

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

MATTHEW FRENCH,

Appellant,

v.

Case No. 12-WHB-05-0100

OHIO STATE UNIVERSITY,

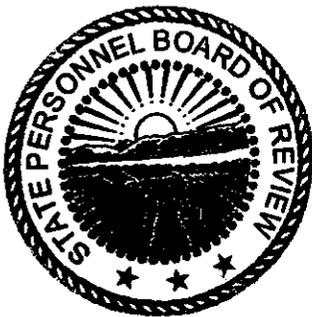
Appellee

ORDER

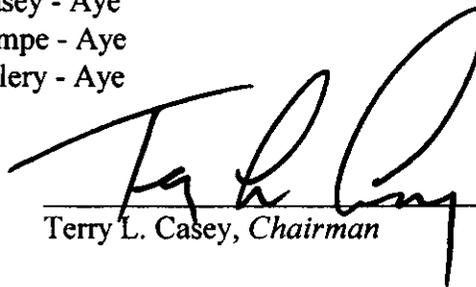
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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



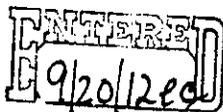
Casey - Aye
Lumpe - Aye
Tillery - Aye


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, September 20, 2012.




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**

Matthew French,

Case No. 12-WHB-05-0100

Appellant

v.

July 24, 2012

Ohio State University,

Jeannette E. Gunn

Appellee

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 17, 2012. Appellant indicated in his response to this Board's June 4, 2012, Procedural Order and Questionnaire that he had filed two written reports pursuant to R.C. 124.341(A) with his supervisor, specifically an email addressed to Jason Walsh dated April 29, 2011, and an email addressed to Deborah Kyser dated May 8, 2011. Appellant provided a copy of the email messages and indicated that he believed that the conduct he reported constituted patient abuse, as described by R.C. 2903.34(A)(1) and (2).

Appellant alleged that co-workers in the emergency department took retaliatory action against him as a result of his reporting activities on October 4, 2011, by neglecting to provide timely care for a co-worker he had accompanied to the emergency room. He further alleged that his termination effective May 2, 2012, was retaliatory discipline resulting from his "whistleblowing" activities.

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.R.C. 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.R.C. 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 properly reported an alleged violation or violations of state or federal statutes, rules, or regulations, or misuse of public resources that he became aware of during the course of his employment, and the employee must demonstrate that one or more prohibited retaliatory actions were taken by Appellee.

In response to this Board's June 4, 2012, Procedural Order and Questionnaire, Appellant indicated that he filed two written reports with his supervisors in the form of emails dated April 29 and May 8, 2011, respectively, and provided copies of those emails. In his April 29, 2011, email Appellant described the treatment of two patients in the OSU emergency department – one incident occurred on the evening of April 28, 2011, and the other incident occurred two or three weeks prior to that date. In his May 8, 2011, email Appellant described a security officer's actions involving the restraint of a patient in the lobby of the emergency department.

Upon a review of the documents provided in support of Appellant's assertion, I find that Appellant did not identify a violation or violations of a state or federal statute, rule, or regulation, or the misuse of public resources in his emails. Appellant noted in his April 29, 2011, email that he believed the conduct he observed was "unethical" and constituted "borderline patient abuse." In his May 8, 2011, email, Appellant opined that the security officer's response was "uncalled for." Although he referenced employee behavior which was clearly of a troubling nature, Appellant did not assert that the conduct rose to the level of a violation of state or federal statutes, rules, or regulations. Appellant has failed to demonstrate his compliance with the reporting requirements of R.C. 124.341 and to establish a *prima facie* case, consequently, this Board lacks jurisdiction to consider the instant appeal.

Therefore, I respectfully **RECOMMEND** that this appeal be **DISMISSED** for lack of jurisdiction.


Jeannette E. Gunh
Administrative Law Judge

JEG: