

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

WILLIAM POLT,

Appellant,

v.

Case No. 12-WHB-08-0182

DEPARTMENT OF REHABILITATION & CORRECTION,
SOUTHEASTERN CORRECTIONAL INSTITUTION,

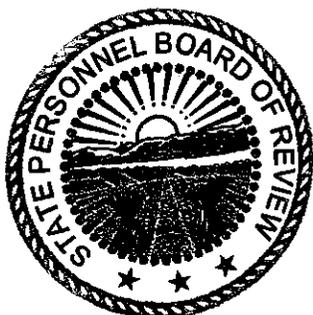
Appellee

ORDER

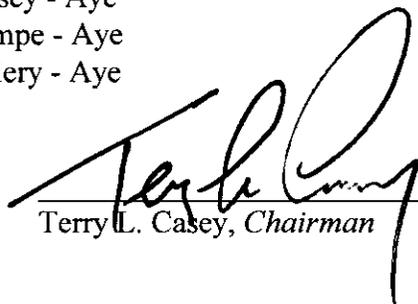
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Appellee's Motion to Dismiss is granted and this appeal is **DISMISSED**.



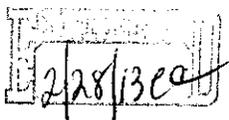
Casey - Aye
Lumpe - Aye
Tillery - Aye

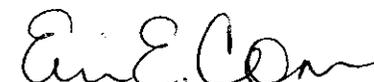

Terry L. Casey, *Chairman*

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 28, 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**

William Polt

Case No. 12-WHB-08-0182

Appellant

v.

December 13, 2012

Department of Rehabilitation & Correction,
Southeastern Correctional Institution

Appellee

Marcie M. Scholl
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter comes on for consideration due to the filing of an appeal by Appellant Polt on August 9, 2012. In his notice of appeal, he checked the box marked "Retaliatory Discipline Whistleblower". On September 21, 2012, this Board issued a Procedural Order and Questionnaire to Appellant Polt with regard to the documents he filed to claim whistleblower protection. Appellant Polt responded on October 5, 2012. In his response, he stated he sent an email on April 29, 2011 to Warden Sheri Duffey and on June 3, 2011 and July 20, 2012, completed two incident reports. He attached copies of the email and the incident reports. On November 16, 2012, Appellee filed a Motion to Dismiss. Appellant Polt responded verbally at the hearing in this matter and in a companion reduction case.

In looking at the statute governing "whistleblower" appeals, section 124.341 of the Ohio Revised Code, the pertinent part of the statute states as follows:

(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. In addition to or instead of filing a written report with the supervisor or appointing

authority, the employee may file a written report with the office of internal auditing created under section 126.45 of the Revised Code.

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, appointing authority, or the office of internal auditing, 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. (Emphasis added).

As can be seen from reading the provisions of R.C. 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 the misuse of public resources**, or, in 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 against the employee as a result of the employee's filings. Appellee argues Appellant Polt did not satisfy the requirements.

In *Haddox v. Ohio State Attorney General*, (Franklin 2007), 06CVF-08-10391, the Franklin County Court of Common Pleas restated these conditions as prerequisites to whistleblower jurisdiction under R.C. 124.341. The court in *Haddox* noted that "[j]urisdiction to invoke whistleblower protection requires that the whistleblower show that she 1) made a written report, 2) transmitted the written report to her supervisor, appointing authority, the state inspector general, or other appropriate legal official; and 3) identified a violation of state or federal statute, rule, or regulation, or misuse of public resources in the report." See *Haddox v. Ohio State Attorney General*, (Franklin 2007), 06CVF-08-10391, (citing *Wade v. Ohio*

Bureau of Worker's Compensation, 1999 Ohio App. LEXIS 2614, Franklin App. No. 98AP-997 (June 10, 1999) unreported citing to *State ex rel Cuyahoga Cty. SPBR*, 82 Ohio St. 3d 496, 696 N.E.2d 1054 (1998) and to *Chubb v. Ohio Bur. Of Worker's Comp*, 81 Ohio St. 3d 275, 690 N.E.2d 1267 (1998)).

The *Haddox* court went on further to explain that "the requirement of a written communication, specifically addressed to an appropriate individual, is an essential element of whistleblower protection and will be strictly applied." *Haddox v. Ohio State Attorney General*, (Franklin 2007), 06CVF-08-10391, (citing *Wade v. Ohio Bureau of Worker's Compensation*, 1999 Ohio App. LEXIS 2614, Franklin App. No. 98AP-997 (June 10, 1999) unreported citing to *Kuch v. Structural Fibers, Inc.*, 78 Ohio St. 3d. 134, 141, 677 N.E.2d 308 (1997)). Therefore, in order to invoke this Board's jurisdiction, an employee must first establish that he or she complied with the reporting requirements of R.C. 124.341.

In looking first at the emails to the Warden, dated April 29 and May 4, 2011, neither email alleges with any specificity the alleged policy being violated. The response from the Warden also indicates that breaks are permitted per contract so it is not clear from the face of the document exactly who Appellant Polt is alleging is violating a policy. Also, the emails are dated over a year from the date of his reduction, so proximity in time must also be viewed. These documents do not qualify as whistleblower documents for all of the above reasons, but primarily because the emails do not allege with any specificity as to what is being violated, when or by whom.

With regard to the incident reports, those are also not whistleblower documents. *Haddox*, supra, also held that an employee who makes a report as part of that employee's normal job duties cannot claim whistleblower protection for making the report. As a Lieutenant, it was within Appellant Polt's job duties to make reports of incidents that he felt were worthy of such a report. The report is not addressed to any one person, as there is a distribution list at the bottom of the report, so it also fails to meet the requirement of filing the report with a particular person.

In accordance with R.C. 124.341 and consistent with case law and similar state and federal procedures, an employee filing a whistleblower appeal is assigned both the burden of proof and the initial burden of production. The employee's initial burden of production includes demonstrating that the employee filed a report with

the appropriate entity specifically fulfilling the requisite reporting requirements of the pertinent whistleblower statute and that thereafter disciplinary retaliatory action was taken against the employee as a result of the employee having filed a report pursuant to that statute.

Accordingly, Appellant Polt has failed to demonstrate that he met the requisite reporting requirements set forth in R.C. 124.341, by failing to allege any specific violations of statute, rule or regulation in his emails and by using documents that he is required to file as part of his job duties as whistleblower documents. Thus, he has failed to meet his prima facie burden and it is my **RECOMMENDATION** that Appellee's Motion to Dismiss be **GRANTED** and that this appeal should be **DISMISSED**.



Marcie M. Scholl
Administrative Law Judge

:mms