leave to file a sur-reply *instanter* filed on June 10, 2009, is well taken, and hereby **GRANTED**.

Based upon the pleadings contained in the case file on February 9, 2009, the Appellant was ordered by her supervisor and the Labor Relations Chief, but not the appointing authority, to cease performing her duties as EEO Regional Administrator for Appellee and to begin performing the duties of a reception/clerk. The Appellant believes that the reduction of her duties was disciplinary in nature. The Appellee in its answer to question number one in its questionnaire stated that the Appellant was "placed under investigation" and "one subject under investigation was how she conducted investigations. For this reason, during the investigation her responsibility for investigations was suspended."

The Appellant was obligated to follow the orders of her superiors or be insubordinate and face removal. The Appellant did as she was ordered. The Appellant characterized that the new duties were not consistent with the classification of an EEO Regional Administrator.

The Appellant's affidavit explains the significant reduction in her duties and that she performed these new duties as instructed until she was removed effective April 21, 2009. The record also shows that the Appellant appealed removal to the State Personnel Board of Review and it is presently pending before this Board. It is uncontested that the appointing authority did not sign a reduction in position order in this case. As such, the Appellant filed her notice of appeal in the instant case alleging a reduction a position and moves for disaffirmance of this action by the Appellee since it had not complied with the requirements of Ohio Revised Code section 124.34 and O.A.C. 124-3-01 (A) (1), (2) and (3).

The Appellee, the Ohio Department of Job and Family Services (ODJFS), it employed Shelba Bradley as an EEO Regional Administrator. In that capacity, Ms. Bradley was responsible for internally investigating Title VI and Title VII complaints at ODJFA. The Appellee has alleged based upon certain correspondence between Ms. Bradley and another ODJFS employee, it appeared that Ms. Bradley was inappropriately advising an employee about how to handle her ODJFS supervisor. Thereafter, ODJFS initiated an investigation into Ms. Bradley's investigatory practices, and, in particular, the ways in which she provided assistance to ODJFS employees who complained of discrimination.

In February 2009, during the pendency of the investigation, and as a direct result of what appeared to be Ms. Bradley's alleged indiscretions with respect to advising ODJFS employees about their discrimination complaints, Ms. Bradley was told to cease investigating Title VI and Title VII complaints, as this is not contested by the Appellee. At the conclusion of its investigation, approximately two and one half months later, ODJFS removed Ms. Bradley from her position. The Appellee now asserts that Ms. Bradley claims that this temporary modification of her job duties was disciplinary in nature and amounted to a reduction from EEO Regional Program Administrator to the position of a clerk. The Appellant now moves this Board to disaffirm the new order reduction.

The Appellee asserts that Ms. Bradley's motion is not well taken for several reasons. The Appellee further asserts that their action was appropriate, not a discipline reduction, to temporarily modify an employee's duties pending an investigation. Further, the Appellee asserts that this appeal is moot since Ms. Bradley has been removed from employment at ODJFS and Ms. Bradley did not suffer any consequences resulting from the alleged reduction of duties prior to her

removal. Finally, the Appellee asserts that in the event that Ms. Bradley prevails in her appeal of the removal, her full EEO Regional Program Administrator duties will be restored, pursuant to this Board's order, so there is no need to take any action in this appeal.

ODJFS proposes that it is permitted to conduct an investigation and it may temporarily suspended employees duties in the event that the investigation concerns the performance of those duties.

Ohio revised code section 124.388 states in pertinent part:

An appointing authority may, in its discretion, place an employee on administrative leave with pay. Administrative leave with pay is to be used only in circumstances where the health or safety of employees or of any person or property entrusted to the employees care could be adversely affected. Compensation for administrative leave with pay shall be equal to the employee's base rate of pay. The length of administrative leave with pay is solely at the discretion of the appointing authority, but shall not exceed the length of the situation for which the leave was granted.

Nothing in Ohio Revised Code section 124.388 even remotely suggest that an employer may reduce an employee in position while it investigates that individual. The statute speaks only to, and only authorizes, the use of administrative leave and specific instances which do not exist in this case. The statute itself is completely silent on the subject of reduction in position or suspension of duties, as well.

However, the Appellee stated that in March of 2008, the Ohio Department of Administrative Services (DAS) issued directive number 08-08. After reading the above noted directive it was noted on page 2, under the heading of job modifications and reassignments, that "temporary reassignments and modifications of duties shall continue only during such period pending an investigation and do not constitute a reduction duties, position or reclassification."

Ohio Administrative Code section 123:1-45-01 states in pertinent part:

The director may issued directives or memoranda to implement the provisions of department rules and to establish the necessary forms or procedures to carry out chapters 123., 124., 125., and 153. of the revised code in the rules adopted thereunder. Any such directives or memoranda shall be distributed to all state departments, boards, bureaus, commissions, and universities and to other agencies that may be affected by the content of the directive or memorandum.

As can be seen by the above stated Ohio Administrative Code section DAS directives are intended to help state agencies implement various procedures to help carry out an agency's mission in contemplation of Chapter 124 of the Ohio Revised Code.

As was noted above, ODJFS was concerned about the manner in which Ms. Bradley was advising employees about their equal employment opportunity concerns. The agency contends that if Ms. Bradley were permitted to continue to advise employees on how to create claims of discrimination against ODJFS ended supervisors, she could have greatly compromised the integrity of the ODJFS investigative process, which could have significant economic consequences should and ODJFS employee file a lawsuit against ODJFS in Federal Court or the Ohio Court of Claims. However, the Appellee asserts that there appeared to be no physical threat to other staff or a serious risk of undetected destruction of property by Ms. Bradley, and placement on administrative leave seemed unnecessary since ODJFS could simply modify Ms. Bradley's duties, during this investigation to avoid any potential and furthering conflicts, and not be done as a disciplinary measure.

The Appellee in its pleadings also aver that the instant appeal is now moot because Ms. Bradley, at the time of the filing of her motion to disaffirm, was no longer an employee of ODJFS. In the Appellant's pleadings, a "reduction in position" is "an action which diminishes and employee's duties or responsibilities to the extent an audit of the employee's position would result in a reclassification to a classification assigned a lower pay range." O.A.C. 124-1-02 (Z). As ODJFS no longer employs Ms. Bradley, there is no risk that the temporary modification of her job duties will lead to an audit that could find her reclassified to a lower position. Further, during the approximate two and one half month period of time that Ms. Bradley was directed not perform Title VI and Title VII complaints, she was paid at

her regular rate of pay. Arguably, ODJFS could have initiated an audit of this Bradley's position during the two and one half month period time of her investigation, which theoretically could have put Ms. Bradley at risk of being placed into a lower position. However, ODJFS never initiated such an audit. Thus, other than the potential risk of adverse audit finding, which never came to pass and now cannot occur because Ms. Bradley no longer works for ODJFS, the temporary modification of Ms. Bradley's job duties imposed no other consequence, economic or otherwise on Ms. Bradley that this Board may address in this appeal.

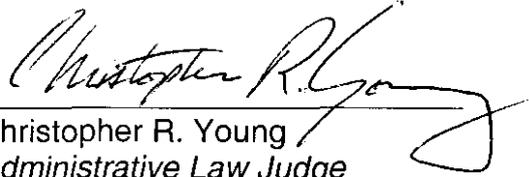
In the case at hand, the only remedy which this Board can offer the Appellant would be to order the Appellee to restore the duties of the Appellant to be that of an EEO Regional Administrator. However, the Appellant subsequent to the filing of this instant appeal was removed for cause, which is subject to an additional filing of an appeal before this Board, which will be heard on its own merits. Therefore, there is no adequate remedy at law present in the instant appeal as the undersigned cannot order the Appellee to restore the Appellant's duties when the Appellant is no longer serving in that position. In the Appellant's additional appeal the administrative law judge assigned to that matter will make a determination as to the validity of that removal order, and if so, disaffirm that removal order, or modify that removal order and place the appellant back in her position as an EEO Regional Administrator.

Further, it should be noted that if the undersigned were to disaffirm the Appellee's actions taken against the Appellant, as disciplinary in nature, the Appellant could argue that the reduction and duties would bar the Appellee from bringing a subsequent removal action against the Appellant which would be heard on the merits. In all cases coming before this Board, the Administrative Law Judges should be more concerned with giving all parties concerned a fair hearing. If the undersigned Administrative Law Judge were to disaffirm the instant action, the Appellee then would be not allowed to have its case heard on the merits of removing the Appellant for her alleged misconduct. This would potentially allow an inequitable result. Moreover, it is the undersigned understanding that the Appellee acted reasonably under the circumstances in the following the Ohio Department of Administrative Services directive number 08-08, that allowed temporary reassignments and modifications of duties to continue only during such period pending an investigation which the would not constitute a reduction of duties position or reclassification. As was revealed by the pleadings, the Appellant had her duties reduced and/or reassigned only during this investigation of approximately two and one half months prior to her subsequent removal, with no monetary loss in pay.

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RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that this Board based upon the pleadings in the case file **OVERRULE** the Appellant's motion for disaffirmance, and in the alternative, **DISMISS** the instant appeal as there are no remaining legal issues to resolve and is **MOOT**.


Christopher R. Young
Administrative Law Judge