

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

Kevin Whaley,

Appellant,

v.

Case No. 2014-WHB-02-0042

Ohio Veterans Home,

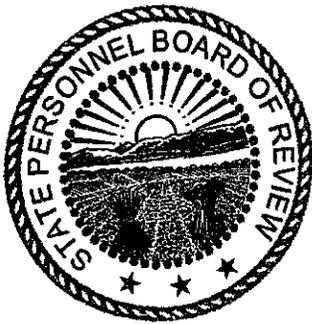
Appellee,

ORDER

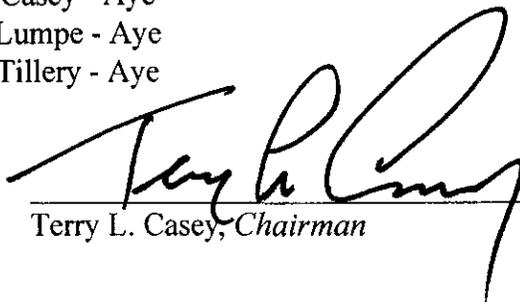
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 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, October 09, 2014.



Emily E. Conner
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**

Kevin Whaley,

Case No. 2014-WHB-02-0042

Appellant

v.

August 29, 2014

Ohio Veterans Home,

Jeannette E. Gunn

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on pursuant to Appellee's Motion to Dismiss, filed with this Board on July 30, 2014. Appellee's Motion was supported by affidavits and documentation as required by O.A.C. 124-11-07. Appellant filed no response to Appellee's Motion to Dismiss.

Appellant was employed by Appellee Ohio Department of Veterans Services (ODVS) Ohio Veterans Home (OVH) in an unclassified Program Administrator 3 position. He was removed from employment with Appellee on January 24, 2014, and appealed to this Board, claiming whistleblower protection pursuant to R.C. 124.341. Appellee asserts that this Board is without jurisdiction to consider the instant matter.

CONCLUSIONS OF LAW

This Board has jurisdiction to consider retaliatory discipline arising pursuant to the proper report of violations of state or federal statutes, rules, or regulations; the misuse of public resources, or OSHA violations. See, R.C. 124.341, 4167.13. In the case at hand, Appellant asserted that his removal constituted retaliatory discipline resulting from his report to the OVH Superintendent of wrongdoing in the OVH Pharmacy.

Case law has established that the framework for the order and presentation of evidence first articulated by the United States Supreme Court in *McDonnell*

Douglas v. Green (1973), 411 U.S. 792, is appropriate in a “whistleblower” appeal brought under O.R.C. 124.341. See, *Leslie v. Ohio Department of Development* (2006), Franklin County No. 05CVF-05-4401, unreported. Accordingly, Appellant bears the burden to prove, by a preponderance of the evidence, that the disciplinary or retaliatory action taken by Appellant’s appointing authority was the result of Appellant making a proper report under the pertinent statute.

Appellant must first establish a *prima facie* case to support his claim under O.R.C. 124.341.

R.C. 124.341 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.

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 or appointing authority, 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.

(B) Except as otherwise provided in division (C) of this section, no officer or employee in the classified or unclassified civil service shall take any disciplinary action against an employee in the classified or unclassified civil service for making any report authorized by division

(A) of this section, including, without limitation, doing any of the following:

- (1) Removing or suspending the employee from employment;
- (2) Withholding from the employee salary increases or employee benefits to which the employee is otherwise entitled;
- (3) Transferring or reassigning the employee;
- (4) Denying the employee promotion that otherwise would have been received;
- (5) Reducing the employee in pay or position.

In order to establish a *prima facie* case, an employee in the classified or unclassified civil service must demonstrate that he or she properly reported an alleged violation or violations of state or federal statutes, rules, or regulations, or misuse of public resources that he or she became aware of during the course of his or her employment, and the employee must demonstrate that one or more prohibited retaliatory actions were taken by Appellee.

In response to this Board's April 16, 2014, Procedural Order and Questionnaire, Appellant indicated that he filed a written report with OVH Superintendent Richard Hatcher on November 19, 2013, in the form of a report of his administrative investigation of Randy Harris. Appellee argued in its Motion to Dismiss that Appellant's report did not constitute "protected activity" under R.C. 124.341, because Appellant's reporting arose in the performance of his normal job duties.

Uncontroverted information contained in the record indicates the following:

At the time of his removal, Appellant was employed by Appellee as a Program Administrator 3. As a Program Administrator 3, Appellant was responsible for, among other things, conducting investigations; conferring with legal, law enforcement and other departmental and governmental personnel concerning cases under investigation; and preparing reports. On September 26, 2013, OVH Superintendent Richard Hatcher assigned Appellant the task of investigating the

possible misconduct of former ODVS Pharmacist Randall Harris. On November 19, 2013, Appellant submitted a report containing his findings in Mr. Harris' investigation to Superintendent Hatcher and to the Director of ODVS through ODVS legal counsel; he identified this report as evidence of his compliance with the procedural requirements of R.C. 124.341(A).

Appellee relies on *Haddox v. Ohio Atty. Gen.*, 10th Dist. Franklin No. 07AP-857, 2008-Ohio-4355, (Aug. 26, 2008) to support its argument that the protections of R.C. 124.341 do not apply in this matter, because Appellant's report was made as part of his normal job duties. The *Haddox* court held that emails and reports made as part of an employee's regular job duties do not constitute whistleblower activity within the meaning of R.C. 124.341(A), noting that to accept otherwise would "transform every disclosure made by a state employee ... into a protected whistleblower activity" and undermine the legislative intent behind R.C. 124.341(A). The court further observed that such a finding would "open the door for all compliance discussions to be viewed as 'reports' that implicate the [Whistleblower] Act." *Id.*

In the matter at hand, the record reflects that investigating and reporting potential wrongdoing was one of Appellant's normal and customary job duties. Applying the Tenth District Court of Appeals' holding in *Haddox* to the facts of the present case, therefore, I find that Appellant's provision of the findings of his assigned investigation of former ODVS Pharmacist Randall Harris to Superintendent Hatcher and, allegedly, other ODVS personnel was not a protected whistleblower activity.

As such, I find that Appellant has failed to provide sufficient evidence to establish a *prima facie* case, and this Board lacks jurisdiction to consider the instant appeal. Accordingly, I respectfully **RECOMMEND** that this appeal be **DISMISSED**.


Jeannette E. Gunn
Administrative Law Judge