

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Nazih Darwiche,

Appellant,

v.

Case No. 2013-WHB-06-0163

Kent 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, as well as the parties' submissions at Oral Argument before the Full Board, the Board hereby adopts the Recommendation of the Administrative Law Judge.

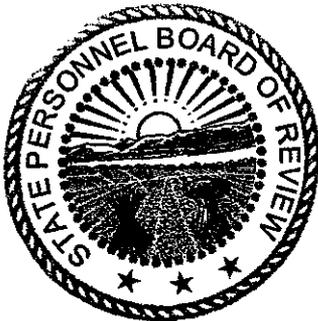
It is noted that Appellant raises very substantive and important issues in his pleadings. However, this Board cannot reach the merits of a whistleblower appeal under R.C. 124.341 unless the procedural prerequisites established by the General Assembly in that Revised Code provision are satisfied. In the instant case, serious questions must be raised concerning the sufficiency of Appellant's asserted whistleblower reporting document(s) and, secondarily, concerning whether Appellant properly filed his report(s) with a person contemplated in R.C. 124.341 to receive such reports. Accordingly, Appellant has not met his *prima facie* burden and, for this reason, the instant appeal must be dismissed.

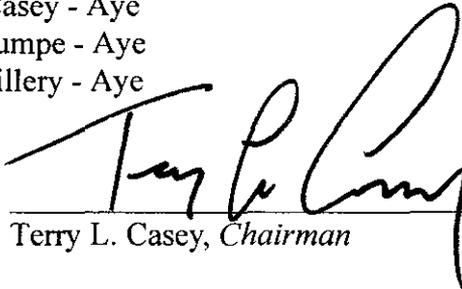
Wherefore, it is hereby **ORDERED** that the instant appeal be **DISMISSED** for Appellant's failure to meet the procedural prerequisites set forth in R.C. 124.341.

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 03, 2014.



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**

Nazih Darwiche,

Case No. 2013-WHB-06-0163

Appellant

v.

May 13, 2014

Kent State University

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

Appellant Darwiche filed a notice of a whistleblower appeal and a Questionnaire was issued by this Board to which Appellant Darwiche responded. In the Questionnaire, Appellant Darwiche was asked if he filed a written report with his supervisor or other pertinent official as set out in section 124.341 of the Ohio Revised Code which alleged violations of state or federal statutes, rules, or regulations or concerning a misuse of public resources. Appellant Darwiche answered that he did file such written report and attached a packet in response to the request for copies of his written report.

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.

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.

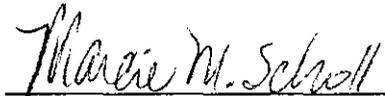
The requirement that the written communication identify a violation of state or federal statute, rule, or regulation, or misuse of public resources has not been met by Appellant Darwiche. Appellant Darwiche fails to identify any violation of state or federal statute, rule, or regulation, or misuse of public resources by Kent State University. Some of the emails which he attached as part of his response were not authored by him but were emails he was copied on. In none of the attachments is there referenced any state or federal statute, rule or regulation which Appellant Darwiche purports to be violated. He mentions the words "federal regulations" but never specifically cites a specific regulation or rule as per the requirement of the whistleblower statute. In those instances, he asks questions about the federal regulations, but does not allege a violation of the "federal regulations" nor of a specific regulation as is required under the whistleblower statute.

In one of his emails, dated March 4, 2013, Appellant Darwiche asks "is SFA in compliance according to Federal Regs?" but again, that is not a report of any violation of the federal regulations. None of the documents provided by Appellant Darwiche contain any reference to any violation of state or federal statute, rule, regulations or the misuse of public resources and as such fail to satisfy the reporting requirements under R.C. 124.341 and *Haddox*.

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 written report with the appropriate entity specifically fulfilling the requisite reporting requirements

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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. Appellant Darwiche 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 or the misuse of public resources. Thus, he has failed to meet his prima facie burden and it is my **RECOMMENDATION** that this appeal should be **DISMISSED**.



Marcie M. Scholl
Administrative Law Judge