STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Marisa Regent,

Appellant,

v.

Department of Health,

Appellee,

Case Nos. 2014-REM-08-0193
2014-MIS-08-0194
2014-INV-08-0229

ORDER

These matters came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

After a thorough examination of the entirety of the records, 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 Appellee's Motion to Dismiss is **GRANTED**, and that the two instant appeals and one Request for an Investigation are **DISMISSED** as a matter of law, pursuant to O.R.C. sections 124.03, 124.328, 124.34 and 124.56.

Casey - Aye
Lumpe - Aye
Tillery - Not Present

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, January 08, 2015.

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

Marisa Regent	Case Nos. 2014-REM-08-0193 2014-MIS-08-0194 2014-INV-08-0229
Appellant	
v.	November 26, 2014
Department of Health	
Appellee	Christopher R. Young *Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

These matters came on for consideration upon Appellee's Motion to Dismiss the above-captioned cases filed on September 19, 2014, upon the Appellant's Memorandum in Opposition (the Answer) to Appellee's Motion to Dismiss filed on October 2, 2014, and upon the Status Conference which was held on November 19, 2014 at 10:00 a.m. attended by all of the parties concerned. In essence, Appellee's Motion to Dismiss states that this Board lacks jurisdiction to consider Ms. Marisa Regent's removal appeal because: (1) Ms. Regent was not removed from a position at the Ohio Department of Health (ODH) and (2) even if she was removed, (a) her appeal was untimely; and (b) her appeal would otherwise be governed exclusively by the OCSEA/AFSCME collective bargaining agreement and its grievance/arbitration procedures. Further, the Appellee states that the Board also lacks jurisdiction over Ms. Regent's Miscellaneous appeal for the same reasons stated above with respect to her removal appeal and because Ms. Regent had not identified any additional grounds for that appeal. Lastly, the Appellee also asserts that this Board does not have jurisdiction over Ms. Regent's Investigation appeal pursuant to O.R.C. section 124.56 because no abuse of power relative to an appointment, layout, reduction, suspension or removal occurred.

For clarification, the evidence and pleadings in the case files, as well as both memorandum for and against Appellee's Motion to Dismiss state essentially the same thing. ODH hired the Appellant, Ms. Marisa Regent, on February 11, 2002 as an Executive Secretary 1. (See Affidavit of Jamie Erickson). On April 2, 2006 Ms. Regent was demoted to the position of Office Assistant 2, a position in the OCSEA/AFSCME bargaining unit. Ms. Regent continued to work as an Office Assistant 2 until her lay off on November 28, 2009. Ms. Regent agreed that she remained in her position as an Office Assistant 2 until she was laid off December 2009. (See statements in Appellant's Notice of Appeal). Further, Ms. Regent applied

for a disability retirement benefit through the Ohio Public Employees Retirement System (OPERS) at or around that time and was granted a disability retirement benefit January 18, 2012 retroactive to December 1, 2009, at or around the same time that she was initially laid off.

On March 21, 2013, OPERS notified ODH that Ms. Regent's disability retirement benefit through OPERS would be terminated effective June 30, 2013. In August 2013, Ms. Regent informed ODH that, subsequent to her layoff, she had applied for and was granted a disability retirement benefit with OPERS. ODH asserts that it was not until August 27, 2013 that ODH learned that OPERS had terminated Ms. Regent's benefits as of June 30, 2013 and that OPERS was advising ODH to reinstate Ms. Regent, which ODH then attempted to do.

In November 2013, Ms. Regent submitted to an IME, and although cleared to work by the physician who conducted the IME, Ms. Regent claimed that her personal physician had not cleared her to work. Ms. Regent then contacted ODH in March 2014 requesting a return to work. As a result, on April 17, 2014, ODH sent a letter to Ms. Regent notifying her that she would be reinstated to an Office Assistant 2's position, effective May 5, 2014. The facts also indicate that prior to May 5, 2014, Ms. Regent contacted Mr. Derek Urban, a Staff Representative of OCESA, who explained to Ms. Regent that ODH had made it clear to OCSEA that they intended to reinstate Ms. Regent on May 5, 2014 and lay her off the very same day. Mr. Urban explained to Ms. Regent that the ODH found it necessary to do this because Ms. Regent's position did not exist and was abolished prior to her going off on a disability retirement benefit. Further, Mr. Urban had explained to Ms. Regent that ODH would be sending two separate letters to Ms. Regent, one letter reinstating her and the other letter notifying her of her layoff. (See statements in Appellant's Notice of Appeal).

Subsequent to receiving ODH's letter of reinstatement sent on April 17, 2014, Ms. Regent telephoned ODH to advise the agency that she would not be returning to work on May 5, 2014. As a result, ODH sent a follow-up letter to Ms. Regent on April 25, 2014 explaining that her failure to report to work on May 5, 2014 would be considered to be a forfeiture of her right to reinstatement. Ms. Regent did not return to work on May 5, 2014.

Ms. Regent filed a Notice of Appeal with this Board on August 4, 2014 checking the "removal" box asserting that she was removed on May 5, 2014 and was notified of said removal on May 1, 2014. The Board also recognized a second appeal from Ms. Regent's August 4, 2014 Notice of Appeal, and identified it as a

"Miscellaneous" appeal. Additionally, on August 19, 2014, Ms. Regent filed a Request for Investigation pursuant to O.R.C. section 124.56.

With respect to Ms. Regent's removal appeal, the Board should find this appeal to be untimely and dismiss it as a matter of law. Ms. Regent's removal appeal should be dismissed because she was not removed, but rather chose not to be reinstated to her Office Assistant 2 position on May 5, 2014. Further, the underlying facts in these cases revealed that if Ms. Regent had been reinstated, she would have been a member of OCSEA and, therefore, subject to the terms and conditions of that collective bargaining agreement, culminating in final and binding arbitration.

The facts indicate that Ms. Regent was never removed from her position via an O.R.C. section 124.34 Order of Removal. Moreover, appeals from no order removals must be filed no later than 30 days after the employee receives actual notice of the action. See O.A.C. section 124-1-03(I). As stated in Ms. Regent's notice of appeal, she received notice of the alleged removal on May 1, 2014, yet filed her appeal on August 4, 2014, ninety-five (95) days after she had received notice. Thus, Ms. Regent's removal appeal is untimely and should be dismissed as a matter of law.

However, as also argued in Appellee's Motion to Dismiss, if Ms. Regent would have been reinstated to the position of Office Assistant 2, a position within the bargaining unit, her only recourse would have been to file a grievance pursuant to the collective bargaining agreement with OCSEA/AFSCME, through final and binding arbitration, if in fact she would have been removed or laid off.

As stated earlier, Appellee asserted that this Board also lacks jurisdiction over Ms. Regent's "Miscellaneous" appeal, due to its not being filed timely and due to issues raised therein that would be covered under a collective bargaining agreement, along with the fact that Ms. Regent had not identified any additional grounds for that appeal. Without Appellant stating any additional grounds/reasons on which to base an appeal, the undersigned finds that the "Miscellaneous" appeal should be dismissed as a matter of law.

O.R.C. section 124.56 sets forth the basis for this Board's subject matter jurisdiction over the Request for an Investigation that Appellant filed. That section provides, in pertinent part,

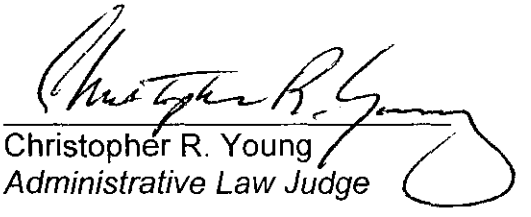
> When the state personnel board of review ... has reason to believe that any officer, board, commission, head of a department, or person having the power of appointment, layoff, suspension, or removal, has abused such power by making an appointment, layoff, reduction, suspension, or removal of an employee under his or their jurisdiction in violation of this chapter of the Revised Code, the board...shall make an investigation, and if it finds that a violation of this chapter, or the intent and spirit of this chapter has occurred, it shall make a report to the governor... The officer or employee shall first be given an opportunity to be publicly heard in person or by counsel in his own defense. The action of removal by the governor, mayor, or other chief appointing authority is final except as otherwise provided in this chapter of the Revised Code.

Consequently, the Appellant's Request for an Investigation under O.R.C section 124.56 must, of necessity, focus upon the actions of the appointing authority with respect to abusing its power. In the instant appeal, the Appellant, in essence, does allege an abuse of authority by the appointing authority in connection to failing to afford her reinstatement rights afforded under O.A.C. section 123:1-30-04.

O.R.C. section 124.56 limits the State Personnel Board of Review's investigatory powers to cases in which an appointment, layout, reduction, suspension, or removal has been made in the derogation of O.R.C. chapter 124. Where a complaint does not allege any of the above stated triggering devices, the State Personnel Board of Review is without jurisdiction to proceed with an investigation. *Okapal v. University of Toledo,* (1982) PBR 82-INV-10-3019 and *Logsdon v. University of Cincinnati*, (1982) PBR 82-INV-08-2690. Reinstatement rights are not covered under this Board's investigatory powers. As can be seen from the Appellant's Investigation Request, none of the Appellant's above stated grounds triggers this Board's investigatory powers.

Appellant has not been subject to an appointment, reduced, laid off, suspended or removed from her position as required by O.R.C. section 124.56 since her lay off in 2009. Further, the evidence revealed that Ms. Regent was not removed from her position but instead chose not to be reinstated to her Office Assistant 2 position, after having been directed to come back to work on May 5, 2014. Thus, since no employment action triggering O.R.C. section 124.56 occurred, the State Personnel Board of Review lacks subject matter jurisdiction over Ms. Regent's Request for an Investigation, and the Investigation Request should be dismissed as a matter of law.

Therefore, I respectfully **RECOMMEND** that the Appellee's Motion to Dismiss be **GRANTED**, and that the two instant appeals and one Request for an Investigation be dismissed as a matter of law, pursuant to O.R.C. sections 124.03, 124.328, 124.34 and 124.56.



Christopher R. Young
Administrative Law Judge