

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

James Rogers, Jr.,

Appellant,

v.

Case No. 2014-WHB-03-0068

City of Stow,

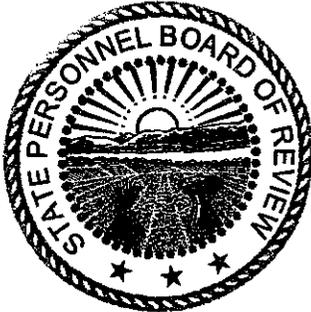
Appellee,

ORDER

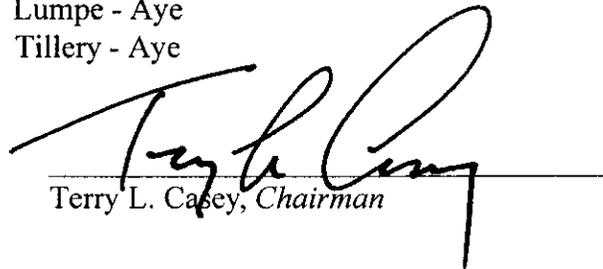
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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**.



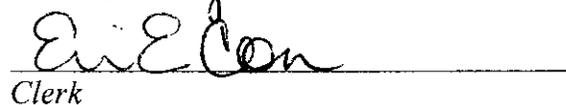
Casey - Aye
Lumpe - Aye
Tillery - Aye


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, July 17, 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**

James Rogers Jr

Case No. 2014-WHB-03-0068

Appellant

v.

June 6, 2014

City of Stow

Appellee

Marcie M. Scholl

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on for consideration upon the filing of a notice of appeal by Appellant Rogers on March 25, 2014; this Board's Procedural Order and Questionnaire issued on April 30, 2014; Appellant Rogers' response to the Questionnaire, filed on May 12, 2014; and Appellee's Reply to Appellant's Information Provided in Response to Board Questionnaire, filed on May 30, 2014.

In response to this Board's question number three in the Questionnaire, Appellant Rogers answered "yes" to the question of if he filed a written report regarding alleged violations as required under section 124.341 of the Ohio Revised Code, which is commonly referred to as the "whistleblower statute". He was then asked to specify the time, place and circumstance of reporting and he answered "First wrote to Judge Coates on December 20, 2013, then gave more complete statement to Ohio State Highway Patrol Officer Kanterson January 29th, 2014 for the investigation." Question number 4 then directed Appellant Rogers to attach a copy of the written reports he filed and he answered "Judge Lisa Coates has only copy of the original 12-20-13 report." He then states the follow-up report to the State Highway Patrol is attached.

That report does not meet the requirements found in section 124.341 of the Ohio Revised Code. That statute 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.

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 or complaint with the supervisor, appointing authority, the office of internal audit, or the auditor of state's fraud-reporting system, 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).

In looking at the report Appellant Rogers attached to his questionnaire response, it does not reference any specific violation of state or federal statutes, rules, or regulations or the misuse of public resources, as required by the statute. It is a narrative of an incident on a specific date, but nowhere in the narrative is there any mention of a specific violation of a state or federal statute, rule or regulation.

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)). (Emphasis added).

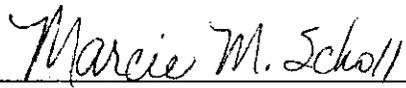
Appellant Rogers’ narrative statement does not identify any violation other than to say “. . . a case number is required to run CCH’s; . . .”. He does not cite to any document, rule, regulation or statute which he alleges to have been violated and he does not allege there was any misuse of public resources. Therefore, the document which he submitted does not comply with the requirements of section 124.341 of the Ohio Revised Code and as such, it cannot be construed as a whistleblower document.

The other document which he alleges he filed was not attached to his response, as he states the only copy he filed is in the possession of Judge Lisa Coates. Appellee, however, denies that Judge Coates received such a document. In Appellee’s Reply they state “Stow disputes that Appellant ever provided Judge Coates with a written report on December 20, 2013 or otherwise.”

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)). (Emphasis added). 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.

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. Since Appellant Rogers did not furnish to this Board any written report which complies with the requirements as established by section 124.341 of the Ohio Revised Code, he has failed to meet his prima facie burden of proof and the initial burden of production.

Accordingly, it is my **RECOMMENDATION** that this appeal be **DISMISSED**.



Marcie M. Scholl
Administrative Law Judge