

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

ROBERT MACON,

*Appellant,*

v.

Case No. 12-WHB-11-0243

CITY OF CLEVELAND,  
DEPARTMENT OF PUBLIC UTILITIES,

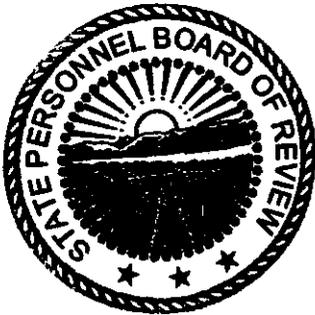
*Appellee*

**ORDER**

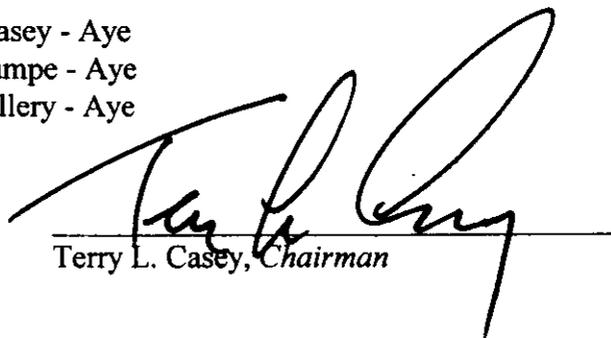
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 appeal is **DISMISSED** for lack of subject matter jurisdiction.



Casey - Aye  
Lumpe - Aye  
Tillery - Aye

  
Terry L. Casey, *Chairman*

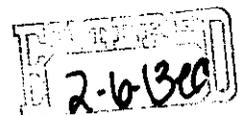
**CERTIFICATION**

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, 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**

Robert Macon,

Case No. 12-WHB-11-0243

*Appellant,*

v.

January 10, 2013

City of Cleveland,  
Department of Public Utilities,

*Appellee.*

BETH A. JEWELL  
*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This matter came on for consideration on January 10, 2013, for a telephone status conference among the Administrative Law Judge, Appellant Robert Macon, and James C. Cochran, Assistant City Law Director, representing Appellee.

I find that Appellant has filed this appeal to redress safety issues he has identified in his employment with Appellee. Appellant submitted a September 28, 2012 Employee Incident Report that he filed with Appellee to report what he describes as unsafe working conditions. Appellant also submitted a copy of an October 25, 2012 letter to Appellee from the Ohio Bureau of Workers' Compensation, Safety and Hygiene Division, concerning a safety report submitted by unidentified employees of Appellee under R.C. 4167.10(B). Appellant's position is that he is a "whistleblower" because he submitted a written report alleging violations of health and safety standards. Appellant appears to believe that by bringing a "whistleblower" appeal before this Board, he can ask this Board to oversee and remedy the safety concerns he has identified.

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.

In a "whistleblower" appeal, the burden of proof remains at all times with Appellant. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 253, citing *Board of Trustees of Keene State College v. Sweeney* (1978), 429 U.S. 24,

25, n.2., 29. Appellant bears the burden of production to establish, by a preponderance of the evidence, the existence of the elements of a *prima facie* case, which are as follows:

1. Appellant must establish that he complied with the requirements of R.C. 124.341 by filing a written report with either his supervisor, appointing authority, or other appropriate official named in that statute, alleging a violation of state or federal statutes, rules, regulations or the misuse of public resources.
2. Appellant must then establish that after he filed such report, the appointing authority took disciplinary or retaliatory action, against him as a result of Appellant having filed the report under R.C. 124.341(A) (*i.e.*, a causal relationship).

Appellant has not identified any disciplinary or retaliatory action taken against him as a result of his filing of the September 28, 2012 written report. Appellant expressed the concern that he may be labeled a whistleblower and then "harassed," but such concerns are merely speculative and prospective, at most, and do not invoke the jurisdiction of this Board.

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

  
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BETH A. JEWELL  
Administrative Law Judge

BAJ: