

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

David P. Foucart,

*Appellant.*

v.

Case No. 09-REM-02-0068

Marion County Health Department,

*Appellee.*

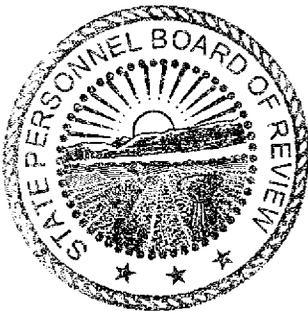
**ORDER**

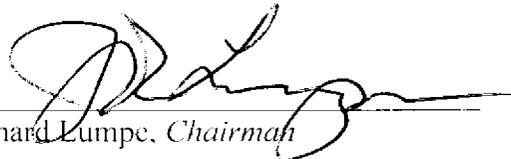
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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** since there are no remaining legal issues to be resolved.

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, August 26, 2009.

  
Clerk

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

8-26-09

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

David P. Foucart,

Case No. 09-REM-02-0068

*Appellant*

v.

July 23, 2009

Marion Co., Health Dept.,

Christopher R. Young

*Appellee*

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause comes on for consideration on July 23, 2009, upon the Appellee's filing a motion to dismiss on July 20, 2009, and upon the Appellant's response to the Appellee's motion to dismiss filed on July 21, 2009, and in consideration of the procedural order issued on April 16, 2009, along with a conversation which was held on July 13, 2009, with Assistant Prosecutor David J. Stamolis, regarding the lack of response filed to the April 16, 2009, procedural order. It should be noted that Assistant Prosecutor David J. Stamolis stated to the undersigned that the Marion County Health Department rescinded the order at issue, repaid the Appellant, and issued a subsequent order of removal, although the Appellee had not notified this Board of that action. To date, the Appellant has not filed an appeal of the subsequent order of removal which had an effective date of April 30, 2009. As a result, the Appellee filed the instant motion to dismiss on July 20, 2009, to clarify this matter.

For clarification, the Appellant's employment was originally terminated by the Marion County health Department on February 9, 2009. However, the Appellant was not served with a notice of removal until February 10, 2009. On February 19, 2009, the Appellant filed the instant appeal to this Board. Thereafter, on April 16, 2009, the undersigned issued a Procedural Order to the Appellee informing them of an apparent error in the issuance of the "section 124.34 order" stating that the Board would be required to disaffirm the action. The Marion County Health Department corrected this mistake by rescinding the action, but failed to notify this Board of its action.

On April 30, 2009, the Appellant was notified by the Marion County Health Department that the removal from employment dated February 9, 2009, had been rescinded and that he would receive back pay from the original removal date through April 30, 2009. (See exhibits 1, 2, and 3 attached to Appellee's motion to dismiss filed July 20, 2009). Additionally, on April 30, 2009, David McElhatten, the Administrator of the Marion County Health Department, personally served the Appellant with a notice of removal with an effective date of April 30, 2009. (See exhibit 1).

Moreover, the Appellant did receive back pay from February 9, 2009, until April 30, 2009, as evidenced by the pay history records of the Appellant's contained in Appellee's Exhibit 4.

With respect to the Appellant's contention that the subsequent order of removal (the same order with new dates) given to him by the Appellee was not valid, as the Appellee had not complied with the order to return me to my position without a proper appeal with the State Personnel Board of Review or to a Common Pleas Court, was not persuasive to this Administrative Law Judge.

Ohio Administrative Code section 124-3-03(C) states in pertinent part:

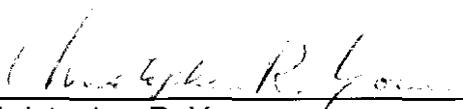
Upon written notice to the employee, an employee authority may rescind a "section 124.34 order" or an order of involuntary disability separation. Rescission of a "section 124.34 order" or an order of involuntary disability separation under this rule shall not be a bar to filing another order based upon the same allegations.

As can be seen from the above administrative code section an employer may rescind a "section 124.34 order" and file a subsequent order based upon the same allegations, as in this case at hand. Furthermore, in Appellant's response he did not contest that the Appellee had paid his salary and benefits from the original date of his removal until April 30, 2009, as well.

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### RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that this Board based upon the foregoing argument and exhibits submitted **GRANT** the Marion County health Department's motion to dismiss, and **DISMISS** the Appellant's appeal as there are no remaining legal issues to be resolved.

  
\_\_\_\_\_  
Christopher R. Young  
Administrative Law Judge

CRY: