STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

MARK ALDERMAN,

Appellant,

v.

Case Nos. 12-RED-07-0175
12-MIS-07-0176

DEPARTMENT OF DEVELOPMENT,

Appellee

ORDER

These matters came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

After a thorough examination of the entirety of the records, 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 appeals are **DISMISSED** for lack of subject matter jurisdiction and the Appellee's motion to dismiss these appeals is **GRANTED**, along with Appellant's failure to comply with the requirements set forth in Ohio Administrative Code 124-11-07 (A)(2) and (C), along with **TERMINATING** the investigation requests for lack of jurisdiction.

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, January 16, 2013.

Clerk

ENTERED
1.16.13

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

Mark Alderman,	Case No. 12-RED-07-0175 Case No. 12-MIS-07-0176
Appellant	
v.	December 6, 2012
Dept. of Development,	
Appellee	Christopher R. Young *Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on for consideration on December 6, 2012, upon the Appellant's request for an alleged Reduction and Investigation filed on July 26, 2012, and upon the Appellee's Motion to Dismiss filed on October 18, 2012. To date, the Appellant has not responded to Appellee's Motion to Dismiss nor has he filed a request for an extension of time to file a memorandum in opposition to Appellee's motion to dismiss.

In essence, the Appellant has asked this Board to investigate the Appellee, the Ohio Department of Development, by requesting an investigation be conducted into alleged discriminatory and harassing conduct by his supervisor, Melissa Stanford, Section Supervisor, CSBG/HEAP, Field Unit, Office of Community Assistance, Community Service Division. In support of this appeal, the Appellant, Mark Alderman, included documentation concerning his most recent performance evaluation, an alleged unwarranted investigation, alleged denial of vacation and sick leave, and a written and oral reprimand.

The record in this case reveals that the Appellant, Mr. Mark Alderman, is a Community Development Analyst with the Ohio Department of Development (ODOD). Further, the record also reveals that the Appellant is a member of the Service Employees International Union, District 1199, The Health Care and Social Service Union, Change to Win, CLC ("SEIU"). The record indicates via the Appellant citing his two previous performance evaluations, unwarranted investigations into vacation and/or sick leave denials, a couple of written reprimands as well as an oral reprimand, earlier this year. It was noted by the undersigned

Administrative Law Judge that the Appellant apparently had previously grieved the written and oral reprimands, as he referenced that he was trying to reduce the number of grievances through the collective bargaining process.

Unlike a court of general jurisdiction, the State Personnel Board of Review has authority only where it has been explicitly conferred upon it by the Ohio General Assembly. This Board's investigatory jurisdiction is derived from Revised Code Section 124.56, which provides that this board shall conduct an investigation when it has reason to believe that:

> . . . Any officer, board, commission, head of a department, or person having the power of appointment, layoff, suspension, or removal, has abused such power by making an appointment, layout, reduction, suspension or removal of the employee under [his or their jurisdiction in violation of [Chapter 124.] of the Revised Code. . .

Thus, the Appellant must allege that the Appellee has made an appointment, layout, reduction, suspension, or removal in violation of Revised Code Chapter 124., In order to trigger this Board's investigatory authority. We are a request for an investigation alleges none of the above referenced triggering devices, the State Personnel Board of Review is without jurisdiction to proceed with an investigation. (See *State ex rel. Carver v. Hull* (1994), 70 Ohio St. 3d 570; *Okapal v. University of Toledo* (1982) SPBR 82-INV-10-3019; *Reed v. Montgomery County Board of Mental Retardation* (1982) SPBR 82 82-INV-09-2801;*Logsdon v. University of Cincinnati* (1982) SPBR 82-INV-08-2690. As was noted by the Appellant's request for investigation, none of the allegations requested contained an allegation which would in fact trigger this Board's investigatory authority.

In addition, to the reasons stated above, this cause also comes on for consideration due to the Appellee's October 18, 2012 filing of a motion to dismiss regarding the above captioned cases. The motion to dismiss contained: a memorandum in support; the affidavit of Lauren Hunter, Appellee's Assistant Chief Human Relations Officer/Labor Relations, along with various accompanying documentation and pertinent case law. As previously mentioned, the Appellant was provided with the requisite amount of time to file a memorandum contra to Appellee's motion to dismiss, but, to date has not done so.

O.A.C. 124-11-07 sets forth the motions practice before this Board. O.A.C. 124-11-07 (A)(2) indicates that when a party files a dispositive motion, then an adverse party must respond affirmatively and show that there is a genuine issue in dispute. O.A.C. 124-11-07 (C) sets forth a 10 day time frame to respond to dispositive motions, such as the instant motions to dismiss. Appellant has failed to file the requisite response to Appellee's motion to dismiss and thus, has failed to comply with O.A.C. 124-11-07. Furthermore, Appellee's jurisdictional arguments previously mentioned that were dressed in the above captioned appeals appear to have merit.

As was stated in the Appellant's investigatory requests into alleged discriminatory and harassing conduct by his supervisor impacting upon the Appellant's work environment it should be noted that the Ohio Civil Rights Commission may be a more proper forum in which the Appellant may seek a remedy from these alleged discriminatory practices.

Revised Code Chapter 4112. deals with the powers and duties of the Ohio Civil Rights Commission (OCRC). Revised Code Section 4112.02, entitled, "unlawful discriminatory practices" outlaws various discriminatory practices committed by any employer in the state.

Revised Code Section 4112.02 reads, in part:

> It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or to otherwise discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

In his request, the Appellant both expressly and implicitly references alleged practices involving unlawful discrimination and harassing behavior. Because Revised Code 4112., *et seq.*, specifically denominates the Ohio Civil Rights

Commission to deal with such alleged discrimination, I would suggest that the OCRC may be a more proper forum in which the Appellant may seek a remedy from these alleged discriminatory practices.

Additionally, this matter came on for consideration on December 6, 2012, due to the Appellant filing this appeal to protest his written and oral reprimands and performance evaluations.

Again, unlike a court, the State Personnel Board of Review has jurisdiction only when it has been explicitly conferred upon it by the Ohio General Assembly. Ohio Revised Code Section 124.03 grants this Board authority to review suspensions of more than three days, removals, reductions, layoffs and abolishments. Suspensions of three days or less are not appealable to the State Personnel Board of Review, pursuant to Ohio Revised Code Section 124.34. Only suspensions in excess of three days are appealable, see *Gillard v. Norris* (1988), 857 F.2d 1095; *Rapier v. Darke County Board of Mental Retardation and Developmental Disabilities* (Mar. 10, 1993), Franklin Co., No. 92-CV-09-7589, unreported. Along this line of reasoning neither are annual performance evaluations reviewable by this Board, as well as written and oral reprimands.

Therefore, I respectfully **RECOMMEND** that the instant appeals be **DISMISSED** for lack of subject matter jurisdiction and the Appellee's motion to dismiss these appeals be **GRANTED**, along with Appellant's failure to comply with you requirements set forth in O.A.C. 124-11-07 (A)(2) and (C), along with the State Personnel Board or Review **TERMINATING** these investigation requests for lack of jurisdiction, as well.

Christopher R. Young
Administrative Law Judge

CRY: