

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

TERRY L. JANKE,

Appellant,

v.

Case No. 10-WHB-04-0084

DEPARTMENT OF JOB & FAMILY SERVICES,

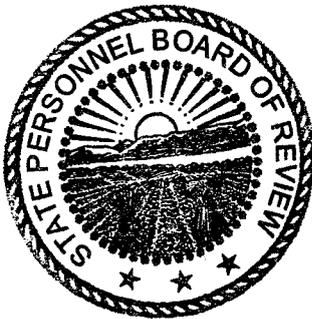
Appellee

ORDER

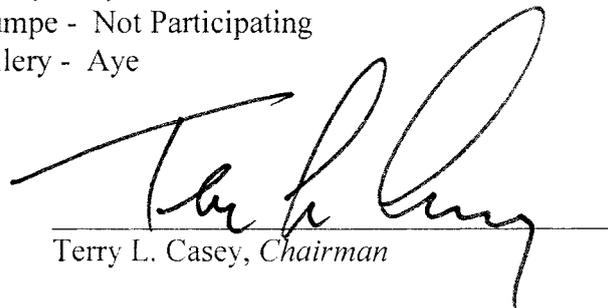
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of record, including 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 is **DISMISSED**. Appellant has failed to meet his burden of proof to demonstrate, by a preponderance of evidence, that the action taken by Appellee was the result of Appellant making a report under R.C. 124.341(A).



Casey - Aye
Lumpe - Not Participating
Tillery - Aye


Terry L. Casey, *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 constitutes (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, December 01, 2011.



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**

Terry L. Janke,

Case No. 10-WHB-04-0084

Appellant

v.

August 15, 2011

Department of Job & Family Services,

Jeannette E. Gunn

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter came on for consideration pursuant to Appellant's April 1, 2010, filing of an appeal alleging that the revocation of his unclassified appointment constituted a retaliatory action as prohibited by R.C. 124.341. A record hearing was held in this matter on November 16 and 17, 2010, and concluded with a third day of testimony on April 13, 2011. Appellant was present at record hearing and was represented by Michael A. Moses, attorney at law. Appellee was present through its designee, John Weber, Deputy Director, Office of Workforce Development, and was represented by Joseph N. Rosenthal, Assistant Attorney General.

The parties entered into the following stipulations prior to the beginning of testimony:

1. There was a loss of grant funds for the fiscal year ending September 30, 2009, of \$525,000.
2. The loss of grant fund was because the DVOS positions required by the grant were not fully staffed.
3. The actual loss of funds was realized in the funds appropriated for the first quarter of federal fiscal year 2010.

STATEMENT OF THE CASE

John Weber testified that he has been employed by Appellee for approximately twenty-five years and is presently employed as Deputy Director of the Office of Workforce Development, a position he has held since October 2009. He indicated that the Office of Workforce Development is primarily responsible for administering federal employment and training programs and maintaining Ohio's labor market information.

The witness recalled that in July 2009 he held the position of Acting Assistant Deputy Director and had oversight of the Local Area Support and Oversight Bureau headed by Thomas Hutter. He noted that Veterans' Services, headed by Appellant, is a section or unit within that Bureau and explained that it consists of an external program, which provides field staff and direct services to individuals, and an internal program, which focuses on statewide activities and manages the Veterans' Relief Fund.

Mr. Weber explained that Appellee's Veterans' Services program is fully federally funded and noted that Appellee applies each year for a grant through the U.S. Department of Labor to operate the program. He identified Appellee's Exhibit 21 as the grant application submitted for federal fiscal year 2009. The witness explained that grant funds are primarily used to pay for the program's staff positions, and in its application Appellee provides a narrative about the services that will be provided, data regarding demographics for the population to be served, and information about how the program will be staffed. Mr. Weber stated that the majority of program staff are either Disabled Veterans Outreach Specialists (DVOS), who provide direct service to veterans by assisting them in getting employment and training services, or Local Veterans Employment Representatives (LVER), who work with employers to identify employment opportunities. He identified Robert Creel as the liaison between Appellee and the Department of Labor; he noted that Appellee provides office space to Mr. Creel and Mr. Creel provides technical assistance and facilitates submission of the grant.

The witness testified that Appellant held the position of ODJFS Program Administrator 1 (Appellee's Exhibit 3) and was head of the Veterans' Services program at the time his unclassified appointment was revoked on March 26, 2010. He noted that Appellant was responsible for oversight, management and administration of the veterans program and staff as a whole.

Mr. Weber recalled that he first became aware in November 2009 that there was a risk of forfeiting grant funding due to insufficient staffing. He noted that Appellant made him aware of the problem through his bi-weekly reports that were reviewed with the executive management team. The witness stated that he was aware that the DVOS positions had a high turnover rate and directed Mr. Hutter and Appellant to work with Human Resources to hire the necessary staff to fill the positions. Mr. Weber testified that he also discussed the need to fill staff positions in the Veterans' Services program with Penny Purviance, who handled Human Resources issues for the Office of Workforce Development.

The witness observed that he expected an employee at Appellant's level of responsibility to do more than simply identify the problem, and believed that he would do what was needed to address the issue. Mr. Weber stated that he became frustrated when he saw that Appellant was not taking sufficient action to fix the staffing problem and began researching and evaluating the situation himself. He testified that he created a document recommending changes in the program in late January or early February (Appellee's Exhibit 14); the witness recalled that he sought feedback on his recommendations from colleagues in the Office of Local Operations, which had housed Veterans' Services prior to its move to Workforce Development in 2009.

Mr. Weber noted that one of the changes he recommended was that Appellant be replaced as head of the program. He stated that he did not feel that Appellant had the necessary management skills, and observed that while Appellant did a good job of making him aware of problems, he did not bring solutions to the problems he had identified. The witness testified that Appellant had the responsibility for working within the bureaucracy of the agency to fix the problems and nothing that he observed gave him reason to believe that Appellant was doing so.

The witness noted that Appellant had the ability to take his concerns up through the chain of command to try to solve the program's staffing problems. He observed that although Appellant did not have the authority to change the hiring procedures, he did have the authority to press the matter. Mr. Weber acknowledged that dealing with the organizational structure in the Office of Workforce Development was not an easy task, but stated that Appellant should have recognized that merely bringing the matter to his supervisor's attention had not solved the problem and taken additional steps to address the issue, such as

requesting a meeting with the witness and/or representatives from Human Resources.

Mr. Weber testified that he had made the decision to replace Appellant as program director in mid-February 2010, when he sent his recommendations for program changes to Bill Lind and Julie Smith in the Office of Local Operations. He recalled that he had two other potential candidates in mind for the position, Tammy Brown and Pam Mason, and interviewed them in early March 2010. The witness identified Appellee's Exhibits 15 and 16 as emails he sent to the candidates regarding his decision to recommend Ms. Mason for the position. Mr. Weber confirmed that he consulted with Janet Kaplan, who was the Human Resources staff member assigned to work with the Office of Workforce Development, in January or February 2010 and stated that he believed Ms. Kaplan was the individual who advised him on the technical issues surrounding the proposed revocation of Appellant's unclassified appointment.

The witness recalled that Appellant was notified of the revocation of his unclassified appointment on March 26, 2010, in a meeting with Carolyn Borden-Collins, who was the Assistant Deputy Director of Human Resources, Janet Kaplan, and himself. He noted that Ms. Borden-Collins stated the action being taking, explained Appellant's options, and provided him with a copy of the notification letter.

Mr. Weber confirmed that on or about March 23, 2010, Appellant provided him with a memorandum reporting wrongdoing, specifically that Appellee had violated federal law by failing to maintain a specified number of employees in the Veterans' Services program (Appellee's Exhibit 8). He testified that Appellant's report had no influence on his decision to revoke Appellant's unclassified appointment, as the decision had been made prior to March 23, 2010.

The witness recalled that he became aware in late January 2010 of two incidents involving inappropriate conduct by staff members; he identified an incident that occurred in Lucas County in September 2009 and an incident that occurred in Stark County on January 20, 2010. Mr. Weber testified that neither incident played a part in his decision to revoke Appellant's unclassified appointment, as he had already made that decision prior to learning of the incidents.

Mr. Weber testified that he personally made the decision to revoke Appellant's unclassified appointment and did not seek the prior approval of Appellee's Director. He confirmed that he was not Appellant's immediate supervisor

and indicated that Appellant reported directly to Tom Hutter, who reported to Assistant Deputy Director Diana Jackson; Diana Jackson reported directly to the witness. Mr. Weber noted that Ms. Purviance and Ms. Kaplan were not in Appellant's chain of command.

Janet Kaplan testified that she has been employed by Appellee for more than twenty-four years and currently holds a position classified as Human Capital Management Administrator in Appellee's human resources area. She confirmed that she is familiar with the Office of Workforce Development.

Ms. Kaplan confirmed that she was aware of the concept of continuous posting and stated that she was not aware why continuous posting was not used to maintain a pool of applicants for positions in the Veterans unit. She noted that Appellee used different methods to recruit DVOS applicants, such as mass testing.

The witness recalled that she was involved in the March 2010 revocation of Appellant's unclassified appointment and subsequent fall-back to a classified position. She stated that Mr. Weber contacted her in February 2010 regarding the personnel action and noted that she was researching Appellant's fall-back rights in late February and early March 2010. Ms. Kaplan explained that R.C. 124.11(D) provides that an employee in the unclassified service who previously held a classified position may have fall-back rights to the same classified position or one in the same pay range. She noted that Appellant was not able to fall back into the Field Operations position that he previously held because it had been converted agency-wide to an unclassified position, but that she identified the Customer Service Veterans Program Manager 1 position as being in the same pay range.

Ms. Kaplan testified that on or about March 18, 2010, she prepared a letter notifying the Department of Administrative Services (DAS) of Appellee's intent to revoke Appellant's unclassified appointment (Appellee's Exhibit 4), requesting that DAS certify Appellant's fall back rights to the position of Customer Service Veterans Program Manager 1. She observed that DAS responded affirmatively on or about March 24, 2010 (Appellee's Exhibit 5), and that she prepared a notification letter to be sent to Appellant on or about March 26, 2010 (Appellee's Exhibit 7). The witness confirmed that she was present when the letter was given to Appellant and did not hear Appellant threatened in any way during the meeting.

Larry Ashbaugh testified that he was employed by Appellee for approximately eighteen years and held the position of Veterans Program Manager from 2000 until

his retirement in November 2009. The witness noted that the hiring process for vacant DVOS and LVER positions changed when the Veterans Program moved from Local Operations to the Office of Workforce Development in April 2009. He recalled that the process was slower and managers were told by Penny Purviance that they could not utilize a continuous posting to create a pool of applicants. Mr. Ashbaugh confirmed that he was told by Ms. Purviance that everything related to personnel matters in the Office of Workforce Development went through her.

The witness stated that hiring was a topic of discussion and staff proposed ways to address the hiring problems in every meeting, but that to his knowledge the matter was never taken past Mr. Hutter's level of management. Mr. Ashbaugh noted that it was common knowledge that if the positions were not filled, the grant money would be recovered. He confirmed that there had been reductions in grant funds in prior years due to insufficient staffing and recalled specifically that grant funds had been reduced in 1993.

Mr. Ashbaugh recalled that shortly before his retirement in 2009 he investigated a complaint in the Toledo office involving unprofessional staff conduct. He noted that after he conducted interviews and got statements from the individuals involved in the incident he forwarded the information to Ms. Purviance to decide whether or not she wanted to pursue the matter. The witness was not aware of the outcome of the matter, as Ms. Purviance had not responded prior to his retirement.

