

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

Joseph C. Sommer,

Appellant.

v.

Case No. 10-WHB-01-0012

Bureau of Workers Compensation,

Appellee.

ORDER

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

The Board has conducted a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge. The Board also accepts Appellant's memorandum *contra* to Appellee's motion to dismiss into the record and overrules Appellee's motion to strike same. After a review of the record, the Board hereby modifies the Recommendation of the Administrative Law Judge, who understandably relied on previous determinations that did not fully recognize the scope of protections set forth in R.C. 124.341 (D). As a result, this Board dismisses the instant appeal for the reasons set forth, herein.

It should be noted that R.C. 124.341 (D) designates this Board as the sole and exclusive avenue of remedy for employees who have suffered a disciplinary or retaliatory action in response to whistleblower reporting in compliance with the elements set forth in R.C. 124.341 (A). Further, O.A.C. 124-9-04 (B) sets forth that a written reprimand constitutes "prior discipline" before this Board. *Thus, we hold that an otherwise qualifying written reprimand would constitute a disciplinary action under R.C. 124.341 (D).*

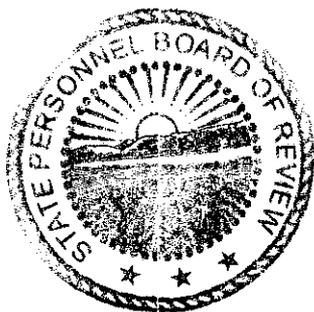
Yet, in the instant case, it appears that Appellee did not discipline Appellant for exercising his protected reporting under R.C. 124.341. Conversely, it appears that Appellee reprimanded Appellant for using inappropriate and intemperate language contained within his written report to the Office of the Inspector General (namely ... [I]f the nominating council is composed of scofflaws, ...") (*i.e.* a contemptuous law violator).

An employee must exercise good faith in reporting an alleged violation (See R.C. 124.341 (C)). Further, the employee should appreciate the serious level of responsibility that accompanies the significant protections that R.C. 124.341 provides to such an employee. Accordingly, the employee should exercise good judgment and reasonable discretion in making a report that is protected pursuant to R.C. 124.341 (A) and (D).

Here, Appellant utilized the proper reporting mechanism but did not do so responsibly. For this reason, Appellee reprimanded Appellant for "Failure of Good Behavior" and not for the act of reporting, itself.

See also in the rules of Professional Conduct in the Preamble: A Lawyers Responsibilities (5)..... A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjustified criticism. Although a lawyer, as a citizen, has a right to criticize such officials, the lawyer should do so with restraint and avoid intemperate statements that tend to lessen public confidence in the legal system. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Wherefore, it is hereby **ORDERED** that the instant appeal be **DISMISSED** due to the fact that Appellee reprimanded Appellant not for his reporting of his concern but for the unacceptable and intemperate language that he utilized to do so, pursuant to R.C. 124.341 (D).



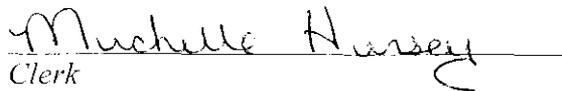
Lumpe - Aye
Sfalcin - Aye
Tillery - Aye


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, April 15, 2010.


Michelle Hursey
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**

Joseph C. Sommer,

Case No. 10-WHB-01-0012

Appellant

v.

March 2, 2010

Bureau of Workers Compensation,

Jeannette E. Gunn

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter came on for consideration due to Appellant's January 14, 2010, filing of an appeal alleging that his written reprimand constituted retaliatory action based upon his "whistleblowing" activities, as prohibited by R.C. 124.341. Appellee filed a Motion to Dismiss with this Board on February 19, 2010, asserting that this Board lacks jurisdiction to consider the claims raised by Appellant. Appellant filed no memorandum *contra*.

Based upon the information contained in the record, I find that Appellant sent an email to the Ohio Inspector General alleging that the Industrial Commission nominating council had failed to follow the requirements of R.C. 4121.02(D). Appellant subsequently received a written reprimand on December 17, 2009, arising from Appellee's concern that the method of his email communication with the Inspector General's office gave the impression that Appellant was speaking on behalf of the Bureau of Workers' Compensation legal department.

CONCLUSIONS OF LAW

In order to invoke the protection of R.C. 124.341, an employee in the classified or unclassified civil service must meet two threshold requirements: the employee must have properly reported an alleged violation or violations of state or federal statutes, rules, or regulations, or misuse of public resources that the employee became aware of during the course of his or her employment, and the employee must demonstrate that one or more prohibited retaliatory actions must have been taken by Appellee.

R.C. 124.341 states, in pertinent part:

(A) If an employee in the classified or unclassified civil service becomes aware in the course of employment of a violation of state or federal statutes, rules, or regulations or the misuse of public resources, and the employee's supervisor or appointing authority has authority to correct the violation or misuse, the employee may file a written report identifying the violation or misuse with the supervisor or appointing authority.

If the employee reasonably believes that a violation or misuse of public resources is a criminal offense, the employee, in addition to or instead of filing a written report with the supervisor or appointing authority, may report it to a prosecuting attorney, director of law, village solicitor, or similar chief legal officer of a municipal corporation, to a peace officer, as defined in section 2935.01 of the Revised Code, or, if the violation or misuse of public resources is within the jurisdiction of the inspector general, to the inspector general in accordance with section 121.46 of the Revised Code. In addition to that report, if the employee reasonably believes the violation or misuse is also a violation of Chapter 102., section 2921.42, or section 2921.43 of the Revised Code, the employee may report it to the appropriate ethics commission.

(B) Except as otherwise provided in division (C) of this section, no officer or employee in the classified or unclassified civil service shall take any disciplinary action against an employee in the classified or unclassified civil service for making any report authorized by division (A) of this section, including, without limitation, doing any of the following:

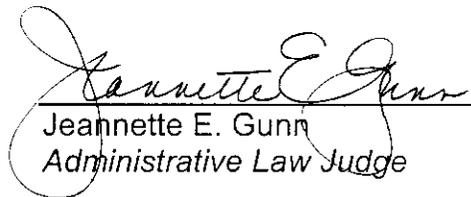
- (1) Removing or suspending the employee from employment;
- (2) Withholding from the employee salary increases or employee benefits to which the employee is otherwise entitled;
- (3) Transferring or reassigning the employee;

- (4) Denying the employee promotion that otherwise would have been received;
- (5) Reducing the employee in pay or position.

The information contained in the record is sufficient to support a *prima facie* claim that Appellant properly complied with the first threshold requirement by making a written report of an alleged violation of state or federal statutes, rules, or regulations or the misuse of public resources to an appropriate entity. However, Appellant's appeal fails to demonstrate that one or more prohibited retaliatory actions were taken by Appellee.

Appellee's application of the maxim of statutory interpretation "*expressio unius est exclusio alterius*" (the expression of one thing is the exclusion of the other) to R.C. 124.341 is persuasive. Appellant received a written reprimand; this Board has previously held that a written reprimand is not a retaliatory action which is prohibited by R.C. 124.341. See, *Sites v. ADAMHS Board, Scioto-Lawrence-Adams Counties* (Aug. 2009), SPBR Case No. 09-WHB-04-0213. Therefore, Appellant may not claim protection under the statute.

Accordingly, I find that this Board lacks jurisdiction to consider the instant matter because the action Appellant has appealed does not rise to the level of prohibited retaliatory action as set forth in R.C. 124.341(B), I respectfully **RECOMMEND** that Appellee's Motion be **GRANTED** and the instant appeal be **DISMISSED** for lack of subject matter jurisdiction.


Jeannette E. Gunn
Administrative Law Judge