

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

Randall Harris,

Appellant,

v.

Case No. 2014-WHB-03-0047

Ohio Veterans Home,

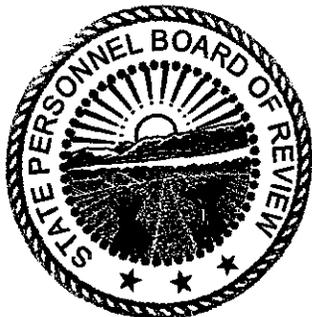
Appellee,

ORDER

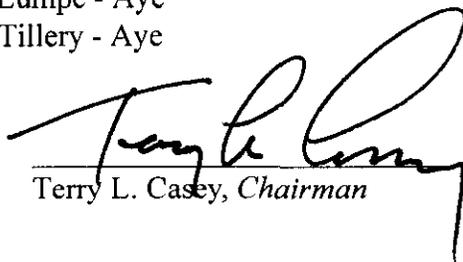
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Appellee's motion is **GRANTED** and the instant appeal is **DISMISSED** because Appellant was unable to meet the requisite burdens in his prima facie case, pursuant to R.C. 124.03 and R.C. 124.341.



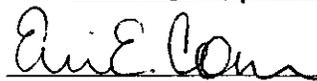
Casey - Aye
Lumpe - Aye
Tillery - Aye


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, March 11, 2015.


Clerk

NOTE: Please see the reverse side of this Order **or** the attachment to this Order for information regarding your appeal rights.

NOTICE

Where applicable, this Order may be appealed under the provisions of Chapters 124 and 119 of Ohio Revised Code. An original written Notice of Appeal or a copy of your Notice of Appeal setting forth the Order appealed from and the grounds of appeal must be filed with this Board fifteen (15) days after the mailing of this Notice. Additionally, an original written Notice of Appeal or a copy of your Notice of Appeal must be filed with the appropriate court within fifteen (15) days after the mailing of this Notice. At the time of filing the Notice of Appeal or copy of your Notice of Appeal with this Board, the party appealing must provide a security deposit to the Board. In accordance with administrative rule 124-15-08 of the Ohio Administrative Code, the amount of deposit is based on the length of the digital recording of your hearing and the costs incurred by the Board in certifying your case to court. The length of the digital recording, the costs incurred, the corresponding amount of deposit required, and the final date that the Notice of Appeal or copy of your Notice of Appeal and the Deposit will be accepted by this Board are listed at the bottom of this Notice. If a full or partial transcript of the digital recording has been prepared prior to the filing of an appeal, the costs of a copy of that certified transcript will be accepted by this Board; transcript costs will be listed at the bottom of this Notice.

IF YOU ELECT TO APPEAL THIS BOARD'S FINAL ORDER, THEN YOU MUST PROVIDE THE DEPOSIT LISTED BELOW AT THE TIME YOU FILE YOUR NOTICE OF APPEAL OR COPY OF YOUR NOTICE OF APPEAL WITH THIS BOARD. Please note that the law provides that you have fifteen (15) calendar days from the mailing of the final Board Order to file your Notice of Appeal or copy of your Notice of Appeal both with this Board and with the Court of Common Pleas. The fifteenth day is the date that appears at the bottom of this Notice.

METHOD OF PAYMENT: for all entities other than State agencies, payment of the deposit must be by money order, certified check, or cashier's check. State agencies are required to use the Intra-State Transfer Voucher (ISTV) system (OBM Form 7205), which must be processed prior to the filing of an appeal. To initiate an ISTV, State agencies may call the State Personnel Board of Review Fiscal Office at 614/466-7046.

IF YOU MAINTAIN YOU CANNOT AFFORD TO PAY THE DEPOSIT LISTED BELOW, THEN YOU MUST COMPLETE THE BOARD'S "AFFIDAVIT OF INDIGENCE" FORM. YOU CAN OBTAIN THAT FORM BY CALLING 614/466-7046. THE COMPLETED AFFIDAVIT MUST BE RECEIVED BY THIS BOARD ON OR BEFORE March 18, 2015. You will be notified in writing of the Board's determination. If the Board determines you are indigent, you will be relieved of the responsibility to pay the deposit to the Board. However, if the Board determines you are NOT indigent, then YOU MUST FILE YOUR NOTICE OF APPEAL OR A COPY OF YOUR NOTICE OF APPEAL AND PAY THE DEPOSIT BY THE DATE LISTED BELOW.

If you have any questions regarding this notice, please contact the Board at 614/466-7046.

Case Number: 2014-WHB-03-0047

Transcript Costs: \$405.00 Administrative Costs: \$25.00

Total Deposit Required: * \$430.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: March 26, 2015

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

Randali Harris

Case No. 2014-WHB-03-0047

Appellant

v.

February 4, 2015

Ohio Veterans Home

James R. Sprague

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came on for record hearing on October 21, 2014. This matter was initially scheduled for three consecutive days of record hearing, beginning on October 21, 2014 and ending on October 23, 2014. However, as explained, below, only one of those days was utilized.

Appellant was present at the October 21, 2014 record hearing and was represented by Michael A. Moses, Attorney at Law. Appellee, Ohio Veterans Home (OVH) [a component of the Ohio Department of Veterans Services-ODVS], was present through its designee, Fred Stratmann, then-Interim Superintendent of OVH and ODVS General Counsel. Appellee was represented by Amanda L. Scheeser and E. Joseph D'Andrea, Assistant Attorneys General.

Respective counsel are to be commended for their performances on behalf of their respective clients in this matter.

On March 3, 2014, Appellant timely filed the instant "whistleblower" appeal (R.C. 124.341) contesting his removal from his Pharmacy Operations Manager position with OVH, notice of which was dated February 10, 2014 and effective February 11, 2014.

Appellant did not dispute that his position fell within the unclassified service. However, he asserted that he had fallback rights. Appellant further asserted that he was removed as a result of filing written reports identifying issues alleged to have been present at the OVH pharmacy. Appellant claims the protections offered to such filers by R.C. 241.341, Ohio's "whistleblower statute" covering employees of the State of Ohio.

It is noted that R.C. 5907.02 provides that the Superintendent of the OVH may serve as the appointing authority for the OVH and reads, at paragraph 3.:

The director shall appoint a superintendent of the Ohio veterans' homes upon any terms that are proper, and the superintendent, with the advice and consent of the director, shall employ aides, assistants, and employees, and perform other duties that may be assigned to the superintendent by the director or become necessary in the carrying out of the superintendent's duties. The superintendent shall be responsible directly to the director.

On May 21, 2014, this Board conducted an initial Pre-hearing in this matter. On October 14, 2014, this Board conducted a Telephone Status Conference in this matter. On October 20, 2014, this Board conducted a second Pre-hearing in this matter.

At the October 21, 2014 record hearing, Appellant presented his case-in-chief and called two witnesses.

First to be called was **Kevin Whaley**, who served as an Investigator for the Department of Veterans Services from approximately July 2012 to approximately July, 2014. At the time of record hearing, Mr. Whaley was employed as an Investigator at the Department of Rehabilitation and Correction's Toledo Correctional Institution.

Second to be called was **Randall Harris**, the Appellant in this matter. Appellant began his service with the OVH in July, 1999 as a Pharmacy Supervisor. He was promoted and served in an interim capacity as the Pharmacy Operations Manager beginning in approximately April, 2010. In approximately August, 2010, he began serving in a permanent capacity as OVH's Pharmacy Operations Manager and did so until his removal, effective February 11, 2014.

Appellant rested at the conclusion of his case-in-chief and Appellee moved for a "directed verdict" (read: directed recommendation) regarding this appeal. Appellee based its motion on the asserted premise that Appellant had demonstrated no causal connection between his filing of identified reports and his removal some time later by (then) Interim Superintendent Stratmann.

Appellant contested this assertion. He argued at hearing that the record supported a finding that a report of an investigation conducted regarding various aspects of the OVH pharmacy operation formed the basis for Appellee's removal of Appellant.

Appellant also argued at hearing that his appeal letter *in his companion removal appeal* (SPBR Case No. 14-REM-03-0046) opines:

- 1) The afore-mentioned investigation report was critical of then-current OVH Superintendent Richard Hatcher;
- 2) the report may have partially contributed to Superintendent Hatcher's being asked to resign from his position;
- 3) Fred Stratmann had a personal friendship with Superintendent Hatcher; and
- 4) Mr. Stratmann's alleged connection with Superintendent Hatcher allegedly led Mr. Stratmann to remove Appellant in retaliation for the contributing part the report may have played in Superintendent Hatcher being asked to resign from his position.

Appellee reserved the right to assert that Appellant was removed for cause, in the event that its motion for a directed disposition was denied.

Pursuant to Appellee's motion for a directed disposition, the undersigned determined that Appellant did not include Mr. Stratmann on the witness list for his case-in-chief and provided no other direct testimony at record regarding then-OVH Superintendent Stratmann's motivation in removing Appellant effective February 11, 2014.

Upon examination of the record, it appears that **the only testimonial (or other evidence) offered at the record hearing tying Mr. Stratmann in any way to Appellant was that Appellant introduced himself to Mr. Stratmann**, at a meeting that took place while Appellant still worked at OVH.

Accordingly, as Appellee noted at the conclusion of Appellant's case-in-chief, it appeared that Appellant was unable to tie any of Appellant's identified "whistleblower reports" to Mr. Stratmann, who served as the OVH's appointing authority at the time of Appellant's removal. Yet, to ensure that a thorough review of Appellee's motion for a directed disposition occurred, the undersigned requested that the parties submit expedited briefs focusing on this question.

In their briefs, respective counsel were asked to address whether Appellant had sufficiently demonstrated, during his case-in-chief, that a causal link existed between either Appellant's **February 7, 2011** identified report or Appellant's **August 10, 2012** identified report and Mr. Stratmann's **February 11, 2014** removal of Appellant. (Please see Appellant's Response to Procedural Order and Questionnaire, filed June 30, 2014, setting forth the dates Appellant's asserted whistleblower reports were submitted to Appellee).

On December 16, 2014, Appellee filed Appellee's Motion for Directed Verdict/Motion to Dismiss Harris' Whistleblower Appeal and accompanying Memorandum in Support.

On January 13, 2015, Appellant filed Appellant's Memorandum in Opposition to Appellee's Motion for Directed Verdict/Motion to Dismiss Harris' Whistleblower Appeal and the Affidavit of Buffy Andrews, who was employed at the OVH as a Human Capital Management (HCM) Administrator 2 from January 2012 to January 7, 2014.

On January 26, 2015, Appellee filed Appellee's Reply in Support of Appellee's Motion for Directed Verdict/Motion to Dismiss and Motion to Strike and also pertinent accompanying documents.

Appellant's principal assertion in this case is that then-Superintendent Fred Stratmann was aware of the reports that Appellant claims were R.C. 124.341-compliant and that Mr. Stratmann directly and demonstrably retaliated against Appellant for filing these reports. Appellant further asserted that Mr. Stratmann's motivation to remove Appellant stemmed from Mr. Stratmann's perception that the reports may have partially contributed to Mr. Hatcher's resignation.

Appellant relies on **three areas of presentation** in order to attempt to demonstrate that a causal link existed between Appellant's whistleblower filings and Appellant's subsequent removal.

First, Appellant argues that **the evidence adduced at record hearing** is sufficient to demonstrate (or at least infer) that a causal link was established between Appellant's identified filings and then-Superintendent's Stratmann's removal of Appellant. As noted, above, Appellant was unable to demonstrate at hearing that Mr. Stratmann had *any* contact with Appellant other than Appellant introducing himself at a meeting. Further, Appellant failed to demonstrate at hearing that Mr. Stratmann had knowledge of the whistleblower reports.

Secondly, Appellant argues that, in **Appellant's notice of appeal letter in Appellant's companion case** (SPBR Case No. 2014-REM-03-0046), he asserted that Mr. Stratmann perceived that the alleged whistleblower reports partially contributed to Mr. Hatcher's being asked to resign. Appellant further asserted therein that, because Mr. Stratmann and Mr. Hatcher were friends, Mr. Stratmann retaliated against Appellant for his filings.

The notice of appeal letter cites no particulars to substantiate Appellant's assertions and Appellant was unable to substantiate these allegations at hearing.

Finally, in Appellant's January 15, 2015 filed memorandum in opposition to Appellee's motion to dismiss/motion for a directed verdict, Appellant offered **the Affidavit of Buffy Andrews**, who served as OVH's HCM Administrator 2 for much of the period at issue in this appeal.

The pertinent portions of Ms. Andrews' Affidavit include her assertion that then-Superintendent Stratmann received a copy of the report of investigation conducted by Ohio Department of Veterans Services' Investigator Kevin Whaley, which report contained inquiries from Mr. Whaley to Appellant and Appellant's responses to those inquiries. Further, Ms. Andrews declared that then-Superintendent Stratmann allegedly asked Ms. Andrews if OVH had enough evidence on Appellant for removal.

We take administrative notice that Ms. Andrews was, herself, recently an Appellant before this Board in SPBR Case Nos. 2014-REM-02-0032, 2014-INV-02-0034, and 2014-WHB-02-0054. The Board dismissed these cases when Appellant did not exercise her right to file required responses to this Board's Procedural Orders. There is nothing in the instant record to call the veracity of Ms. Andrews into question. Thus, questioning the evidentiary and procedural value of her Affidavit should not be interpreted as a negative reflection on her truthfulness.

Having so stated, we must note that placing weight on Ms. Andrews' Affidavit at this stage of these proceedings presents this Board with at least three questions.

Is it equitable and efficient to allow Appellant to utilize the Affidavit of Buffy Andrews?

First, we must consider whether Appellant had an opportunity to call Ms. Andrews during Appellant's case-in-chief. Appellant had that opportunity and could have very easily placed Ms. Andrews on his list of witnesses, called her to the stand, and asked her the very questions that would perhaps have yielded the same information offered in her Affidavit.

Appellant did not utilize that opportunity. Allowing Appellant to have the ability to call or otherwise use the statements of Ms. Andrews at this juncture, following Appellant's conclusion of his case-in-chief, allows Appellant to have "two bites at the apple". Doing so would essentially allow Appellant to assess his case-in-chief (after the fact) and then supplement the case with additional testimonial or other evidence favorable to his position.

To allow this type of supplementation at this juncture does not maximize a level playing field. Neither does it promote administrative efficiency to bring

resolution to the parties, in accordance with the procedures set forth in R.C. Chapter 119.

Does O.A.C. 124-9-02 permit Appellant to utilize Ms. Andrews' Affidavit, after Appellant has closed his case-in-chief?

O.A.C 124-9-01 mandates that this Board utilize the Ohio Rules of Evidence for hearing, except as modified by O.A.C Chapter 124.

O.A.C. 124-9-02 governs questions concerning the admissibility of hearsay evidence offered before this Board.

O.A.C. 124-9-02 states:

The board may permit the introduction of evidence otherwise excludable as hearsay. A foundation, establishing both the reliability of the testimony and its necessity, shall be laid before hearsay may be admitted.

There is little argument that the operative statements in Ms. Andrews' Affidavit are hearsay; a number are hearsay within hearsay. The statements contained in Ms. Andrews' Affidavit were not made while the declarant was testifying at the trial or hearing, yet were offered for the truth of the matter asserted. (Please see Evid. R. 801 (C), as amended July 1, 2007). Moreover, Appellee has had no opportunity to cross examine Ms. Andrews or Mr. Stratmann concerning these statements, since the statements were submitted nearly three months *after* Appellant concluded his case-in-chief.

Because the operative statements in Ms. Andrews' Affidavit are either hearsay or hearsay within hearsay, O.A.C. 124-9-02 requires Appellant to establish the reliability of the testimony and its necessity.

Since the declarants at issue in the Affidavit were not examined at hearing, their hearsay statements cannot be considered reliable. Correspondingly, since these declarants were not called during Appellant's case-in-chief, it is difficult to argue that the admission of these hearsay statements is a necessity. Because Appellant has not established the requisite foundation to consider the operative (hearsay) statements contained in Ms. Andrews' Affidavit, these statements should have no evidentiary impact on the instant appeal.

Do the alleged statements of then-Superintendent Stratmann contained in the Affidavit either show or infer a causal connection between Appellant's February 7, 2011 and August 10, 2012 filings and Appellant's February 11, 2014 removal?

Even assuming, for the sake of argument, that Appellant could overcome all the above-referenced hurdles relating to equity, administrative efficiency, and hearsay, the alleged statements of then-Superintendent Stratmann contained within Ms. Andrews' Affidavit do not appear to show or suggest a causal connection between Appellant's filing of his whistleblower documents and Mr. Stratmann's removal of Appellant.

In her Affidavit, Ms. Andrews alleges that **she disagreed with Mr. Stratmann's alleged decision to disseminate Kevin Whaley's investigation report to those referenced in the report. Mr. Stratmann is alleged to have asserted that those so referenced had a right to review the report.**

Secondly, Ms. Andrews alleges that, following the issuance of Mr. Whaley's afore-mentioned investigation report, **then-Superintendent Stratmann asked Ms. Andrews "... if we 'had enough' on Mr. Harris for removal"**

Finally, Ms. Andrews alleges that **Mr. Stratmann asked Ms. Andrews if Appellant would have appeal rights or fallback rights if Appellant was removed.**

We begin by noting that none of Mr. Stratmann's alleged statements or questions identified by Ms. Andrews in her Affidavit shows any retaliatory or improper motive on the part of Mr. Stratmann toward Appellant.

Further, we note that Mr. Stratmann was serving at the time *in a dual capacity not only as OVH Superintendent but also as ODVS Legal Counsel*. Thus, he was likely aware of Ohio's public records law.

Understanding that Mr. Whaley's report of investigation was not part of an ongoing criminal investigation, it can be argued that Mr. Stratmann was providing a public record to those involved during the course of the investigation; allegedly noting that the people so involved had a right to know the contents of this (public) record.

As well, the evidence adduced at hearing appears to indicate that Appellee, at least, had significant questions about whether Appellant was conducting the mandated reviews of OVH client charts. Further, Appellant admitted at hearing that at one point he stopped instructing his staff to perform this mandated chart review so that his staff could focus on filling prescriptions for OVH residents. Thus, the record that was established *during Appellant's case-in-chief* strongly suggests that Appellee was dissatisfied with Appellant's job performance as OVH's Pharmacy Operations Manager.

Taken as a whole, then, Mr. Stratmann's alleged statements seem *more likely than not* to reflect an appointing authority and legal counsel who wanted to know if his HCM Administrator (Ms. Andrews) thought OVH had sufficient facts to remove one of its employees and, if so, what that employee's legal recourse might be. These statements also seem to reflect an appointing authority and legal counsel who simply chose to distribute a public record to those referenced therein.

Mr. Stratmann's alleged statements seem *less likely* to reflect a desire to eliminate Appellant from the OVH operation *because Appellant responded to Investigator Whaley's inquiries with comments allegedly unfavorable to former OVH Superintendent Richard Hatcher.*

For the reasons stated, above, Ms. Andrews' Affidavit cannot be considered to provide reliable and probative evidence in this matter. As such, it cannot be further considered.

I find that Appellant was unable to meet his required burden; because Appellant did not demonstrate (through inference or otherwise, in Appellant's case-in-chief or thereafter) that, as a direct result of Appellant's February 7, 2011 filing or his August 10, 2012 filing, Mr. Stratmann retaliated against Appellant by removing him from his unclassified Pharmacy Operations Manager position with the Ohio Veterans Home. As a result thereof, this Board should grant Appellee's motion and dismiss this appeal.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **GRANT** Appellee's motion and **DISMISS** the instant appeal, because Appellant was unable to meet the requisite burdens in his *prima facie* case, pursuant to R.C. 124.03 and R.C. 124.341.


James R. Sprague
Administrative Law Judge