Cheryl Stiles testified that she is presently employed by the U.S. Department of Labor as the West Virginia Director for Veterans' Employment and Training. She noted that she was previously employed by Appellee in the Veterans Unit as a Veterans Program Manager (VPM) and a Local Veterans Employment Representative (LVER) and worked with Appellant prior to her resignation in August 2010. The witness observed that West Virginia's Veterans program is very similar to Ohio's.

Ms. Stiles stated that she was familiar with the process used by Appellee to fill staff positions in the veterans services program during her employment. She recalled that under the Office of Workforce Development structure, anything related to human resources had to go through Ms. Purviance, which often created delays and slowed down the hiring process. The witness testified that the issue of staffing was frequently raised at managers' meetings and Ms. Purviance stated several times that Human Resources would not allow a continuous posting for DVOS and LVER positions. Ms. Stiles observed that Mr. Hutter was aware of the managers'

frustrations with the hiring process and the inability to fill vacancies; she testified that he stated that he would "let them know," but never reported any type of response or solution to the problem.

Jeff Borelli testified that he was employed by Appellee for approximately thirty years and retired May 30, 2010. He confirmed that Ms. Purviance was the Human Resources liaison for the Office of Workforce Development. The witness noted that employees were required to work through Ms. Purviance for all matters related to Human Resources.

Diana Jackson testified that she was employed by Appellee as Assistant Deputy Director of the Office for Workforce Development from February through August 2010 and reported directly to John Weber. She indicated that she supervised Alice Worrel and Mr. Hutter, who was responsible for oversight of the Veterans' Services program.

Ms. Jackson confirmed that she attended biweekly management team meetings with Mr. Weber, Mr. Hutter, Ms. Purviance and Appellant and noted that she also interacted with Appellant on occasions when she needed information about the Veterans' Services program. She explained that she understood the mission of the program was to provide employment information and job training services to veterans who faced additional barriers to employments.

The witness stated that as a condition of receiving federal grant funds under the Jobs for Veterans Act, state programs are required to provide specific types of service and employ sufficient personnel to deliver those services. She noted that she was aware that Appellee could have its grant award reduced if vacant staff positions were not filled, and recalled that the issue was discussed in management and human resources meetings. Ms. Jackson recalled that Appellant was concerned about the possibility of losing grant money due to a failure to fill the positions and brought up the issue in more than one meeting.

Ms. Jackson testified that she was aware that there was a push to get position descriptions for the vacant DVOS jobs approved and posted. She indicated that Ms. Purviance and the Human Resources department controlled that part of the process.

The witness acknowledged that she received a copy of Appellant's March 23, 2010, memorandum and observed that the concerns raised by Appellant therein

were consistent with those he had raised in earlier meetings. She stated that a decision had been made by Mr. Weber at least several weeks prior to the date of this report that Appellant would no longer head the Veterans' Services program. Ms. Jackson recalled that the matter had been discussed by Mr. Weber and Ms. Purviance in early February and indicated that Mr. Weber was attempting to find a new position for Appellant that reflected his experience and would allow him to remain at the same pay level. She confirmed that she was part of the discussions regarding Appellant's new position, but did not recall which position he was ultimately offered.

Appellant testified that he is presently employed by Appellee as a supervisor at its Cincinnati call center. He noted that after his unclassified appointment was revoked, he held a Veterans Program Manager 1 position within the Veterans' Services program but subsequently applied for a different position. Appellant observed that while in the Veterans Program Manager 1 position he continued to perform some of the same duties that he performed as Director of the Veterans' Services program.

Appellant recalled that Mr. Weber stated that his unclassified appointment was revoked due to his failure to staff vacant positions. He indicated, however, that he had no control over staffing because Ms. Purviance handled all personnel matters. Appellant testified that staffing was a constant issue for him, beginning even before he accepted the Director's position. He noted that he had had many conversations about staff with Mr. Creel and they had discussed as far back as January 2009 that if positions were not filled, Appellee would lose grant money.

Appellant testified that he asked Ms. Purviance for continuous postings for DVOS positions, but was refused. He confirmed that he had requested postings and that vacant positions be filled on numerous occasions to no avail.

Appellant identified his March 23, 2010, memorandum and noted that there was no information contained in the memorandum that he had not already reported in meetings with his supervisor and other management personnel. He stated that the essence of the memorandum was that Appellee had violated federal law by not maintaining the staffing levels set forth in their grant application and that Appellee would forfeit grant money because they had not filled vacant staff positions.

FINDINGS OF FACT

Based upon the testimony presented, stipulations entered into, and evidence admitted at record hearing, I make the following findings of fact:

Appellant held the unclassified position of Program Administrator 1 prior to March 26, 2010, and served as Director of Appellee's Veterans' Services program. In that position, Appellant was responsible for oversight, management and administration of the Veterans' Services program and staff as a whole.

The Veterans' Services program is a section or unit within Appellee's Local Area Support and Oversight Bureau, which is part of the Office of Workforce Development. Veterans' Services is fully funded by a federal grant from the U.S. Department of Labor and consists of an external program, which provides field staff and direct services to individuals, and an internal program, which focuses on statewide activities and manages the Veterans' Relief Fund. Grant funds are primarily used to pay for the program's staff positions; the program is staffed by Disabled Veterans Outreach Specialists (DVOS) and Local Veterans Employment Representatives (LVER).

In November 2009, Appellant made John Weber aware through discussions and weekly reports submitted at management meetings that there was a risk that Appellee would be required to forfeit some grant funding as a result of insufficient staffing of DVOS positions. Mr. Weber directed Mr. Hutter and Appellant to work with Human Resources to hire the necessary staff to fill the positions and also discussed the need to fill staff positions in the Veterans' Services program with Penny Purviance, the Office's Human Resources liaison, but the required number of positions was not filled and a loss of funds was realized in the funds appropriated for the first quarter of federal fiscal year 2010, in the amount of \$525,000. A grant reduction due to insufficient staffing had also occurred in 1993.

As a result of his frustration with Appellant's perceived failure to address the staffing problem, Mr. Weber made a decision to remove Appellant from his position as Director of the program. On or about February 19, 2010, Mr. Weber documented four recommended changes to the program; Appellant's replacement as program head was the fourth recommendation contained in the memorandum. Mr. Weber contacted Janet Kaplan in February 2010 regarding the intended personnel action and she began researching Appellant's fall-back rights at that time. Ms. Kaplan determined that Appellant was not able to fall back into the Field Operations

position that he held prior to accepting his Program Administrator 1 position because it had been converted agency-wide to an unclassified position, but she identified the Customer Service Veterans Program Manager 1 position as being in the same pay range.

In early March Mr. Weber interviewed two potential candidates and on March 17, 2010, he recommended Pamela Mason for the Director's position. On or about March 18, 2010, Ms. Kaplan prepared a letter notifying the Department of Administrative Services (DAS) of Appellee's intent to revoke Appellant's unclassified appointment and requesting that DAS certify Appellant's fall back rights to the position of Customer Service Veterans Program Manager 1.

Appellant provided Mr. Weber and other members of Appellee's administration with a memorandum reporting wrongdoing, on March 23, 2010. Appellant specifically alleged that Appellee had violated federal law by failing to maintain a specified number of employees in the Veterans' Services program.

DAS certified Appellant's fall back rights to a Veterans Program Manager 1 position on March 24, 2010.. Upon receiving the certification from DAS, Ms. Kaplan prepared a notification letter to be provided to Appellant.

On March 26, 2010, Appellant's unclassified employment was revoked and he exercised his fall back rights pursuant to R.C. 124.11(D) to fill the position of Veterans Program Manager 1. Appellant was notified of the revocation of his unclassified appointment on that date, in a meeting with Carolyn Borden-Collins, who was the Assistant Deputy Director of Human Resources, Janet Kaplan, and Mr. Weber.

CONCLUSIONS OF LAW

In a whistleblower appeal, the employee bears the burden to prove, by a preponderance of the evidence, that the disciplinary or retaliatory action taken by the employee's appointing authority was the result of the employee making a report under R.C. 124.341(A). Case law has established that the framework for the order and presentation of evidence first articulated by the United States Supreme Court in *McDonnell Douglas v. Green* (1973), 411 U.S. 792, is appropriate in a whistleblower appeal brought under O.R.C. 124.341. See, *Mark Leslie v. Ohio Department of Development* (2006), Franklin County No. 05CVF-05-4401, unreported.

Therefore, if an employee establishes a *prima facie* case to support his or her claim under O.R.C. 124.341, then the burden of production shifts to the appointing authority to rebut the employee's evidence by articulating a legitimate, non-retaliatory reason for its employment decision. If the appointing authority satisfies that burden of production, the burden of persuasion shifts to the employee to prove that the appointing authority's stated reason is a pretext for retaliation.

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.

In order to establish a *prima facie* case, an employee in the classified or unclassified civil service must demonstrate that he or she properly reported an alleged violation or violations of state or federal statutes, rules, or regulations, or misuse of public resources that he or she became aware of during the course of his or her employment, and the employee must demonstrate that one or more prohibited retaliatory actions were taken by Appellee.

In response to this Board's April 14, 2010, Procedural Order and Questionnaire, Appellant indicated that he filed a written report with his appointing authority on March 23, 2010, alleging that Appellee's failure to maintain a specified number of employees to carry out the mandates of the Jobs for Veterans Act constituted a violation of a federal statute. I find that the document provided by Appellant is sufficient to demonstrate that he complied with the reporting requirements of R.C. 124.341(A). I further find that the revocation of Appellant's unclassified appointment falls within the parameters of actions prohibited by R.C. 124.341(B).

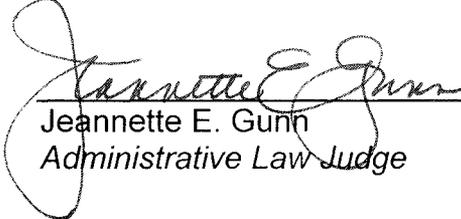
At record hearing, Appellee produced sufficient evidence to support a conclusion that Mr. Weber's decision to revoke Appellant's unclassified appointment was made in mid-February 2010, approximately one month prior to the date Appellant filed his written report. Appellee commenced necessary personnel actions to effectuate the revocation, interviewed candidates for Appellant's position and made a recommendation for Appellant's successor prior to the date Appellant's report was filed. While actual notification of the revocation of his unclassified appointment was not provided to Appellant until after the date on which he filed his written report with the appointing authority, I find that Appellee's revocation of Appellant's unclassified appointment was implemented significantly before

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Appellant engaged in a protected whistleblowing activity and no causal relationship existed between the two events.

Notwithstanding the above analysis, Appellee also presented sufficient evidence to demonstrate that Mr. Weber's decision to revoke Appellant's unclassified appointment was made based upon his observation of Appellant's job performance, and his conclusion that Appellant lacked the management skills needed for the position. Appellant presented testimony and evidence regarding the circumstances surrounding the job performance that was witnessed by Mr. Weber, however, I find that he failed to prove by a preponderance of the evidence that Appellee's explanation was a pretext for retaliation.

Based upon the above analysis and upon a review of the complete record, I find that Appellant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence, that the action taken by Appellee was the result of Appellant making a report under R.C. 124.341(A). Therefore, I respectfully **RECOMMEND** that the instant appeal be **DISMISSED**.


Jeannette E. Gunn
Administrative Law Judge

JEG: