

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

Jeffrey A. Jackson,

*Appellant,*

v.

Case No. 11-WHB-03-0072

Montgomery County Board of Commissioners,

*Appellee.*

**ORDER**

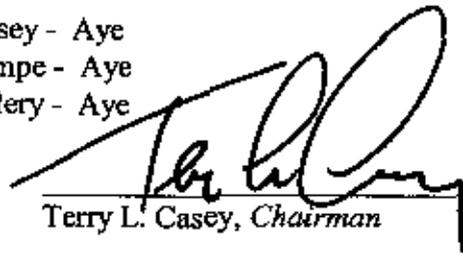
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 this appeal be **DISMISSED** for lack of jurisdiction due to Appellant's failure to demonstrate that he met the requisite reporting requirements set forth in O.R.C. § 124.341.



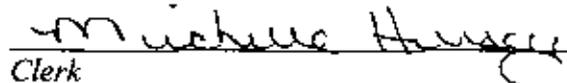
Casey - Aye  
Lumpe - Aye  
Tillery - Aye

  
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, July 22, 2011.

  
Clerk

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

7-22-11mH

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

Jeffrey A. Jackson

Case No. 11-WHB-03-0072

*Appellant*

v.

May 25, 2011

Montgomery County Board of Commissioners

*Appellee*

Marcie M. Scholl  
*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause comes on for consideration upon Appellant Jackson's notice of appeal, filed on February 24, 2011. Appellant's notice of appeal alleges that his removal was "retaliatory in nature". A Procedural Order and Questionnaire was issued by this Board on March 24, 2011. Appellant Jackson filed his response to the Questionnaire on April 7, 2011. When asked if he filed a written report alleging a violation of state or federal statutes, rules, regulations or the misuse of public resources, Appellant Jackson answered "in Mid-December 2010, Mr. Jackson filed a Report of "Major Unusual Incident" with his employer. Shortly after filing this report, Mr. Jackson was retaliated against and fired." When asked to attach a copy of any written reports filed, Appellant Jackson answered "The employer has a copy of this report. HIPPA laws prevent Mr. Jackson from keeping a copy."

In looking at the statute governing "whistleblower" appeals, section 124.341 of the Ohio Revised Code, the pertinent part of the statute states as follows:

**(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.** In addition to or instead of filing a written report with the supervisor or appointing authority, the employee may file a written report with the office of internal auditing created under section 126.45 of the Revised Code.

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, appointing authority, or the office of internal auditing, 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. (Emphasis added).

As can be seen from reading the provisions of R.C. 124.341(A), this statute protects an employee only if the following requirements have first been satisfied: (1) **the employee** filed a written report with either the **employee's supervisor or appointing authority identifying a violation of state or federal statutes, rules, regulations or the misuse of public resources**, or, in cases where the violation is believed to be a criminal offense, in addition to or instead of filing a written report with the employee's supervisor or appointing authority, the employee made a report with another official or entity named in the statute, and (2) after filing a report under division (A), the appointing authority took disciplinary or retaliatory action against the employee as a result of the employee's filings.

In *Haddox v. Ohio State Attorney General*, (Franklin 2008), 2008-Ohio-4355, No. 07AP-857, the Franklin County Court of Appeals, Tenth District, restated these conditions as prerequisites to whistleblower jurisdiction under R.C. 124.341. The court in *Haddox* noted that "[j]urisdiction to invoke whistleblower protection requires that the whistleblower show that she 1) made a written report, 2) transmitted the written report to her supervisor, appointing authority, the state inspector general, or other appropriate legal official; and 3) identified a violation of state or federal statute, rule, or regulation, or misuse of public resources in the report." See *Haddox v. Ohio*

*State Attorney General*, (Franklin 2007), 06CVF-08-10391, (citing *Wade v. Ohio Bureau of Worker's Compensation*, 1999 Ohio App. LEXIS 2614, Franklin App. No. 98AP-997 (June 10, 1999) unreported citing to *State ex rel Cuyahoga Cty. SPBR*, 82 Ohio St. 3d 496, 696 N.E.2d 1054 (1998) and to *Chubb v. Ohio Bur. Of Worker's Comp.*, 81 Ohio St. 3d 275, 690 N.E.2d 1267 (1998)).

The *Haddox* court went on further to explain that "the requirement of a written communication, specifically addressed to an appropriate individual, is an essential element of whistleblower protection and will be strictly applied." *Haddox v. Ohio State Attorney General*, (Franklin 2007), 06CVF-08-10391, (citing *Wade v. Ohio Bureau of Worker's Compensation*, 1999 Ohio App. LEXIS 2614, Franklin App. No. 98AP-997 (June 10, 1999) unreported citing to *Kuch v. Structural Fibers, Inc.*, 78 Ohio St. 3d. 134, 141, 677 N.E.2d 308 (1997)). Therefore, in order to invoke this Board's jurisdiction, an employee must first establish that he or she complied with the reporting requirements of R.C. 124.341.

Inspecting the first necessary component for whistleblower jurisdiction as set forth in *Haddox*, the record of the present case is devoid of any proof that Appellant Jackson filed a written report alleging a specific violation of a federal or state statute, rule or regulation. When asked to specify which State or federal statute, rule or regulation that Appellant Jackson believed was violated, he answered very generally, stating "Department of Disabilities Regulations, Ohio Administrative Code, Stillwater Policy for any Major Unusual Incidents". None of those references cite to a *specific* rule or regulation which was alleged to be violated. The whistleblower statute mandates that the employee filing a written report must *identify* specifically which rule, regulation or statute has been violated. It is not up to the appointing authority nor this Board to guess what administrative rule from the entire Ohio Administrative Code may have been violated.

Appellant Jackson states that he was not permitted to retain a copy of the report he filed. He could have subpoenaed the report and had the names redacted. He could have made a public records request for the report. This Board cannot proceed to hear an appeal based on a document which has not been produced by the Appellant and which is needed to establish his *prima facie* case. As stated in *Haddox*, *supra*, is it absolutely essential that the Appellant be able to show that he filed a written report in order to meet the requirements of the whistleblower statute. Without proof of such written report, the Appellant has failed to meet his initial burden of showing that he falls under the whistleblower protection.

Assuming *arguendo* for a moment that Appellant Jackson had produced the "Major Unusual Incident Report", according to the holding in the *Haddox* case, the report still would not satisfy the requirements found under the statute. As an employee of the Stillwater Center, Appellant Jackson would be responsible for filing such a report anytime an incident occurred. Filing such a report is part of his normal everyday duties and as such, the report cannot then be used as a whistleblower document. By filing a Major Unusual Incident Report, Appellant Jackson was merely doing his job. The court in *Haddox* stated:

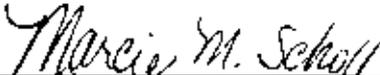
To accept Haddox's argument, and myopically view only the subject matter of the report without considering the context in which it was made, would transform every disclosure made by a state employee in a supervisory position into a protected whistleblower activity. We do not find this to be the purpose for which R. C. 124.341 was enacted, nor would the same further the legislature's laudatory goal of protecting whistleblowers. And, as one court astutely noted, such 'would be to open the door for all compliance discussions to be viewed as 'reports' that implicate the [Whistleblower] Act.' *Freeman v. Ace Tel. Asdn.* (D.Minn., 2005), 404 F.Supp.2d 1127, 1141. *Haddox*, supra at pg.18.

The record indicates Appellant Jackson was a Nurse Supervisor (as his position is stated on the removal order) and therefore, the holding in *Haddox* is directly on point. Appellant Jackson cannot claim that by doing his job as a supervisor and completing a Major Unusual Incident Report, that he filed a whistleblower document.

In accordance with R.C. 124.341 and consistent with case law and similar state and federal procedures, an employee filing a whistleblower appeal is assigned both the burden of proof and the initial burden of production. The employee's initial burden of production includes demonstrating that the employee filed a report with the appropriate entity specifically fulfilling the requisite reporting requirements of the pertinent whistleblower statute and that thereafter disciplinary retaliatory action was taken against the employee as a result of the employee having filed a report pursuant to that statute.

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Accordingly, Appellant Jackson has failed to demonstrate that he met the requisite reporting requirements set forth in R.C 124.341, by failing to file a proper written whistleblower report and by failing to allege any specific violations of statute, rule or regulation. Thus, he has failed to meet his *prima facie* burden and it is my **RECOMMENDATION** that this appeal be **DISMISSED**.

  
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Marcie M. Scholl  
Administrative Law Judge

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