STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

KELLY L. METTLER,

Appellant,

v. Case No. 11-WHB-08-0302

LUCAS COUNTY BOARD OF ELECTIONS,

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 case is **DISMISSED**, pursuant to R.C. 124.03, R.C. 124.341, R.C. 124.11 (A) (2), and R.C. 3501.01 (U) (6).

Casey - Abstained
Lumpe - Aye
Tillery - Aye

J. Richard Lumpe, *Vice Chairman*

ENTERED
2-6-13

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, February 06, 2013.

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

KELLY L. METTLER,

and

DENNIS C. LANGE

Appellants

v.

LUCAS COUNTY BOARD OF ELECTIONS,

Appellee

Case Nos. 11-WHB-08-0302
11-WHB-08-0317

January 4, 2013

JAMES R. SPRAGUE
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

These cases came to be heard on August 28, 2012 and August 29, 2012. Present at the hearing were Appellants, Kelly L. Mettler and Dennis C. Lange, who were represented by R. Kevin Greenfield, Attorney at Law. Appellee, Lucas County Board of Elections (LCBOE) was present through its designee, Anthony DeGidio, a Member of the LCBOE, and was represented by Brenda G. Meyer, Assistant Prosecuting Attorney.

These causes came on due to Appellants' respective August 19, 2011 filings of appeals from their unclassified removals from their respective positions with the LCBOE. Both removals were effective on August 9, 2011, with each appeal being timely filed.

These two cases have undergone a complex record development process. In addition to two days of record hearing, this process included: a pre-hearing; a number of telephone conferences among respective counsel and the undersigned; a hearty motions practice; Appellants' submission of Interrogatories to Assistant Secretary of State Scott Borgemenke; and the parties' submission of well-argued and well-researched post hearing briefs filed on or about December 21, 2012.

Both counsel are to be commended for providing professional and high-quality representation to their respective clients and for so effectively assisting this Board in the development of the instant records.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

Jurisdictional Posture

Jurisdiction over the subject matter of these two appeals was established pursuant to R.C. 124.341, to the extent set forth, below. It is noted that Appellants, as are all employees of Ohio's county Board of Elections, serve in the unclassified service, pursuant to R.C. 124.11 (A) (2) and R.C. 3501.01 (U) (6). However, qualifying unclassified employees are expressly given whistleblower protection under R.C. 124.341. So, the determinations in Appellant Mettler's and Appellant Lange's instant cases fall into three areas.

We must **first** determine whether Appellants' have demonstrated that their actions met the procedural prerequisites set forth in R.C. 124.341 (A).

If Appellants demonstrate their actions so quality, we must, **next**, determine whether Appellants can demonstrate that a causal connection existed between their reporting actions and their subsequent removals, so as to qualify under the protections set forth in R.C. 124.341 (B).

If Appellants can demonstrate this causal connection, then, **lastly**, we must determine an appropriate remedy for Appellee's violation(s) of the protections set forth in R.C. 124.341 (B).

From a review of the records established, to date, in these matters, it appears that Appellant Mettler has met the reporting requirements contained in R.C. 124.341 (A), Paragraph 2., through her filing of an Incident Report with the Lucas County Sheriff's Office (LCSO) (Appellants' Exhibit A.), although that report's January, 2008 filing date is nearly four years' distant in time from Appellant Mettler's August 9, 2011 removal.

Appellant Mettler also identified Appellants' Exhibit S. as a July 12, 2011 dated two-paragraph document that Appellant Mettler provided to Lavera Scott, Ms. Mettler's indirect LCBOE Democrat supervisor, on or about this same date. The document discusses Appellant Mettler's interaction with Ms. Scott and (at that time new) LCBOE Board Member Jon Stainbrook regarding the daily operations and chain of communication of the office. Ms. Mettler also stated at hearing that she and Ms. Scott discussed some of the topics covered in the document with LCBOE Board Member Ronald Rothenbuhler and that she and Ms. Scott considered giving the document to Mr. Rothenbuhler but did not do so.

This document does not identify any violation of law or misuse of public resources. Further, while Appellant did provide the document to her indirect supervisor, it is difficult to see what Ms. Scott could have done to rectify any alleged violation involving one of the LCBOE Board Members, since it is the Board Members of the LCBOE who serve as the appointing authority for all employees of the LCBOE.

Thus, while the document does provide additional evidence substantiating that there was friction and a lack of amity between Appellant Mettler and Mr. Stainbrook, it comes nowhere close to satisfying the procedural prerequisites contemplated in R.C. 124.341 (A). As such, henceforth, Appellants' Exhibit S. will only be considered for its probative value concerning the relationship between Ms. Mettler and Mr. Stainbrook.

Appellant Lange identified Appellants' Exhibit D. (*i.e.* "the Wenz note") as an April 26, 2010 dated document that he filed that may qualify him for the protections contemplated in R.C. 124.341 (B). Appellant Lange's report is a one page note that is signed by Appellant Lange. The note's text states, in full:

> Regarding 6-C Central Committeeman
>
> in [sic] March 2008 Primary Jeffrey Wenz ran for the 6-C Precinct. I know Mr. Wenz and informed the former director and deputy director that Mr. Wenz had moved to 7-F but was running in 6-C.
>
> They forwarded that information to John Borell and the Lucas County Prosecutur [sic] office. To my knowledge nothing was done about it and it was brought up in a Republican meeting that Mr. Wenz was running again in 6-C.

Deputy Director Jeremy Demagall asked me about this and to write up what I remembered from March 2008 election.

Appellant Lange's report (set forth as Appellants' Exhibit D.) does not satisfy the reporting requirements as contemplated in R.C. 124.341 (A) and as affirmed in Ohio's body of case law, for several reasons. First, Appellant Lange was instructed to write up the report in the ordinary course of Mr. Lange's duties, diminishing the likelihood that anyone receiving this report would consider it a whistleblower document.

Secondly, Appellant Lange is "reporting" directly to his supervisor. Yet, here it can be argued, to invoke R.C. 124.341 (B)'s protections, Appellant Lange should have reported directly to the requisite law enforcement officer with the power to rectify the perceived violation. Thirdly, if and when this document finally arrived at the Office of the Lucas County Prosecuting Attorney (LCPA), this matter had already been reported to the LCPA's Office and that Office had already chosen not to further pursue the matter; as Appellant Lange essentially concedes in the body of his report.

As well, Appellant Lange identified Appellants' Exhibit E. as a March 23, 2011 dated summary of two separate interactions that he asserts took place with Kelly Bensman in 2008 and with Jon Stainbrook in 2010 ("meeting confrontation summary"). At some point early in the term of Secretary of State Jon Husted, the document was provided to the Assistant to Assistant Secretary of State Scott Borgemenke.

The text of the document reads:

To Whom This May Concern

On June 14th, 2008 at the 2008 re-organizational of the Lucas County Republican Central Committee meeting held at Angola Gardens banquet hall I was leaving the meeting and a male with a video camera approached me with Kelly Bensman. She said "Yea get him, he's one of those state workers from the Board of Elections". I turned and corrected her; I stated, "I work for the County Board of Elections". She then said, "It won't be for long, we are going to fire you and the rest of the Republicans."

> On June 9th, 2010 at the 2010 re-organizational of the Lucas County Republican Party Central Committee meeting held at the Erie Street Market banquet hall after the vote for the Party Chairman that put Jon Stainbrook back in as chairman, Mr. Stainbrook was running up and down the aisles glad handing and high fiving. As he came down the aisle I was sitting in, I extended my hand to congratulate him on his win. I said, Congratulations Mr. Chairman." He went two or three steps past me, stopped, turned, came back and shouted, "I'm going to fire you".
>
> I do have 3 or 4 people that were sitting around me that heard him.

It is highly unlikely that this document fulfills the procedural prerequisites contemplated by R.C. 124.341 (A). First, it is doubtful that the Secretary of State's Office is an entity set forth in R.C. 124.341 as a qualifying recipient of a whistleblower complaint. Thus, while the Secretary of State's Office may well be an appropriate recipient for allegations concerning elections law violations, it does not appear to qualify as a whistleblower complaint recipient.

Secondly, it may strain credulity to state that this report alleges any violation of law or misuse of public resources, and certainly not in an express manner. Perhaps one may read a conditional or future threat of employment discrimination or retaliation into these summaries, but the document, itself, does not allege a violation or misuse. Thus, while Appellants' Exhibit E. provides some meaningful context to the demonstrated ongoing struggle for control of the Lucas County Republican Party and the distrust that struggle may have engendered, it does not fulfill the procedural prerequisites set forth in R.C. 124.341 (A).

Additionally, Appellants Mettler and Lange participated in the research/compilation of <u>various other reports that the LCBOE provided to the Office of the LCPA)</u>. These reports do not appear to fulfill the reporting requirement that the Appellants authored and filed a written report as contemplated in Paragraph 1. of R.C. 124.341 (A) and as consistently affirmed in Ohio's body of case law. Commensurately, these reports do not appear to fulfill the reporting requirements found in Paragraph 2. of R.C. 124.341 (A). At bottom, this is because not a single one of these reports was authored, approved, or filed by Appellants.

Nonetheless, to ensure that full and fair records have been developed in both of the instant cases, we will proceed, below, to review the substantive requirements of these cases, namely: whether either Appellant Mettler or Appellant Lange has demonstrated by a preponderance of the evidence that his or her respective removal directly resulted from the filing of these reports with the LCPA; whether, in the case of Appellant Mettler, her removal directly resulted from her 2008 filing of an Incident Report with the LCSO; or whether, in the case of Appellant Lange, his removal directly resulted from his filing of either the Wenz note or the meeting confrontation summary discussed above.

Based on the discussion, findings, and reasons set forth, below, we must find that neither Appellant Mettler nor Appellant Lange demonstrated by a preponderance of the evidence that their respective removals were directly caused by the filing of any or the reports noted, above. Accordingly, this Board should dismiss the two instant appeals.

Background regarding the removal of a County Board of Elections (BOE) employee when a motion to terminate is put forward resulting in a tie vote

Ohio's County Boards of Elections occupy a unique place in Ohio's state government, for they serve as the local arm of the Office of the Ohio Secretary of State. Each County Board of Elections is made up of four members, two of whom are Republicans and two of whom are Democrats. The Executive Director of a County Board of Elections and the Assistant Executive Director of a County Board of Elections are also from different parties (*i.e.* if the Director is a Democrat, the Assistant Director will be a Republican).

As reflected, above, County Boards of Election are, by nature, partisan. Yet, they are tasked with monitoring and administering elections at the local level and, thus, must act in concert to fulfill this common goal and mission. Indeed, it is not uncommon for County BOEs to have employees whose duties mirror each other and who perform the same functions, one doing so for the Democrats and the other for the Republicans.

The Members of a County Board of Elections serve as the appointing authority for employees of the Board, and all employees of the Board serve in the unclassified service, as noted, above. Because the Secretary of State enjoys substantial administrative and executive authority over the functions of County

Boards of Elections, if a member of the Board moves for the removal of an employee and a tie vote results (*e.g.* two members in favor of removal and two members vote in opposition to removal), the Secretary of State serves as the tie-breaker.

In the two instant cases, in the LCBOE Meeting of August 2, 2011, the two Republicans on the Board (John Stainbrook and Anthony DeGidio) voted in favor of motions to remove Appellants Mettler and Lange. The two Democrats on the Board (Ronald Rothenbuhler and Cathy Rita) voted in opposition to motions to remove Appellants Mettler and Lange. Appellants are both registered Republicans.

As another part of these actions, motions to remove three other employees of the LCBOE (*i.e.* Lori Jacek, Timothy Reynolds, and Mathew Ward -- also registered Republicans) had also been made with the same resulting tie vote composition.

Because, here, the Members of a County Board of Elections could not resolve these matters internally, the Secretary of State served as the tie-breaker. When Secretary of State Jon Husted is unavailable to cast the tie breaking vote, the Assistant Secretary of State, Scott Borgemenke is tasked with authority to cast the Secretary's vote.

In regard to the motions to remove the five LCBOE employees referenced, above, the records reflect that, in his August 8, 2011 letter to the LCBOE, Mr. Borgemenke wrote that " ... the Secretary breaks the ties in favor of the motions to terminate Kelly Mettler and Dennis Lange ..." and that " ... the Secretary breaks the ties against the motions to terminate Lori Jacek, Timothy Reynolds, and Matthew Ward." (Appellants' Exhibit R.).

Through the above-referenced letter addressed to then-LCBOE Director Ben Roberts and then-LCBOE Deputy Director Daniel DeAngelis, the LCBOE was officially informed of Mr. Borgemenke's actions. The Board thereafter met and effectuated the removals of Appellants Mettler and Lange effective August 9, 2011.

Witnesses Testifying at Hearing

At hearing, 10 witnesses testified, with Appellants testifying on as if on cross examination, direct examination, and rebuttal.

First to testify was **Jeremy Demagall**, who served as the Deputy Director of the LCBOE from September 2008 when the LCBOE was without a Director for several months, through 2011.

Next to testify was Appellant **Kelly Mettler**. Ms. Mettler served as an employee of the LCBOE for 17 and one-half years beginning in 1994 as a Clerk. Ms. Mettler worked her way up the LCBOE hierarchy and was promoted to Elections Manager in March 2010. At the time of her removal, Appellant Mettler was serving as the highest ranking Republican employee of the LCBOE; since at that time the LCBOE lacked either an Executive Director or an Assistant Executive Director.

Next to testify was **James Mettler**, the ex-husband of Appellant Kelly Mettler and a former State Representative. Rep. Mettler testified regarding a conversation he had with Jon Stainbrook that concerned Appellant Kelly Mettler, which seems to have occurred sometime previous to June, 2011, when Mr. Stainbrook began his service on the LCBOE.

Next to testify was **Patrick Kriner**, who served on the LCBOE for about six to six and one-half years, including his service in June 2011.

Next to testify was **Linda Howe**, who served Director of the LCBOE from July 28, 2008 to March 29, 2011.

Next to testify was Appellant **Dennis Lange**. Appellant Lange served with the LCBOE for seven and one-half years prior to his August 9, 2011 removal. Appellant Lange began his service with the LCBOE as a Clerk for three months, and then became a full time Poll Worker recruiter ("Booth Official Recruiter"). Mr. Lange was also very active in the Lucas County Republican Party and served as Central Committee Chairman for four years and as Interim Party Chairman for six or seven months in 2007.

Next to testify was **Ronald Rothenbulher**, who has, since approximately 2010, served as one of the Democratic Members of the LCBOE. Mr. Rothenbuhler was also one of the LCBOE Members who participated in the votes that ultimately resulted in Appellants' respective removals, with Mr. Rothenbuhler (and the other LCBOE Democratic Member at that time – Cathy Rita) voting in the negative on each of the initial votes taken on August 2, 2011 regarding removal.

Next to testify was **Jon Stainbrook**, who has served as a Republican Member of the LCBOE since approximately June 17, 2011. Appellants have asserted that Mr. Stainbrook, and his "group" of the Lucas County Republican Party retaliated against Appellants and essentially effectuated their respective removals based on a number of years and many interactions among these individuals and, for our purposes, also as a result of Appellants' respective filings. Among his other offices, Mr. Stainbrook has served as Chairman of the Lucas County Republican Party since March, 2008. Mr. Stainbrook was also one of the LCBOE Board members who participated in the votes that ultimately resulted in Appellants' respective removals, with Mr. Stainbrook (and the other LCBOE Republican Board Member – Anthony Degidio) voting in the affirmative on each of these pertinent votes.

Next to testify was **John Borell**, who has served as the Deputy Chief of the Civil Division of the Office of the Lucas County Prosecuting Attorney since 2000 and who has served as an Assistant Prosecuting Attorney with the Office of the LCPA since April, 1997. Mr. Borell serves as statutory legal counsel to the LCBOE regarding various of its activities, including elections law. These activities do not include personnel law or matters involving criminal law, with criminal law matters being handled by the Criminal Division of the Office.

Next to testify was **Anthony DeGIdio**, was has served as a Republican Member of the LCBOE since approximately July 27, 2011 and served as Appellee's designee at hearing. Among his other activities in the private sector, Mr. DeGidio served as Mr. Stainbrook's counsel. As noted, Mr. DeGidio also participated in the votes that ultimately resulted in Appellants' respective removals. At the LCBOE's August 2, 2011 Meeting, it was Mr. DeGidio who moved for the removal respectively of each of the five pertinent LCBOE employees and Mr.Stainbrook seconded each of those five motions.

Next to testify, on rebuttal, was Appellant **Kelly Mettler**.

Last to testify, also on rebuttal, was Appellant **Dennis Lange**.

Summary and Analysis of Evidence and Arguments

Appellant Mettler contends that she has filed written reports that qualify for whistleblower protection under R.C. 124.341.

The **first** report that she claims so qualifies is an "Incident Report" (Appellants' Exhibit A.) that Appellant Mettler filed with the Lucas County Sheriff's Office on or about January 18, 2008. The Incident Report alleged that Jon Stainbrook essentially came to the offices of the LCBOE, caused a disturbance with one of its employees, and asked Appellant Mettler to choose sides in an ongoing battle for control of the Lucas County Republican Party.

While not in the report, a further action was attributed to Mr. Stainbrook by Appellant Mettler after Mr. Stainbrook was alleged to have stated to Appellant Mettler: "Don't worry. I got your back." or "Don't worry. Got your back." Appellant Mettler has alleged that Mr. Stainbrook then made a thumb and finger sign of a gun, perhaps pointing at her and made a clicking sound. This series of actions, according to Appellant Mettler, "creeped me out".

One could perhaps see Mr. Stainbrook's actions as threatening. It would seem, however, from the context of the conversations, that, if this action with the thumb and finger did in fact happen, it appears more likely that it could constitute a follow-up to Mr. Stainbrook's indication of support for Appellant Mettler and a reaffirmation and punctuation that he "had her back".

The LCSO investigated this matter, talked to the participants, and subsequently closed their activity on this Incident Report without finding any violation on the part of Mr. Stainbrook.

Perhaps related to this interaction between Appellant Mettler and Mr. Stainbrook is an interaction that occurred between Mr. Stainbrook and Appellant Mettler's ex-husband, James Mettler. There is a great divergence in the testimony of the two participants regarding the location, date, and context of this conversation.

James Mettler recalls that, as he was in the front area of a bar/restaurant in downtown Toledo, Jon Stainbrook came out of the back room and began to threaten to make life difficult for Appellant Mettler, including because she filed the Incident Report with the LCSO. Colorful language was exchanged and Appellant Mettler recalled that Mr. Mettler related the events of this interaction to her more or less contemporaneously to when it happened.

Mr. Stainbrook recalls the matter differently. He recalls that the interaction occurred in a bathroom at Mud Hens Stadium on opening day. He further recalls

that Mr. Mettler approached Mr. Stainbrook in the bathroom and, with a beer in his hand, Mr. Mettler began discoursing with Mr. Stainbrook about Appellant Mettler in an aggressive manner. Mr. Stainbrook testified that he could smell alcohol on Mr. Mettler's person and believed Mr. Mettler to have been intoxicated. Mr. Stainbrook also testified that he was employed for a number of years as a doorman at an establishment that served alcohol and that, as such, he is familiar with the smell and effects of alcohol.

It is essentially impossible to reconcile Mr. Mettler's and Mr. Stainbrook's respective two versions of this interaction. While I make no credibility finding, we must at least consider that Mr. Mettler, who shares several children with his ex-wife, might not be considered to be entirely a disinterested witness. We must also recall that the filing date of this report preceded by more than three and one-half years Appellant Mettler's removal.

To summarize, Appellant Mettler's afore-mentioned LCSO Incident Report does meet the procedural requirements set forth in R.C. 124.341 (A) Paragraph 2. However, as reflected in the record of her appeal, Appellant Mettler has failed to demonstrate that a causal connection exists between her January 2008 LCSO filing and her August 2011 removal.

The **second** report, that Appellant Lange claims qualifies as a whistleblower document, is Appellant Lange's April 26, 2010 note to LCBOE then-Deputy Director Jeremy Demagall regarding Jeffrey Wenz (Appellants' Exhibit D.). This item fails to fulfill the procedural requirements contemplated in R.C. 124.341, for the three reasons delineated, above. To summarize those reasons, the note was written in the ordinary course of Appellant Lange's duties at the LCBOE, the note is not filed with the proper entity - here the pertinent law enforcement representative with the power to rectify the perceived violation, and the issues contained in the note had already been brought to the attention of the LCPA, which Office had already declined to pursue the matter.

The **third** report, that Appellant Lange claims qualifies as a whistleblower document, is Appellant Lange's March 23, 2011 dated summary of two confrontations alleged to have occurred at the 2008 and 2010 re-organizational meeting of the Lucas County Republican Party Central Committee, which summary was provided to an Assistant to Assistant Secretary of State Scott Borgemenke. This item fails to fulfill the procedural requirements contemplated in R.C. 124.341

for the two reasons, noted, above. To summarize those reasons, it is unlikely that the Office of the Secretary of State is contemplated in R.C. 124.341 (A) as a qualified recipient of a whistleblower complaint and this item does not identify a violation of law or misuse of public resources, as contemplated by R.C. 124.341 (A).

The **fourth** set of reports that both Appellant Mettler and Appellant Lange assert meet the procedural prerequisites set forth in R.C. 124.341 (A) are a series of reports that the LCBOE filed with the Lucas County Prosecutor's Office. These reports and associated documents (basically Appellants' Exhibits B., and D. through Q. as admitted) involved what the Director and/or Executive Director of the LCBOE and some of their staff (including Appellants) believed may have constituted voter fraud. Unfortunately, for Appellants, none of these reports was written/authored by Appellants, none was authorized by Appellants, and none was filed by Appellants. Thus, none of these reports fulfill the procedural prerequisites set forth in R.C. 124.341 (A). (Please see *Haddox v. Ohio Atty. Gen.*, 2008-Ohio-4355 for the Court of Appeals for the 10th District's seminal determination on R.C. 124.341 (A)'s reporting requirements.)

Further, pursuant to that same Opinion, in *Haddox, supra*, Appellant Lange's April 26, 2010 dated note to his supervisor does not qualify under these same requirements. As noted, this report was not self-generated, but came about as the result of a directive from Appellant Lange's supervisor issued in the ordinary course of Appellant Lange's duties. Neither does the note report anything that was not already known and that had not already been considered by the LCBOE. Finally, the report was apparently filed directly with then-Deputy Director Demagall and not directly with the LCPA, who would have been the proper entity to have addressed the perceived violation.

[Please recall that, earlier, the undersigned reviewed and rejected Appellants' Exhibit S. for further consideration other than regarding its probative value to further build the two instant records regarding the relationship between Appellant Mettler and Mr. Stainbrook.]

The legal reality in these two cases is that Appellants' Exhibit B. (namely Appellant Mettler's LCSO Incident Report, dated January 18, 2008) is the only report that likely fulfills the procedural prerequisites of R.C. 124.341 (A). Nonetheless, in an abundance of caution, we will consider all of the above-identified reports on the merits (excepting Appellants' Exhibit S.) to determine if Appellants

have demonstrated a causal connection between the filing of these reports and their subsequent removals.

First, we must consider the time span that occurred between the filing of these reports and Appellants' removals. Most of the reports appear to have been filed in March, April, and May 2010 (the outliers being Appellant Mettler's Incident Report filed on or around January 18, 2008 and Appellant Lange's meetings summary apparently filed in early- to mid-2011). Appellants were removed effective August 9, 2011. Thus, more than a year transpired between the filing of all but the most recent report and Appellants' removals.

However, let us look more closely at the content and the context of these reports, particularly focusing on the compiled reports that the LCBOE provided to the LCPA. The reports involve allegations including: that multiple absentee ballots were sent to one address; that the registration of individuals - including those serving on the Lucas County Republican Party Central Committee – may have been listed incorrectly over a lengthy period of time; and that poll workers were provided with incorrect information possibly in an effort to chill participation in this function.

These reports were delivered to John Borell, who passed them on to the Criminal Division of the LCPA. Thereafter, no prosecution or other criminal pursuit of these allegations was ever undertaken by the LCPA.

The context of these reports concerns, to some degree, the ongoing (above-referenced) conflict between two groups. These two groups might be categorized from the testimony as the "old guard" and the "new group". Mr. Stainbrook and his associates appear to fall into the new group. The names of those on these reports also appear to be associated more with the new group. Also apparently associated with the new group is LCBOE Board Member Anthony DeGidio. The testimony further appears to suggest that Meghan Gallagher, the current LCBOE Executive Director, is also associated with the new group.

It also appears the term "new group" is a bit of a misnomer. Indeed, the testimony reflects that several of the individuals identified as being associated with the new group have been active in the Lucas County Republican Party for many years (*e.g.* Jon Stainbrook began assisting the Lucas County Republican Party in the mid-1980s, according to his testimony).

It is still somewhat unclear how Appellant Mettler believes she was identified with the old guard and, thus, targeted for replacement. It is easier to see how Appellant Lange believes he came to be so identified. Testimony reflects that there was a perception that Appellant Lange may have run a party candidate against another party candidate sponsored by Mr. Stainbrook or against Mr. Stainbrook, himself. Further, Appellant Lange, as noted, above, served for a number of years on the Central Committee - including as its Chairman for four years - and served as Interim Party Chairman for six or seven months in 2007. There was also testimony that Meghan Gallagher and Jon Stainbrook had both made comments to Appellant Lange months before the fact to the effect that he was going to be terminated from employment at the LCBOE.

There was also testimony that, based collectively on a number of instances of Mr. Stainbrook's own experiences and from a report that the LCBOE received from Mr. Borell, neither Mr. Stainbrook nor Mr. Degidio felt they could trust Appellants at their respective jobs with the LCBOE.

Additionally, we must consider Appellant Mettler's Incident Report, since this is the only report that probably fulfills R.C. 124.341's procedural prerequisites. Appellants have already established that an acrimonious relationship existed between Appellants and the new group of the Lucas County Republican Party. Yet, testimony was offered by Mr. Stainbrook regarding his reaction to the filing of this report to the effect that it did not particularly concern him. His testimony appears as credible and perhaps more disinterested regarding his reaction to this filing than does that of James Mettler. Thus, we can say that, while the Incident Report was filed very distant in time to Appellant Mettler's removal, it does reinforce that some friction certainly existed between Appellant Mettler and Mr. Stainbrook.

CONCLUSIONS OF LAW

The two instant cases present this Board with the question of whether Appellant Mettler and Appellant Lange, respectfully, demonstrated that they filed the requisite report(s) with the appropriate entities and that, thereafter, Appellee removed them from their respective positions as a result of such filing(s)? Based on the Findings set forth, above, and for the reasons, set forth, below, this Board should find that in only one instance were any of Appellants' reports procedurally

complaint and further find that Appellants failed to demonstrate that their respective removals were caused by any of these filings. Thus, this Board should dismiss the two instant appeals for lack of jurisdiction over their respective subject matter.

In a whistleblower appeal filed pursuant to R.C. 124.341, an Appellant bears the burden of proof at all times during the appeal. This burden not only applies to the requirement that an Appellant demonstrate by a preponderance of the evidence that there has been procedural compliance with the filing requirements contemplated in R.C. 124.341 (A). It also applies to the merits, requiring an Appellant to demonstrate by a preponderance of the evidence that the action being reviewed (here Appellant Mettler and Lange's respective removals) was caused by this very same filing or series of filings.

In spite of the fact that only Appellant Mettler's LCSO Incident Report appears to satisfy R.C. 124.341 (A)'s procedural requirements, Appellants have presented a comprehensive and persuasive case that their respective removals were the result of their filing of the reports reviewed in detail, above. Certainly, Appellants established that there was friction between Appellants and the "new group", which Appellants to some degree of success identified most strongly with Jon Stainbrook. Appellants also demonstrated that this friction appeared to begin several years before Appellants were removed.

Yet, Appellee has also presented a comprehensive and persuasive rebuttal by effectively showing that it is just as probable that Appellants were removed due to issues of trust and performance and in an effort to move on from a somewhat discordant office environment. Appellants were never able to overcome Appellee's rebuttal and, so, have failed to prevail on the merits to show by a preponderance of the evidence that they were removed for filing the various reports discussed, herein.

Thus, the instant records do not support, and I cannot find, that Appellants have established facts that demonstrate by a preponderance of the evidence that,

<u>as a result of Appellant Mettler's filing with the LCSO,</u>

<u>as a result of Appellant Lange's filing with then-LCBOE Deputy Director Demagall,</u>

<u>as a result of Appellant Lange's filing with the Secretary of State's Office,</u>

or as a result of the Lucas County Board of Elections' filings with the LCPA,

the two Republican Members of the LCBOE (Messrs. DeGidio and Stainbrook, respectively) moved, seconded, and voted to remove Appellants (and three other LCBOE Republican employees – Jacek, Reynolds, and Ward).

Neither do the instant records support, and I cannot find, that Appellants have established facts that demonstrate by a preponderance of the evidence that, as a result of any of the above-referenced filings, after the Secretary of State – through his Assistant -- broke the tie (in favor of the motions to remove Appellants but not in favor of the motions to remove Republican employees Jacek, Reynolds, and Ward), Messrs. GeDidio and Stainbrook acted as a direct consequence of any these same filings to finalize and effectuate Appellants' respective removals.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **DISMISS Case No. 11-WHB-08-0302**, pursuant to R.C. 124.03, R.C. 124.341, R.C. 124.11 (A) (2), and R.C. 3501.01 (U) (6).

This is because, although Appellant Kelly L. Mettler demonstrated by a preponderance of the evidence that her filing of an Incident Report with the Lucas County Sheriff's Office procedurally qualified as a written report under R.C. 124.341 (A), she failed to demonstrate by a preponderance of the evidence that a causal connection existed between that filing and her removal, the effectuation of which began on August 2, 2011 and culminated on August 9, 2011.

Further, this is because Appellant Mettler failed to demonstrate by a preponderance of the evidence that the elections reports filed by the LCBOE were her reports, thus failing to fulfill the procedural prerequisites for a whistleblower document contemplated in R.C. 124.341 (A).

Finally, Appellant Mettler failed to demonstrate by a preponderance of the evidence that a causal connection existed between the filing of any of these elections reports and her subsequent removal.

Further, I respectfully **RECOMMEND** that the State Personnel Board of Review **DISMISS Case No. 11-WHB-08-0317**, pursuant to R.C. 124.03, R.C. 124.341, R.C. 124.11 (A) (2) and R.C. 3501.01 (U) (6).

This is because Appellant Dennis C. Lange failed to demonstrate by a preponderance of the evidence that his note to then-Deputy Director Jeremy Demagall regarding Jeffrey Wenz fulfilled the procedural prerequisites for a whistleblower document contemplated in R.C. 124.341 (A).

Moreover, this is because Appellant Lange failed to demonstrate by a preponderance of the evidence that his filing a summary of respective confrontations he had with Meghan Gallagher and with Jon Stainbrook fulfilled the procedural prerequisites for a whistleblower document contemplated in R.C. 124.341 (A).

As well, this is because Appellant Lange failed to demonstrate by a preponderance of the evidence that the elections reports filed by the LCBOE were his reports, thus failing to fulfill the procedural prerequisites for a whistleblower document contemplated in R.C. 124.341 (A).

Finally, Appellant Lange failed to demonstrate by a preponderance of the evidence that a causal connection existed between the filing of any of these three reports or sets of reports and his subsequent removal.

JAMES R. SPRAGUE
Administrative Law Judge

JRS: