

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Meghan Gallagher,

Appellant,

v.

Case No. 2014-WHB-04-0070

Lucas County Board of Elections,

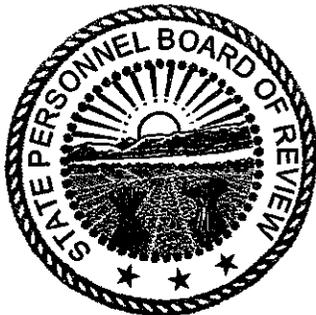
Appellee,

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.

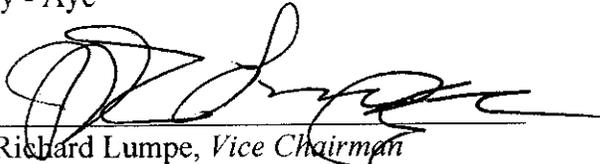
Wherefore, it is hereby **ORDERED** that Appellee's motion is **GRANTED** and the instant appeal is **DISMISSED**, because Appellant lacks a cognizable remedy that may be offered by this Board, pursuant to R.C. 124.03, R.C. 124.341, R.C. 3501.01, and R.C. 3501.09.



Casey - Abstained

Lumpe - Aye

Tillery - Aye


J. Richard Lumpe, *Vice 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, September 14, 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 September 21, 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-04-0070

Transcript Costs: N/A Administrative Costs: \$25.00

Total Deposit Required: * \$25.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: September 29, 2015

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

Meghan Gallagher

Case No. 2014-WHB-04-0070

Appellant

v.

August 6, 2015

Lucas County Board of Elections

James R. Sprague

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on due to Appellant's filing of an appeal following the completion of her term and the non-renewal of an additional term as Director of the Lucas County Board of Elections (LCBOE), the Appellee in this matter. The record was then fairly extensively developed and this matter was set several times for record hearing.

On July 20, 2015, Appellee filed Appellee's motion to dismiss, a memorandum in support, several pertinent exhibits, and the affidavit of John Borrell, Sr., who serves as the Deputy-Chief of the Civil Division of the Office of the Lucas County Prosecuting Attorney. On August 3, 2015, Appellant filed Appellant's memorandum *contra* to Appellee's motion to dismiss, as well as a variety of pertinent exhibits.

In its motion to dismiss, Appellee asserts that *three* independent grounds exist for this Board to dismiss the instant appeal. If this Board finds merit in any of those three grounds, then the instant appeal should be dismissed for lack of jurisdiction over its subject matter.

First, Appellee asserts, during her tenure as the Director of a County Board of Elections, Appellant served as an "election officer" under R.C. 3501.01. As such, Appellee argues, Appellant cannot utilize the whistleblower protections for unclassified (and classified) employees found in R.C. 124.341, Ohio's whistleblower statute covering much of Ohio's non-federal civil service.

Secondly, Appellee asserts, Appellant was not, in fact, removed, but served the entirety of her two-year term as Director under R.C. 3501.09. Appellee argues, therefore, because Appellant suffered no cognizable wrong under R.C. 124.341, she has no cognizable remedy. Thus, Appellee asserts, Appellant has no legitimate claim for redress to bring to this Board.

Thirdly, Appellee asserts, Appellant did not engage in whistleblower activity. This is because, Appellee argues, none of the reports that Appellant submitted qualify as whistleblower reports for purposes of R.C. 124.341.

Is a County Board of Elections Director an "Employee" under R.C. Ch. 124.?

It is noted that Appellant did, in fact, serve as the Director of the LCBOE. Further, R.C. 3501.01 ("Election procedure – elections officials definitions.") indicates, at R.C. 3501.01 (U) (3), that a "Director of a board of elections" is included as "an 'election officer' or an 'election official'". As well (as is explored in more detail, below), R.C. 3501.09 ("Organization of county board") does include the Director and Assistant Director as "officers" for purposes of appointment to the Director's and Assistant Director's requisite two-year terms.

However, this Board has had occasion, recently, to deal rather extensively with the question of who serves as an "officer" in regard to a County Board of Elections. (Please see, *Stainbrook v. Lucas County Board of Elections* SPBR Case No. 2014–WHB-06-0126, Report and Recommendation issued December 15, 2014, final Order issued January 21, 2015). In that case, this Board determined that a *Member* of a County Board of Elections serves as an "officer" on the Board and not as an "employee" for the Board. Thus, such a Board Member cannot utilize the protections that R.C. 124.341 offers to an "employee" in the classified or unclassified service.

Yet, Appellant's service as a Director can be distinguished from that of a Member of a Board of Elections. The Member is nominated by one of the two requisite political parties and has his or her name submitted to the Secretary of State for further consideration and possible appointment. The Member serves at the pleasure of the Secretary of State. The Member is "on the Board". The Board of Elections, through its Members, has extensive administrative and quasi-judicial authority. The biennial appointment of a Director must be preceded by a biennial organizational meeting of the Board of Elections.

While R.C. 3501.01 (U) (3) does refer to a Director as an "election officer", it also refers to a Director as an "election official". Moreover, the Director is appointed by and works for the Board of Elections. It is the Board that may choose to remove the Director or, as here, not to renew the Director's appointment.

Thus, I find that a Director of a County Board of Elections is an unclassified *employee* for purposes of R.C. Ch. 124. Accordingly, all other things being equal, the Director could (under the requisite circumstances not reflected, herein) be entitled to the whistleblower protections set forth in R.C. 124.341.

Does Appellant have an available remedy through SPBR?

As discussed briefly, above, R.C. 3501.09 ("Organization of county board") sets forth the method that a County Board of Elections is to utilize to appoint its Director and its Assistant Director. Paragraph One of R.C. 3501.09 reads, in pertinent part:

Biennially, within five days after the appointments to the board of elections are made by the secretary of state, the members of the board shall meet and organize by selecting one of their number as chairperson, who shall preside at all meetings. They shall, upon careful consideration of each such person's qualifications, select a resident elector of the county, other than a member of the board, as director, and a resident elector of the county as deputy director. All such officers shall continue in office, at the pleasure of the board, for two years. The balloting for such officers shall commence on the day of the convening and be taken until such organization is effected or five ballots have been cast. The director shall first be selected by the votes of at least three members. ... (emphasis added)

It is noted that Appellant was duly appointed to serve a two-year term as Director of the LCBOE. It appears unrebutted in the record that Appellant began her term as Director on March 1, 2012 and completed the entirety of that two-year term, serving her last day on March 4, 2014. Self-evidently, Appellant was not removed during any time in that term, apparently despite the recommendation of the Secretary of State's blue-ribbon panel that Appellant be removed more than one year prior to the expiration of that two-year term.

There is an obvious distinction between the Director of a County Board of Elections who has been removed and the Director of a County Board of Elections who has been allowed to serve his or her full term. The first requires an affirmative and formal act of the Board of Elections, the second, no formal act at all.

Appellant offers that, in addition to the formal circumstances that resulted in Appellant's leaving the service of the LCBOE, other transactions occurred that "...reduced her authority, compromised her position, and took away the resources needed to do her job." (Memorandum *contra* at page 5.) While this may or may not be the case, Appellant would have other remedies not likely offered by R.C. 124.341 for such acts. Indeed, if these alleged acts were sufficiently egregious, Appellant could seek redress through the filing of an action in state or federal court or through the filing of a Charge with the Ohio Civil Rights Commission or the Equal Employment Opportunity Commission.

Finally, there does not appear to be a ready remedy that this Board could offer Appellant, if she were to prevail on the merits. Appellant has served the full term of her appointment. Thus, there would be no unexpired component of her term to which she could be restored.

For this Board to craft a remedy in the instant situation, this Board would perhaps need to ascertain whether (in spite of the recommendation of the Secretary of State's blue-ribbon panel) Appellant would have been appointed to a new term as Director. Further, it is entirely possible that, to address Appellant's concerns, this Board might be called upon to mandate the terms and conditions of Appellant's future employment.

Yet, the State Personnel Board of Review is neither prescient nor is it constituted to actively manage the day-to-day affairs of appointing authorities coming under its purview. Thus, it could prove to be highly problematic for this Board to attempt craft a remedy to address Appellant's concerns in the instant appeal.

In summary, I have found that a Director of a County Board of Elections does serve as an employee for purposes of R.C. Ch. 124., thus, potentially qualifying for the protections offered by R.C. 124.341. Yet, I have also found that a Director of a County Board of Elections who has served his or her entire term has no cognizable remedy that can be provided by the State Personnel Board of Review.

Thus, it is not necessary, at this time, to address Appellee's third asserted jurisdictional bar and determine whether Appellant's reports and the attendant circumstances which may have followed satisfy R.C. 124.341's procedural and substantive prerequisites.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **GRANT** Appellee's motion and **DISMISS** the instant appeal, because Appellant lacks a cognizable remedy that may be offered by this Board, pursuant to R.C. 124.03, R.C. 124.341, R.C. 3501.01, and R.C. 3501.09.


James R. Sprague
Administrative Law Judge