

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Bruce E. Goff,

Appellant,

v.

Case No. 2013-WHB-08-0224

Environmental Protection Agency,

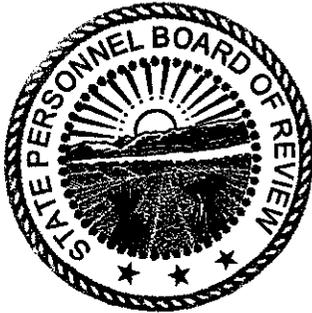
Appellee,

ORDER

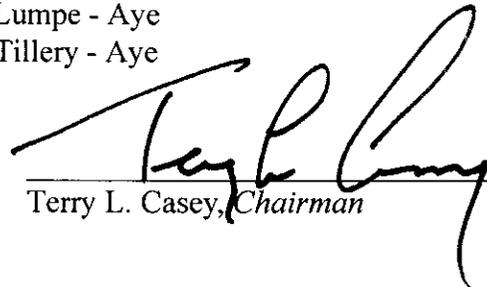
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 this appeal is **DISMISSED**, due to Appellant Goff's failure to meet his prima facie burden.



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, June 20, 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**

Bruce E. Goff

Case Nos. 2013-WHB-08-0224

Appellant

v.

April 18, 2014

Environmental Protection Agency

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on for consideration upon Appellant's Goff filing of an appeal on August 27, 2013; this Board's Procedural Order and Questionnaire mailed to the parties on September 11, 2013; Appellant Goff's response to the Questionnaire, filed on October 1, 2013; Appellee's Motion to Dismiss, filed on December 6, 2013; Appellant's Response to Appellee's Motion to Dismiss, filed on January 27, 2014; and Appellee's Reply to Appellant's Response to Appellee's Motion to Dismiss, filed on January 31, 2014.

Appellant's notice of appeal consisted of a Notice of Appeal form with the boxes "Retaliatory Discipline Whistleblower" checked and the box marked "Other". To that box, Appellant Goff added "Change PD Change of position description-duties". Therefore, two case numbers were assigned to Appellant Goff's appeal.

In response to this Board's Questionnaire regarding the whistleblower appeal filed, Appellant Goff submitted a cover letter and his response to the questionnaire. His cover letter, dated September 29, 2013, states in pertinent part:

I filed no written report thinking the matter would be dealt with, ie. (sic) the company would be investigated for submittal of a false permit application. Next thing I know, I'm re-assigned. No explanation.

In his response to question number three of the questionnaire, which asks if he filed a written report, Appellant Goff responded "No written report." On October 31, 2013, Appellant Goff filed an amendment to his response, asking that several emails from him to his division and to the legal department be included.

In Appellee's Motion to Dismiss and later in its Reply to Appellant's Response to the Motion to Dismiss, Appellee argues that Appellant Goff's responses to the Procedural Order and Questionnaire were untimely and there was no written report filed as required by the statute. The subsequent emails filed by Appellant Goff, Appellee argues, were also untimely and do not allege any specific violation of a rule or statute and were also filed as part of Appellant's Goff's regular duties.

Section 124.341 of the Ohio Revised Code is what is commonly termed as the "whistleblower" statute. It 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.** 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 audit created under section 126.45 of the Revised Code or file a complaint with the auditor of state's fraud-reporting system under section 117.103 of the Revised Code. (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** 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.

Inspecting the first necessary component for whistleblower jurisdiction as set forth in *Haddox*, the record of the present case establishes that Appellant Goff did not file a written report alleging a violation of any statute, rule or regulation. Appellant Goff, prior to seeking legal counsel, filed two documents in which he clearly states in both, "No written report filed". It should be noted that, as Appellee argued, Appellant Goff's response to this Board's Procedural Order and Questionnaire was untimely, as it was due no later than 5:00 p.m., September 27, 2013. Appellant Goff's responses were filed October 1 and October 31, 2013 and no request for an extension of time was filed by Appellant Goff.

In looking at the emails Appellant Goff later submitted in an attempt to have them considered as his "written report", the first one from Appellant Goff, dated April 2, 2013, to Bill Fischbein with copies to Michael Shapiro and Tim Campbell, begins with "Bill: I need a legal opinion." He proceeds to ask questions in the email regarding effluent limits and states there is "no 'official' policy" on this subject. He continues to state that ". . . it seems we are going beyond our authority in 6111." The next email from Appellant Goff, dated April 30, 2013, also addressed to Bill Fischbein and copy to Michael Shapiro, thanks him for his email and ends with "so a new additional question for legal is . . .". The email contains previous versions of a rule and questions regarding the interpretation. What the emails do not contain is any reference to any of state or federal statutes, rules, or regulations. A reference to "6111" is not tied to a state or federal statutes, rule or regulation. On its face, no one knows what "6111" references. More importantly, no allegation is made that anyone at Appellee has violated anything. Appellant Goff uses the term "it seems" but no allegation is made. It must be assumed that Mr. Fischbein is a person in the legal department of Appellee. There is no way of knowing if Michael Shapiro is Appellant Goff's supervisor or not, but even if he was, the email cannot be

construed as a "written report" under section 124.341 of the Ohio Revised Code because it does not allege any violation of any state or federal statute, rule or regulation.

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 Goff has failed to demonstrate that he met the requisite reporting requirements set forth in R.C 124.341, by failing to file written reports and by failing to allege any specific violations of statute, rule or regulation. Thus, he has failed to meet his prima facie burden and it is my **RECOMMENDATION** that this appeal be **DISMISSED**.



Marcie M. Scholl
Administrative Law Judge