

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

Jon Stainbrook,

*Appellant,*

v.

Case No. 2014-WHB-06-0126

Secretary of State,

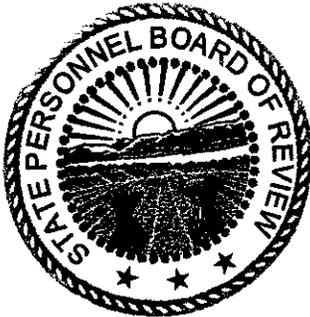
*Appellee,*

**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** for lack of jurisdiction over its subject matter, pursuant to R.C. 124.03 and R.C. 124.341.



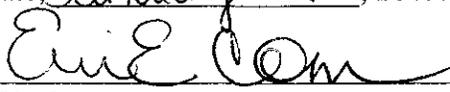
Casey - Abstained  
Lumpe - Aye  
Tillery - Aye

  
\_\_\_\_\_  
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, January 21, 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 January 28, 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-06-0126

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: February 5, 2015

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

Jon Stainbrook

Case No. 2014-WHB-06-0126

*Appellant*

v.

December 15, 2014

Secretary of State

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 June 19, 2014 filing of a *whistleblower appeal* following Appellant's removal from his post as a Member of the Lucas County Board of Elections. Appellant was removed by Ohio Secretary of State Jon Husted, pursuant to the authority vested in the Secretary of State under R.C. 3501.16. At the same time Appellant filed the instant whistleblower appeal, he also filed a removal appeal with this Board (*i.e.* SPBR Case No. 2014-REM-06-125).

Following Appellant's filing of the instant appeal, the record in this matter was extensively developed. That development included the issuance of initial Questionnaires and Procedural Orders and included the filing of initial briefs in this matter. On August 26, 2014, a fairly extensive Pre-hearing was held in this matter. By agreement of the parties, a schedule was at that time established for the submission of additional briefs and/or motions on several issues that concern the jurisdiction of this Board over the subject matter of the instant appeal.

Accordingly, on October 21, 2014, Appellee filed Appellee's Motion to Dismiss (Motion to Dismiss). Pursuant to an extension of time that this Board granted Appellant, on December 4, 2014, Appellant timely filed Appellant's Reply in Opposition to Appellee's Motion to Dismiss (Appellant's Memorandum *Contra*). Further, on December 4, 2014, the two attorneys who would thereafter be representing Appellant filed a joint notice of appearance in the instant matter.

In Appellee's above-referenced Motion to Dismiss, Appellee raises or reasserts two jurisdictional bars regarding Appellant's instant whistleblower appeal. Appellee also asserts three evidentiary bars concerning some or all of the documentation that Appellant has put forth as Appellant's "written reports", referenced in and filed pursuant to the reporting requirements found in R.C. 124.341.

*Yet, this appeal appears to turn on the first jurisdictional bar raised by Appellee, which is explored in depth, below.* Thus, it is not necessary, at this time, to review Appellee's second asserted jurisdictional bar or to review Appellee's three asserted evidentiary bars.

As its first asserted jurisdictional bar, Appellee states, on page 4. of its Motion to Dismiss: **"Members of county boards of elections are not employees in the classified or unclassified service but rather are officers."**

Conversely, on page 4. of his Memorandum *Contra*, Appellant states: **"Appellant Stainbrook as a Member of the Board of Elections is an Unclassified Employee that is Entitled to Whistleblower Protection Provided by R.C. 124.341."**

If this Board accepts, as factually and legally accurate, Appellee's first asserted jurisdictional bar, then Appellant's instant appeal must be dismissed. This is the case because the provisions of R.C. Chapter 124. do not appear to apply to "officers" who are neither in the classified nor in the unclassified service.

#### Brief Background

A Member of a County Board of Elections (BOE) in Ohio is appointed to his or her post through selection by the pertinent party receiving the highest or second highest number of votes in the most recent gubernatorial election, pursuant to R.C. 3501.06. Vacancies are created *either* by a Member's vacating his or her post during an unexpired term *or* by the pertinent term of an incumbent Member running its full length. Under either of these two circumstances, the post is filled by a candidate selected from the political party to which the most recent occupant of that BOE post belonged.

Once the name of the person the party selects (to fill the post) is provided to the Secretary of State, then the Secretary of State places that person in the requisite BOE post. If the Secretary of State believes there is a legally valid reason as to why that individual cannot or should not fill that BOE post, then there are legal provisions that the Secretary of State may institute to bar that individual from taking that seat, subject to *ex post facto* judicial review.

Additionally, for cause, the Secretary of State may remove or suspend a Member of a BOE for any of several reasons set forth in R.C. 3501.16. When this occurs, the vacant post is to be filled in the same manner described, above, unless the vacancy cannot be filled in this manner.

Can a Member of a County Board of Elections claim the protections offered by R.C. 124.341 (D)?

Let us, now, examine the question of whether a duly-appointed Member of a County Board of Elections is an individual who would come under the definitions and provisions set forth in R.C. Chapter 124., including those found in R.C. 124.341.

Art. XV, Section 10 of the Ohio Constitution forms the basis of Ohio's non-federal civil service. Correspondingly, R.C. Chapter 124. effectuates Art. XV Section 10 and constitutes the statutory basis for much of Ohio's non-federal civil service.

**R.C. 124.341** sets forth Ohio's whistleblower law for employees of Ohio's classified and unclassified civil service, including State and County employees.

R.C. 124.341 (A) contains reporting mechanisms applicable to when one of these employees perceives that a violation of law, misuse of public resources, or similar violation has occurred. R.C. 124.341 (A) extends whistleblower protection to " ... **an employee in the classified or unclassified civil service** ... ". (emphasis added)

R.C. 124.341 (B) contains a prohibition against retaliating against the reporting employee.

R.C. 124.341 (C) contains a requirement that the employee make a reasonable effort to determine the accuracy of any information to be reported pursuant to R.C. 124.341 (A).

**R.C. 124.341 (D) contains the appeal and remedial provisions of R.C. 124.341 applicable to this Board.**

In his Memorandum *Contra*, at page 4., Appellant correctly notes that R.C. Chapter 124. states, at R.C. 124.01 (F), that the term "employee" is to mean " ... any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer. ... "

Appellant also argues, at page 5. of his Memorandum *Contra*, that Appellee appears to have already conceded the point that Appellant is "an unclassified employee".

This is the case, Appellant asserts, because Appellee has indeed previously stated: "Therefore, Stainbrook was an unclassified employee.", on page 2. of

Appellee's Motion to Dismiss in Appellant's companion removal appeal (*i.e.* SPBR Case No. 2014-REM-06-0125).

R.C. 3501.01 (U) (5) identifies individuals who fall under the definitions of "election officer" and "election official" *for purposes of any Revised Code provisions that relate to "elections and political communications"* (emphasis added) (Please see Preamble to R.C. 3501.01 and also R.C. 3501.01 (U) (5)). Appellant thus reminds us at page 5. of his Memorandum *Contra*:

Since, R.C.124.11 (A)(2) provides that all "election officers" as defined by R.C. 3501.01 are unclassified employees, R.C. 3501.01 (U)(5) includes a member of a Board of Elections.

Appellant is correct that, at first blush, it appears that a Member of a County BOE could be considered to be an unclassified employee for purposes of R.C. Chapter 124. We may therefore legitimately ask why Appellee continues to assert that a Member of a County BOE is *not* an "employee" *for purposes of R.C. Chapter 124.*, making that BOE Member *ineligible* for the protections offered by R.C. 124.341?

Interestingly, the Supreme Court of Ohio has had occasion to consider whether a Member of a County Board of Elections is an "officer" or conversely, an "employee" of the State. (Please see Motion to Dismiss at pages 4. through 6.)

In *State ex rel. Milburn v. Pethel* 153 Ohio St. 1, (1950), the Supreme Court pondered this issue. The Court offered that a Member of a County Board of Elections is imbued with the sovereignty of the State, exercises functions of an executive, legislative, or judicial nature, and is an *officer* whose compensation is subject to the prohibition of increased compensation set forth in Art. II, Section 20 of the Ohio Constitution. (*Milburn, supra*, at Paragraphs 1. and 3. of the Syllabus)

There is nothing in the extant record to suggest that Members of today's County Boards of Elections do not essentially exercise the same powers and authority they exercised in 1950 when the Supreme Court of Ohio considered the proper designation for these BOE Members.

While the Supreme Court's pronouncement in *Milburn, supra*, is certainly persuasive, we may ask if there are other persuasive sources more recent in time that may provide guidance on this question. We note that the Attorney General of Ohio was provided with an opportunity to offer discourse on a similar question in 1990. (Please see Motion to Dismiss at page 6.)

When posed with the question of whether Members of the State Employment Relations Board were “officers” for purposes of R.C. Chapter 124., then-Attorney General Anthony J. Celebrezze, Jr. offered, in AG Opinion No. 1990-014 (at Paragraph 3. of the Syllabus) the following: “A member of the State Employment Relations Board is not an ‘employee’ under R.C. 124.01 (F).”

The Attorney General reached back to Ohio’s 1915 statutory provisions to conduct his analysis. He also expressly reviewed and applied *Milburn, supra*, which was still good case law in 1990 and remains so today. Further, the Attorney General’s analysis, interestingly similar in some ways to the Supreme Court’s in *Milburn, supra*, (which is expressly cited in AG Opinion No. 1990-014), is certainly applicable to Members of a County BOE, who exercise the same types of independent functions and are imbued with the same State sovereignty contemplated both in *Milburn, supra*, and in AG Opinion No. 1990-014, *supra*, at pages 2-56 through 2-57.

Please recall that R.C. 124.341 (A) begins with the following: “If an **employee** in the classified or unclassified civil service ...” (emphasis added)

In AG Opinion No. 1990-014, the Attorney General specifically reviewed the definition of “**employee**”, as well as the definitions of “state service” and “appointing authority” found in R.C. 124.01 (currently entitled “Department of administrative services – personnel definitions”) as those definitions existed in 1990.

Those same three definitions found in the current version of R.C. 124.01 are substantially similar to those found in R.C. 124.01 in 1990. Indeed, in R.C. 124.01 (F) (both then and now), the *seminal* component of the definition of **employee** “ ... means any person holding a **position** subject to appointment, removal, promotion, or reduction by an appointing officer.” (emphasis added)

In AG Opinion No. 1990-014, the Attorney General went further and declared:

It appears, however, that the line categorizing all appointed officers as **employees** for purposes of R.C. Chapter 124 may have been too broadly drawn. ...

... It should be noted that R.C. 124.01 (D) [“Appointing authority”] speaks of appointment to “positions in” any office, department, commission, board, or institution. The posts held by the members of a commission or board are “on” the commission or board; board members are officers who constitute the board, rather than simply holding positions in the commission or board. **The posts held**

**by board members are, accordingly, “offices,” rather than positions.** (emphasis added) (AG Opinion No. 1990-014 at 2-58)

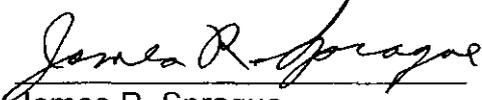
To summarize, the Supreme Court of Ohio has determined that Members of County Boards of Elections are “officers” under Ohio law. Further, the Attorney General of Ohio has opined that the posts held by requisite Members of boards and commissions are “offices” rather than “positions” and, indeed, that “... a member of the State Employment Relations Board is not an ‘employee’ under R.C. 124.01 (F). (AG Opinion 1990-014 *supra*, at 2-58 and 2-65 at Paragraph 3 of the Syllabus).

The pronouncement of the Supreme Court of Ohio and the Opinion of the Attorney General of Ohio are extremely persuasive and perhaps dispositive on the question at hand. Thus, we may reasonably infer, and I so find, that Members of County Boards of Elections are not “employees” for purposes of R.C. Chapter 124.

Accordingly, a Member of a County Board of Elections cannot avail himself or herself of the whistleblower protections that R.C. 124.341 (A) offers to “... an **employee** in the classified or unclassified civil service ....” (emphasis added). As such, Appellant has failed to invoke the jurisdiction of this Board over the subject matter of this appeal and it should, for that reason, be dismissed.

### RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **GRANT** Appellee’s motion and **DISMISS** the instant appeal for lack of jurisdiction over its subject matter, pursuant to R.C. 124.03 and R.C. 124.341.

  
James R. Sprague  
Administrative Law Judge