

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Michelle McCoy,

Appellant,

v.

Case Nos. 2012-REM-05-0086
2012-WHB-05-0087

Department of Youth Services, Central Office,

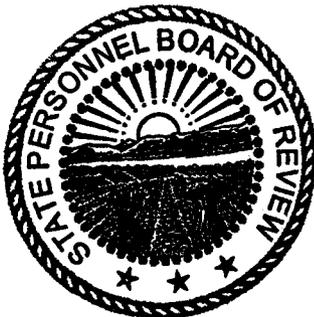
Appellee.

ORDER

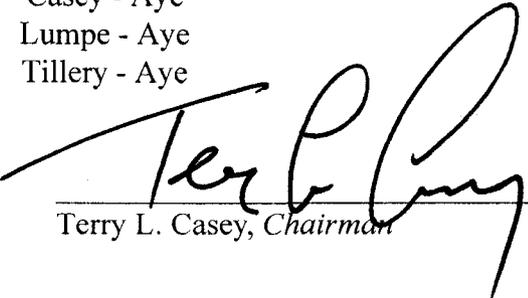
These matters came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

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 Appellee's Motion for a Directed Verdict is **GRANTED** and Appellee's **REMOVAL** of the Appellant from her position of Youth Specialist is **AFFIRMED**, due to the Appellant's failure to produce a written report, and by failing to demonstrate a causal connection between her filing of the alleged whistleblower report and her probationary removal from her position, pursuant to Ohio Revised Code Section 124.341(D).



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, February 13, 2014.



Erin E. Conn
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**

Michelle McCoy,

Appellant

v.

Department of Youth Services,
Central Office

Appellee

Case Nos. 2012-WHB-05-0087
2012-REM-05-0086

November 22, 2013

Christopher R. Young
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on November 1, 2013 at 10:00 a.m. and concluded upon the granting of Appellee's motion for directed verdict after the Appellant had put on her case-in-chief. The Appellant, Michelle McCoy, appeared at the hearing, and was represented by Daniel H. Klos, Attorney at Law. The Appellee, the Ohio Department of Youth Services, Central Office, was present through its designee, Ms. Shannon Komisarek, the Deputy Superintendent of Direct Services of the Scioto Juvenile Correctional Facility and was represented by Mr. Timothy M. Miller and Ms. Wendy K. Clary, both Assistant Attorney Generals.

For clarification, the Appellant was probationary removed from her position as a Youth Specialist at the Scioto Juvenile Correctional Facility on or about April 30, 2012, without the benefit of having been served with an Ohio Revised Code Section 124.34 Order of Removal. Further, the parties agreed that the Appellant filed the instant removal and whistleblower appeals to this Board on or about May 7, 2012, in a timely fashion. Moreover, the following joint stipulation of facts was entered into, as well.

(1) on or about April 5, 2012, Appellant submitted a hand written document to Department of Youth Services (DYS) Security Administrator Keith Williams containing the statement that fellow DYS staff was bringing contraband, including drugs and "black and mild" cigars into the Scioto Juvenile Correctional Facility; and,

(2) despite efforts to locate said hand-written document, DYS has been unable to do so.

Consequently, this case concerned an appeal from a *probationary removal* with the Appellant asserting she was removed as result of filing a whistleblower report. This Board lacks jurisdiction over probationary removals under Ohio Revised Code Section 124.27(C), but can consider them in context of a whistleblower appeal filed under Ohio Revised Code Section 124.341. As a result, both of the above captioned appeals were consolidated into the one hearing.

The issues presented at the November 1, 2013, record hearing was to determine whether the Appellant, Ms. Michelle McCoy, met the procedural and substantial requirements to establish a *prima facie* "Whistleblower" case. Those requirements that were needed to be met were outlined in the undersigned's Procedural Order dated May 8, 2013, under Ohio Revised Code Section 124.341, as follows:

Ohio Revised Code Section 124.341 reads in pertinent part:

(A) If a state employee in the classified or unclassified civil service becomes aware in the course of his 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 his 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, report it to the appropriate ethics commission.

(B) Except as otherwise provided in division (C) of this section, no state officer or state employee shall take any disciplinary action against a state employee 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;

(C) A state employee shall make a reasonable effort to determine the accuracy of any information reported under division (A) of this section. The employee is subject to disciplinary action, including suspension or removal, as determined by the employee's appointing authority, for purposely, knowingly, or recklessly reporting false information under division (A) of this section.

(D) If an appointing authority takes any disciplinary or retaliatory action against a classified or unclassified employee as a result of the employee's having filed a report under division (A) of this section, the employee's sole and exclusive remedy, notwithstanding any other provision of law, is to file an appeal with the state personnel board of review within thirty days after receiving actual notice of the appointing authority's action. If the employee files such an appeal, the board shall immediately notify the employee's appointing authority and shall hear the appeal. The board may affirm or disaffirm the action of the appointing authority or may issue any other order as is appropriate. The order of the board is appealable in accordance with the provisions of Chapter 119. of the Revised Code.

As can be seen from reading the above noted provisions of Ohio Revised Code Section 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 misuse of public resources, or 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, as a result of having filed said report, and show a *causal connection* between the two.

The order and presentation of witnesses and burdens of proof were explained to all counsel involved and to the Appellant prior to the start of the record hearing.

FINDINGS OF FACT

The Appellant, Ms. Michelle McCoy, first testified as on direct examination in her case-in-chief. The witness explained that she was hired on November 7, 2011, as a Youth Specialist, was given a position description, and was subsequently removed on April 30, 2012, during her one-year probationary period. The witness then identified Appellee's Exhibit 4 as a letter dated April 23, 2012, she received on or about April 30, 2012, informing her that she was probationarily removed from employment as a Youth Specialist for not adequately discharging the duties of her assigned position. When questioned, the witness explained she received no other document and explained that as a Youth Specialist she could not investigate contraband, arrest and or subpoena anybody as part of her duties. Further, the witness testified that it is her understanding that bringing drugs into the facility is a criminal offense.

Ms. McCoy testified that at the end of March 2012 several youth told her that three staff members were bringing contraband in to the facility, but that she did not personally observe this happening. Ms. McCoy testified that she then notified Mr. Keith Williams, the Operations Administrator on or about April 5, 2012 about what she learned. The witness explained when questioned, that she told Mr. Williams who was bringing the drugs in, when and how and where they were being put to avoid detection. However, the witness testified that she did not know if this was actually investigated. Moreover, when asked what Mr. Williams told you to do at that time, the witness testified that he did not say anything. Further, the witness testified that she never saw any report that was made by Mr. Williams, nor did she sign it.

The witness then recalled the circumstances which surrounded the incident which occurred on or about April 1, 2012, when she was working on the Buckeye unit. The witness explained that she had worked on first shift that morning at the Cedar unit for eight hours and was told to go work on the Buckeye unit or mandated to go do the same for an additional eight hours that day from 2 PM to 11 PM. The witness explained that when you come on to the unit, as a Youth Specialist, one should count each juvenile and lock the corresponding doors, if necessary. However, the witness testified that when she came on to the Buckeye unit that day, she assumed that the count had already been done.

The witness then identified Appellee's Exhibit 3, as a letter dated April 10, 2012, from Ms. Shannon Komisarek to Ms. Rochelle Jones, the Bureau Chief of Human Resources and Labor Relations, seeking the probationary removal of Ms. McCoy. The witness noted that it appears in the first paragraph that she was removed for breaking rule 5.09P, any violation of Ohio Revised Code Section 124.34, but explained that she was not told of this, but only that she was being removed because of the incident which occurred on Buckeye unit on April 1, 2012. When looking at the second paragraph of Appellee's Exhibit 3, Ms. McCoy explained that she did not talk to any youth in the social workers office, as stated in the letter. When questioned, the witness testified that Ms. Mc Canochie, her co-worker leaned on the social workers office door, discovered the open, and saw that the phone was off of the hook, and replaced it. Ms. McCoy stated that she never entered Ms. Mitchell's office, the social workers office in question. Moreover, the witness explained that Ms. Mc Canochie then notified the Operations Manager, Mr. Price, that the door was unlocked who said he would secure the door, as they did not have keys to the social workers office. When questioned, the witness testified that she was never asked to prepare any written report regarding the discovery that the social workers office door was open. Further, Ms. McCoy stated that proper protocol for discovering the open door would be for one to enter it into a log book, which was not done, as Mr. Price said that he would take care of it.

With respect to Appellee's Exhibit 3, the second paragraph thereof, the statement that "six are seen entering the office and using the phone", the witness explained that she did not see this occur. Further, the witness testified that a co-worker had later told her that youth have climbed into the ceiling to get into the social workers room before, and the door can be unlocked from the inside, as well. The witness testified that she's never seen the video in question at today's hearing.

On cross-examination, the witness then identified Appellee's Exhibit 11 as post orders for the Buckeye unit in place during April 2012. When questioned, the witness testified that she is supposed to review and know the work duties contained therein, specifically the operating procedures, methods and guidelines for the post. Further, when questioned, with respect to page 3 of said document the witness agreed that under security checks all youth room doors, office stores and group room doors are to remain secured at all times. Moreover, with respect to page 4 of said document, paragraph 4, the witness testified that it was her understanding that security rounds are to be conducted a minimum of twice per shift and noted in the log book, and that the youth specialist shall immediately notified the on-duty operations manager of any discrepancies found while conducting security checks. Furthermore, with respect to page 4 of said document, paragraph 9, the witness agreed, when questioned, that as a Youth Specialist she is supposed to pay attention to what the youth are doing and to ensure that all unit doors are locked and secured out at all times. The witness also explained that only one youth are to be in a room at one time so as to not allow them to fight, as a security measure. When questioned, the witness explained that when she went to work at the Buckeye unit, it was on second shift, from 2 PM to 11 PM, or from 1400 hrs. to 2300 hrs. military time.

Everyone in attendance at the hearing including, the witness, examined and viewed the DVD recording of the activities in the Buckeye unit on April 1, 2012, starting at 8:25 PM, or 2025 military time, running until 9:48 PM or 2148 military time. When questioned, the witness explained that from the camera angle viewing from the desk back down the hallway there were three doors on the right; the first right door being the seclusion room; the second right door being the mop room; and the last right door the social workers door, Ms. Mitchell's room, and on the left side of the hallway the last door, and only door, was to the laundry room, and at the very end of the hall was a doorway to the next unit. Further, there was another camera at a different angle which showed from the door going into the other unit looking down the hallway the other way, just reversed. Furthermore, there was a convex mirror positioned in front of the youth specialist desk area in order for when one is sitting at that desk, one can see down the hallway in question.

When reviewing the DVD various youth were walking in and out of these rooms from 2025 military time to 2148 military time, unescorted for the most part, going into already unlocked doors and getting into the social workers office apparently to make unauthorized phone calls. At one point a couple of the youth

were seen going into the social workers office for one half hour each during this DVD recording without any Youth Specialist questioning their whereabouts or noting it in any log book. The witness agreed when questioned that there were two unescorted youth exiting the hall one time that they shouldn't have been there, nor was the laundry room door locked. Additionally, during this DVD recording, youth were also seen entering the unlocked mop room, the unlocked seclusion room, the unlocked laundry room and the unlocked social workers office, all in violation of DYS policy. Moreover, when specifically questioned regarding when she saw a youth exiting the social workers office, she did not do anything. Furthermore, at one point when both the Appellant and Ms. Mc Canochie discovered the laundry room door unlocked, both spent a minute or two searching the laundry room, as opposed to when they discovered the social workers office door unlocked with the phone off the hook, they did not look or appeared to have searched the room thoroughly, which was more of a security threat.

The witness when questioned testified that she was not given a pre-disciplinary hearing, nor which was she interviewed. The witness identified Appellee's Exhibit 4 as a letter dated April 23, 2012, which she signed on April 30, 2012, which stated that she was being probationarily removed. The witness then identified Appellee's Exhibit 2, as a document which she acknowledged as the general work rules of DYS, while agreeing that an employee serving in their initial probationary period may be removed from their position for a violation of any rule. With respect to page 5 of said document under paragraph D "responsiveness", the witness testified that failure to respond to situations that jeopardize the safety and security of the institution shall result in discipline. When questioned, the witness agreed that youth can't make unsupervised phone calls because that within itself creates a security risk. With respect to page 5 of 9 on Appellee's Exhibit 2, noting work rule 5.09P the witness agreed that this rule was for any violation of Ohio revised code section 124.34. The witness testified that work rule 5.11P was for failure to immediately report and/or investigate a violation of any departmental work rule, policy or procedure. The witness testified that work rule 5.13P was for any act or omission not otherwise set forth herein which constitutes a threat security of the facility, staff or any individual under the supervision of the Department. Lastly, on page 6 of 9 on Appellee's Exhibit 2, noting work rule 5.28P, the witness agreed that this rule was for failure to follow work assignment or the exercise of poor judgment in carrying out an assignment. When questioned, the witness agreed that when leaving youth unaccounted for over an hour would be a violation of this rule.

Additionally, the witness noted that on page 6 of 10 and 4 of 9 of Appellee's Exhibit 2 regarding some of the rules on contraband, the witness agreed that the transporting or carrying contraband into the grounds of any institution is against DYS policies and/or procedures. When questioned, the witness testified respect to her earlier testimony that several youth had told her about some co-workers bringing contraband into the institution that occurred sometime in late March 2012 she could have gone to her Operations Manager on duty to report that when she became aware of that situation, before she went on April 5, 2012, to tell the Operations Administrator, Mr. Williams. Specifically, when questioned, the witness testified that she never wrote that information out or signed any document.

The witness then identified Appellee's exhibits 5, 6, 7, 8, 9 and 10, as a series of standard operating procedures; regarding searches, facility entrance, search of employees, search of youth, search of visitors and area searches, all which she acknowledged and was familiar with.

On redirect examination, the witness testified that with regard to searching employees, she as a Youth Specialist cannot search employees upon probable cause. Further, the witness testified that while she does have a key to laundry room, there is no requirement for her to write down an incident report if the door is unlocked. Additionally, the witness testified that she did witness Mr. Williams write down her concerns, and that he told her that he would write something up for her to sign, but that he ever did.

On re-cross examination, the witness testified that she is still under a duty to report contraband if it is being brought into the institution.

Appellant's second witness to testify was Ms. Crystal Mc Canochie, a co-worker and fellow Youth Specialist who was also employed at DYS who was also probationarily removed in connection with the same incident. When questioned, witness testified that on or about April 1, 2012, she along with Ms. McCoy, were working on the Buckeye unit working that second shift. The witness testified that with respect to entering the social workers room, she did, as a door was unlocked. The witness testified she didn't see anybody in the room, the phone was off the hook, and that she placed the phone back on the hook. When asked where Ms. McCoy was during this period of time, the witness testified that she was in the doorway, but did not fully enter into the room. The witness testified that she was going to call Mr. Price, the Operations Manager that day to tell them that social

workers room was unlocked and the phone was off of the hook. The witness testified that Mr. Price had told her that he was going to come down and take care of it. Further, when questioned, the witness testified that she was not given an opportunity to give a statement before she was probationarily removed.

On cross examination, the witness testified that she had seen the social workers door open and unlocked at two different times during the second shift, once being around 7 PM and the other one around 9 PM with Ms. McCoy present. The witness testified that she did not "search the room", but that she did search the laundry room. Further, when questioned, the witness testified that Mr. Price did not come onto the unit before the shift ended. Moreover, when questioned, the witness testified that she could not remember if she wrote an incident report or entered it into the log book, but that she should have.

CONCLUSIONS OF LAW

At the end of the Appellant's case in chief, the undersigned upon Motion for a Directed Verdict by Appellee's counsel, GRANTED said motion. For the reasons set forth below, is the rationale for the reasons for the dismissal of the Appellant's appeal.

The case presented this Board with the question of whether this Board should affirm the actions of the appointing authority, where its employee has not met her *prima facie* burden of proof under Ohio Revised Code Section 124.341, and where the appointing authority has also satisfied the minimal threshold necessary to uphold a probationary removal under Ohio Revised Code Section 124.27(C). Based upon the findings set forth, above, and for the reasons set forth, below, this Board should answer this question in the affirmative; since, in this case, the Appellant has failed to establish that she actually filed a written report, by a preponderance of the evidence, contrary to the stipulation that was in into, and that a *causal* connection existed between her filing of the alleged "whistleblower" report and her removal from her Youth Specialist position.

In the case at hand, it was clear from the record that the Appellant did not meet the procedural and substantive requirements to establish a *prima facie* case. In this case, the Appellant failed to establish that she actually filed a written report, by a preponderance of the evidence, contrary to the stipulation that was in into.

Quite to the contrary, the evidence revealed that the Appellant only stated to Mr. Keith Williams, the Operations Administrator, that three individuals were bringing contraband into the institution, a fact she learned from an incarcerated and felonious convicted youth, without her direct knowledge, upon which Mr. Williams was going to write up a statement for her to sign, to which she testified that she never did.

In order to invoke the jurisdiction of the State Personnel Board of Review and the protection of Ohio Revised Code Section 124.341, a state employee must show: (1) a written report; (2) transmitted to his/her supervisor, appointing authority, the state inspector general, or other appropriate legal official which; (3) identifies a violation of state or federal statute, rule, or regulation or misuse of public resources. (See *Haddox v. Ohio State Attorney General* 2008 Ohio 4355) Further, in *Haddox* it was held that the burden of meeting the procedural requirements of a whistleblower statute is on the employee, who bears the burden of demonstrating by a preponderance of the evidence the existence of a written report filed with the appropriate supervisor or other named authority and providing sufficient detail to identify describe the alleged violation. In this case, the Appellant never produced a written report, contrary to the stipulation that was entered into by prior counsel for the Appellee.

Assuming *arguendo* that the above burden of providing a written report was met, which the undersigned does not agree with, the employee also bears the burden of establishing that the alleged retaliatory termination was in fact retaliation for the whistleblower's protected activity, rather based upon some other aspect of job performance. Again, the facts bore out in this matter that **prior** to reporting the alleged whistleblower oral communication to Mr. Williams on April 5, 2012, on April 1, 2012, Ms. McCoy was recorded via video tape that she was not performing her job up to the standard operating procedures laid forth by the Ohio Department of Youth Services. Additionally, with Ms. McCoy being removed as a probationary employee for unsatisfactory performance, a fellow co-worker, Ms. Mc Canochie, who was also recorded on videotape being neglectful in her work, was also probationarily removed. With respect to the Appellant not performing her job up to the standard operating procedures laid forth by the Ohio Department of Youth Services the evidence revealed that she was not mindful and/or aware of various doors being unlocked, and rooms being occupied at times, by youth under her control, a violation of the rules, wherein she was neglectful in her duties.

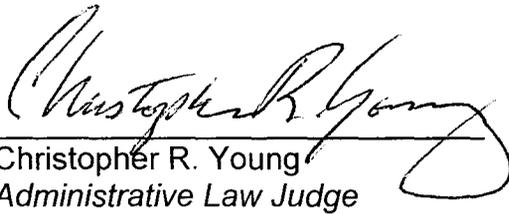
Furthermore, in the holding of *Haddox* it was also found that reporting in connection with one's assigned normal duties is not a protected closure covered by the Whistleblower Protection Act, 5 U.S.C.S. Section 2302. Again, even if one were to construe that the oral reporting of the Appellant to Mr. Keith Williams, the Operations Administrator, not her direct supervisor, was considered meeting the notification requirement covered under the whistleblower statute, it still should not have been a protected disclosure, as reporting someone bring in contraband into the institution is a required activity by any employee under the employ of the Ohio Department of Youth Services. While the design of the Whistleblower Protection Act is to protect government employees who risk their own personal job security for the advancement of the public good by disclosing abuses by governmental personnel, *Willis v. Dept. of Agriculture* (Fed. Cir., 1998), 141 F.3d 1139, 1144, it still cannot alleviate the fiduciary obligation which every employee owes their employer. Again, for the Appellant to simply report something that she should have as part of her duties, that within in itself doesn't rise to a protected status.

Again, assuming *arguendo* that the above burden of providing a written report was met, which the undersigned does not, the Appellant in her case-in-chief did not establish a *causal connection* between her alleged whistleblower reporting and her being removed. There was not one bit of evidence showing that the Appellant's reporting of an alleged whistleblower activity lead to her being probationarily removed, but only left one to make an inference. The evidence failed to show that there was a *causal connection* between the two.

The General Assembly has not permitted employees who are probationary removed under Ohio Revised Code Section 124.27 to appeal to this Board. Thus, one may reasonably conclude that the level of dissatisfaction that the appointing authority must have to effectuate a probationary removal need only being at a *de minimis* level or slightly higher. To put this another way, the evidence necessary to justify probationary removal for "unsatisfactory service" is simply not comparable to the level of dissatisfaction (and corresponding proof) that the only authority would have to have to justify the removal of the classified employee who had successfully completed his or her probationary period. In this case, the Ohio Department of Youth Services demonstrated its dissatisfaction with the Appellant's service during her probationary period, by her actions or inactions as the case may be.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **GRANT** the Appellee's Motion for a Directed Verdict and **AFFIRM** Appellee's **REMOVAL** of the Appellant from her position of Youth Specialist, due to the Appellant's failure to produce a written report, and by failing to demonstrate a *causal connection* between her filing of the alleged whistleblower report and her probationary removal from her position, pursuant to Ohio Revised Code Section 124.341(D).



Christopher R. Young
Administrative Law Judge

CRY: