STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

SHONITA BLACK,

Appellant,

v. Case No. 11-WHB-05-0177

HAMILTON COUNTY, PUBLIC DEFENDER COMMISSION,

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 the 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 appeal is **DISMISSED** for lack of jurisdiction.

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

ENTERED
12-01-11 ccc

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

Shonita Black,	Case No. 11-WHB-05-0177
Appellant	
v.	October 31, 2011
Hamilton County Public Defender Commission,	
Appellee	Jeannette E. Gunn *Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on pursuant to Appellant's Response to this Board's Procedural Order and Questionnaire, filed with the Board on June 28, 2011. Appellant indicated in her response to this Board's June 14, 2011, Procedural Order and Questionnaire that she had filed a written report pursuant to R.C. 124.341(A) with her supervisor, specifically an email addressed to her supervisor dated April 12, 2011. She provided a copy of that email attachment and indicated that she believed that the due process clause of the United States and Ohio Constitution had been violated, along with her *Loudermill* rights, Section 7.0 of the Hamilton County Board of Commissioners Personnel Policy and the United States Code.

Appellant's Response appeared to indicate further that she had made related written reports to the Ohio Civil Rights Commission and the U.S. Equal Opportunity Commission in February 2011, however, she attached no substantiating documents to her Response to evidence such assertions.

CONCLUSIONS OF LAW

This Board has jurisdiction to consider retaliatory discipline arising pursuant to the report of violations of state or federal statutes, rules, or regulations; or the misuse of public resources. See, R.C. 124.341.

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 the pertinent statute. 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.RC. 124.341. See, *Mark Leslie v. Ohio Department of Development* (2006), Franklin County No. 05CVF-05-4401, unreported.

An employee must first establish a *prima facie* case to support his or her claim under O.RC. 124.341. The burden of production then 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 June 14, 2011, Procedural Order and Questionnaire, Appellant indicated that she filed a written report with her supervisor in the form of an email dated April 12, 2011, and provided a copy of the attachment which she alleged constituted such report. In her email, Appellant requested information from Appellee regarding an upcoming meeting, including notice of the type of meeting, a meeting agenda, and an outline of any allegations to be addressed in the meeting. Appellant further invoked compliance "with all procedural safeguards afforded to me pursuant to the Due Process Clause of the Ohio State Constitution as well as the United States Constitution as enunciated in the *Loudermill* decision."

Upon a review of the document provided in support of Appellant's assertion, I find that Appellant's April 12, 2011, email is insufficient to establish her compliance with the reporting requirements of R.C. 124.341. Appellant does not allege a violation or violations of a state or federal statute, rule, or regulation, or the misuse of public resources in her email; although she references her due process rights, she does not assert that they have been breached. Because Appellant's response is insufficient to establish a *prima facie* case, this Board lacks jurisdiction to consider the instant appeal.

Therefore, I respectfully **RECOMMEND** that this appeal be **DISMISSED** for lack of jurisdiction. I note that Appellant has filed a timely appeal of the merits of her alleged retaliatory removal from employment (SPBR Case 11-REM-05-0176); this matter shall go forward independent of the conclusion of the instant appeal.

Jeannette E. Gunn
Administrative Law Judge

JEG: