

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

Don Sauvey,

Appellant,

v.

Case No. 2015-OSH-07-0169

Lorain City Schools,

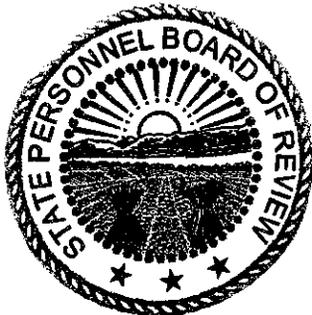
Appellee,

ORDER

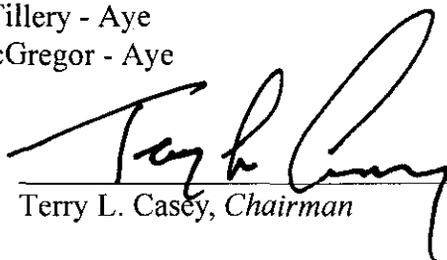
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Mr. Haupt's action of constructively discharging Mr. Sauvey by telling him he was through working for Appellee and asking for his keys and other items to be turned in is **DISAFFIRMED**. It is further **ORDERED** that Mr. Sauvey retain his right to continued employment and receive full compensation for the tasks that he would have performed had he not been discharged from his duties, pursuant to section 4167.06(A) of the Ohio Revised Code.



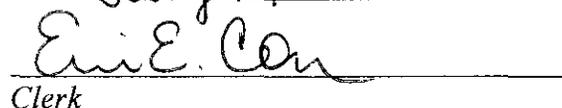
Casey - Aye
Tillery - Aye
McGregor - Aye


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 14, 2016.


Eric E. Con
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 July 21, 2016. 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: 2015-OSH-07-0169

Transcript Costs: \$450.00 Administrative Costs: \$25.00

Total Deposit Required: * \$475.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: July 29, 2016

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

Don Sauvey
Barbara Sauvey
Appellants

Case Nos. 2015-OSH-07-0169
2015-OSH-07-0168

v.

May 20, 2016

Lorain City Schools
Appellee

Marcie M. Scholl
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on January 12, 2016. Present at the hearing were Appellants Barbara Sauvey and Donald Sauvey, represented by Laura Kramer-Rubadue, Attorney at Law and Appellee Lorain City Schools designee Kevin Haupt, Associate Director of Operations, represented by Anthony B. Giardini, Attorney at Law.

The subject matter jurisdiction of the Board was established pursuant to section 4167.13 of the Ohio Revised Code.

STATEMENT OF THE CASE

Appellant Barbara Sauvey testified she is fifty-nine years old and worked for a little over a year for Appellee as a substitute cleaner. As such, she worked forty hours a week and did not receive benefits.

In June, 2015, Mrs. Sauvey testified she attended a safety meeting regarding the changeover to Lysol brand cleaners from the previous cleaner. She stated there was no mention about floor strippers in this meeting. Also in June, 2015, she attended a training session at an elementary school with Ada and Cheryl, the summer trainers for the cleaning crew. Mrs. Sauvey testified she was taught by the two women as to how to strip floors. Speed stripping was described as doing a third of a room, as it was too much to do an entire room at once. They used a bucket with lines in it, and the stripper solution was to be poured into the bucket up to the first line, then the rest of the bucket was to be filled with water. The bucket held six to eight gallons.

In looking at Appellant's Exhibit 1, she testified she has seen this dilution ratio, as it was posted. The dilution ratio Mrs. Sauvey testified she was trained on was 1:5. Appellant's Exhibit 2 was identified by Mrs. Sauvey as a response written by Mr. Haupt on August 22, 2015, to the Public Employment Risk Reduction Program. Mrs. Sauvey testified this was written after her termination from Appellee. She stated she attended a safety meeting on June 4, 2015, and there was no discussion of speed stripping then. Mrs. Sauvey testified she was not given a speed stripping safety data sheet, nor was she given any of the items discussed in the second response of Mr. Haupt's letter. She also stated she was not employed on November 5, 2013 nor on August 17, 2015.

Mrs. Sauvey testified that on July 1, 2015, she arrived at Washington school at approximately 6:30 a.m. She was assigned to a group to strip floors on the second floor and in her group were Shirley, herself and her husband. Shirley put the stripping solution into a bucket and told Mr. Sauvey to put the solution over the entire floor. He told her he did not think that was a good idea, as he thought they should do the floor one-third at a time. Shirley said no, to do the entire floor. Mr. Sauvey then proceeded to put the stripper solution over the entire floor and as he was almost done, Mrs. Sauvey testified her throat started to burn and felt funny. She went out in the hallway to get some fresh air and then her husband came out and told her they needed to get further away from the fumes. They both went down the hall into the mechanical room, but the fumes were also in there. At that time, they both saw Mr. Haupt walking down the hall to the classroom they had just left. Mr. and Mrs. Sauvey then went downstairs to the break room and shortly thereafter, all the other cleaners but Shirley came down and they all stated the fumes were bothering them.

Shortly thereafter, Mr. Haupt came into the break room and asked what was going on and they told him the fumes were really bad upstairs. Mr. Haupt asked if anyone had asthma and Jasmine said she did. Mr. Haupt then told the cleaners to re-group and make new teams and get back to work. He also said there had to be a barrel with water in it and someone needed to get it. At that point in time, Ms. Sauvey testified everyone went back to work. Monica asked Mr. and Mrs. Sauvey if they would do her room and she could finish the room that Shirley and the Sauveys started. Mrs. Sauvey testified she and her husband went into Monica's room and started to strip that room when Monica came back in and asked Mr. Sauvey to put stripper down in another room. Mr. Sauvey told her no, as Brandi said she would do it. The Sauveys stayed in the room they were working in, but the fumes got bad again, so they went into the hallway again. Jasmine was in the hallway passing out dust masks and Mr. Sauvey told Mrs. Sauvey that those masks will not protect them and told her they needed to go downstairs to wait out the fumes. Mrs. Sauvey testified there were no fans in the rooms, just one big one at the end of the hall. She stated she could not remember if any windows were open but her throat was

burning, she was flushed and felt nausea. They went to the break room and again, everyone but Shirley eventually made their way to the break room. They all waited approximately twenty minutes and then Jasmine went about half way up the stairs and returned, saying the fumes were still too bad.

Mr. Haupt came in again and appeared agitated. He asked why they were all in the break room again and Brandi told him the woman upstairs, referring to Shirley, was crazy. Brandi said there was stripper all over the floor and they cannot breathe up there. Mr. Haupt looked at Mr. Sauvey and said “. . . thought you had no problem with chemicals?” Mr. Sauvey replied that they were all having problems, but Mr. Haupt ignored them. The rest of the cleaners left the break room, a few at a time but Mr. and Mrs. Sauvey stayed in the room. Mr. Haupt left the room and returned and stated he was feeling some push back from them. Mr. Sauvey asked him what he was going to do about Shirley and Mr. Haupt replied that “Shirley is going to do what she is going to do.” He then told the Sauveys to work or leave and Mr. Sauvey said that is not a choice. Mr. Haupt then said “that’s it” and asked for their keys. Mr. Haupt was in the hall as the Sauveys left and he told them it was too bad, as he was getting ready to hire them full-time.

On cross examination Mrs. Sauvey testified she received some safety training at Palm school. She stated she used stripper at Palm and at Washington, using the dilution ratio of 1:5 and did a third of the room at a time. She then waited twenty minutes and took off the stripper, working on a three person team. She stated there was air conditioning and fans at Palm and she had no complaints there.

On July 1, 2015, Mrs. Sauvey testified Shirley was there when she and her husband arrived and she did not recall her husband refusing to work with Kyle. She stated they were teamed up at first, but there was not enough equipment so Shirley said she would work with the Sauveys. Mrs. Sauvey testified she does not remember if the stripper had a pump and she did not know the dilution ratio. Mr. Sauvey put the solution on the floor as Shirley was scrubbing the sides of the floor and Mrs. Sauvey was helping her.

Mrs. Sauvey explained they had a ten minute break in the morning and afternoon and were to take a thirty minute lunch. When they were in the break room, Mr. Sauvey told Mr. Haupt the fumes were making them sick. Mrs. Sauvey testified they did not talk to Shirley to tell her they were going to do Monica’s room.

Appellant Donald Sauvey testified he is fifty-nine years old and has been married for forty years. He stated he began as a substitute cleaner on March 15, 2015, working forty hours a week. He attended a safety training on June 4, 2015. Mr. Sauvey stated there was a representative from Lysol there and he gave

guidance on their products. There was no stripping information given and he did not receive a stripping safety data sheet.

In June, 2015, Mr. Sauvey stated he was trained at Palm on how to mix the stripper using a 1:5 ratio and pouring the solution into the bucket that had marks for measures. He was told to dip the mop into the bucket, let it drip and put a thick layer on the floor, doing a third of the room at a time. Then he was trained to stop for about twenty minutes for "dwell time". He stated he used this method for approximately three weeks at Palm and it did not make him sick.

On June 30, 2015, Mr. Sauvey testified he was at Washington and he considered Shirley to be the lead person and he worked with her without any argument. On July 1, 2015, he arrived at Washington at approximately 6:30 a.m. and they had prepped the rooms to be stripped the day before. The first group was assigned and had eight people split into four groups. He was to work with Shirley and his wife was going to work with Kyle. Mr. Sauvey testified he had no objection to Kyle. He was a young guy that worked hard. Mr. Sauvey stated he went to get three buckets, a scrubber and a machine but not all of the equipment was there. It was then that Shirley decided they would split into three teams, so a person was added to each team. Mr. Sauvey asked if his wife could work with him and Shirley and Shirley said fine.

Mr. Sauvey testified he put the solution into a bucket and Shirley began doing all the edges of the floor with the stripper and told him to continue with the entire floor. He testified that surprised him and he told Shirley he did not think that was the best idea as they did not have enough equipment to do all of the floor at once, but Shirley told them that is the way she does it. Mr. Sauvey testified he put the solution all over the floor and when he was about three-quarters of the way done, he realized the fumes were getting strong. He then looked up for his wife and saw her in the hallway. He stated the fumes were bad and his eyes and throat were burning and he could taste a chemical taste and felt dizzy. He felt like he was getting high and becoming disoriented so he told his wife they needed to go into the mechanical room. They sat in there without saying anything to Shirley. They were on their way downstairs when they saw Mr. Haupt.

Mr. Sauvey testified they went downstairs to the break room and he thought he heard Jasmine say she was going to call Ada, one of the trainers. He stated all the other cleaners came down to the break room, complaining about the fumes, but Shirley did not come down. Mr. Sauvey testified he did not know if it was lunch time then but Mr. Haupt came in the room and asked what was going on. No one responded. Mr. Sauvey told him there were not enough supplies and Shirley insisted on doing the entire room at a time and the fumes were making people sick. Mr. Haupt told them they need to re-group and told Mr. Sauvey to get the

emergency water ready. Mr. Haupt left and all the cleaners went back to the second floor.

Mr. Sauvey testified he filled up two buckets with clean water and Monica told him and his wife to finish her area and she would work with Shirley. Mr. Sauvey stated he and his wife went into Monica's room and had done about one-half of the floor when Monica returned and told him to start on the third room and handed him a stripper bucket. She told him to do the entire room and he told he was not going to do that. Brandi overheard him and said she would do that room and she took the mop and went to the room. Mr. Sauvey testified he went back into the room he had been working on and continued. As they worked, the fumes got bad again and he and his wife went back downstairs. Jasmine asked them if they wanted a dust mask and he told her it would not work on the fumes.

It was approximately 2:00 or 2:30 p.m. when this happened and Mr. Sauvey testified he and his wife were the only ones in the room until Brandi came down complaining about the fumes. He said it was a little better this time as they got out of the room quicker this time. He stated there was no fan in the room and he did not recall any windows being open. Mr. Sauvey said his wife's cheeks were flushed and she was feeling nausea. Mr. Sauvey stated he has asthma, hypertension, diabetes and peripheral neuropathy and he was concerned about his asthma. Mr. Haupt came back into the room at approximately 2:45 p.m. and appeared agitated. He asked them why it was that every time he walked into the break room, Mr. and Mrs. Sauvey were in there. Brandi told him Shirley had so much stripper on the floor that they could not breathe up there and she had thrown up. Mr. Haupt said nothing but was upset and not happy with them. He asked who had asthma and Jasmine said she did and then Mr. Haupt looked at Mr. Sauvey and said "you told me you had no problems with chemicals". Mr. Sauvey replied they were all having problems and Mr. Haupt directed all of them to go back to work. Mr. Sauvey testified he told his wife to stay seated as they needed to resolve this problem. Mr. Haupt told him he felt some push back and Mr. Sauvey asked him what was going to be done about the fumes and that it was not safe up there. Mr. Haupt then told him they could go to work or leave. Mr. Sauvey stated that was not a choice and they were not going back upstairs as it was not safe. Mr. Haupt told them to go back upstairs, open a window and work, as there was no option to work on the first floor. Mr. Sauvey and his wife stood up to leave, as he thought they were done for the day when Mr. Haupt said "that's it – you're done". Mr. Sauvey testified he was surprised and shocked when Mr. Haupt told him to turn in everything and said that he was getting ready to hire Mrs. Sauvey full-time. Mr. Haupt told Mr. Sauvey to go ahead and call the EPA, to which Mr. Sauvey replied that he was not trying to start trouble, that he was only trying to protect his health.

Mr. Sauvey identified Appellant's Exhibit 3 as the complaint form he filed with the Public Employment Risk Reduction Program or "PERRP". He testified he had filed a federal OSHA complaint and they referred his complaint to PERRP. He stated he filed the complaint on July 15 or 16, 2015. Appellant's Exhibit 2 was identified as the response to his complaint from the Appellee and he stated he never received any of the documents mentioned in Appellee's response to the complaint. Appellant's Exhibit 4 was identified by Mr. Sauvey as the result of the investigation conducted by PERRP, which they emailed to him on December 16, 2015. He testified that neither he nor his wife quit their jobs.

On cross examination Mr. Sauvey testified his wife did not sign the PERRP complaint and that he was the only one to file the complaint. He stated he made the decision that day that he and his wife were not going back up to the second floor. Mr. Sauvey stated he never complained about the stripper when he used it at Palm.

Appellee's first witness was Shirley Conway, a cleaner with Appellee since 2008. She explained that throughout the year, she cleans classrooms and offices but in the summer, the heavy duty cleaning is done, such as stripping floors, scrubbing walls and lifting furniture. During the summer, Ms. Conway stated she is given extra help to do the cleaning by using sub-cleaners.

On June 30, 2015, Ms. Conway testified she was assigned to a school to clean and she was the cleaning leader. She worked with Appellant Sauveys and she stated they wanted to clean their own way, such as dusting but not doing detail cleaning. Ms. Conway stated she was trained to clean by Mr. Haupt, and after the first day, she re-did some of the work the Sauveys had done, but she said nothing to them, as she wanted to keep the peace.

On July 1, 2015, everyone arrived at approximately 6:30 a.m. to begin cleaning. All of the equipment was in the hallway and Ms. Conway testified the Sauveys told her they needed four buckets and Mr. Sauvey proceeded to pour the chemicals into the bucket. Ms. Conway testified she told him it was too strong, as the mix was supposed to be sixty-four (64) pumps and water to level 5 of the bucket, but Mr. Sauvey told her he knew how to do it. Ms. Conway explained she worked with the Sauveys and she would do the stripping as she had her gators on already. Ms. Conway stated she told the Sauveys they would do the whole room, but they said they only wanted to do a quarter of the room. Ms. Conway told them the room is too small but she listened to them and only did a quarter of the room. When the stripping solution was on the floor, the Sauveys told her they were going to take a fifteen minute break. She wanted them to mop the edges, but they left for their break and did not say anything about the fumes being too strong. Ms. Conway stated this was approximately 10:00 a.m.

Ms. Conway testified Mr. Haupt saw her working alone and then another cleaner came to help her. She said the stripping was not right, as it was getting hard and sticky and at that point, everyone else had left the floor. Ms. Conway testified she did not see the Sauveys the rest of that day, as she stayed in her room and finished and then did a second room with Monica. She stated no one complained to her about the fumes and she did not notice anyone getting sick.

Appellee's next witness was Kathleen Chaffin, a cleaner with Appellee since January, 2015. At that time, she was a sub-cleaner but became full-time in November, 2015. Ms. Chaffin testified that in June, 2015, she trained at Palm for summer cleaning and the Sauveys trained with her. On July 1, 2015, Ms. Chaffin was assigned to Washington school to strip floors. She stated Ms. Conway was in a room with the Sauveys and at approximately 11:00 a.m., she took her lunch break. When she got to the lunch room, the Sauveys, Brandi, and Kyle were in the room and they were not complaining about anything. Shortly thereafter, Mr. Haupt showed up and asked how it was going. Ms. Chaffin testified she did not hear the Sauveys say anything to Mr. Haupt about the fumes. She stated she did not have any problem being on the second floor.

At approximately 1:00 p.m., Ms. Chaffin took a break to get a pop and to go outside and she saw the Sauveys in the break room with Jasmine. She stated none of them said anything to her and Mr. Haupt came in and asked if they were still on break. Ms. Chaffin testified she did not see the Sauveys on the second floor from 11:00 a.m. to 1:00 p.m. At that point, Mr. Sauvey said he could not breathe, as the fumes were too strong and he had asthma. Ms. Chaffin opined that Mr. Haupt seemed upset and at that point, she left the room. She stated she did not see the Sauveys after that. She also stated that Brandi did not tell her she had gotten sick.

On cross examination, Ms. Chaffin testified that when Mr. Sauvey told Mr. Haupt he had asthma, she believes Mr. Haupt said something to the effect of "if you cannot do your job, then maybe we do not need you." She opined that she thought Mr. Haupt just meant that Mr. Sauvey should go home for the day, but not be fired. Ms. Chaffin also testified that Ms. Conway made her stripper solution weaker than what they were taught at Palm.

Appellee's final witness was Kevin Haupt, an employee of Appellee for approximately eight years. Prior to that, he served in the Army for approximately twenty-five years and was hired in as a Custodian, then became a supervisor over the custodians and maintenance workers. He stated he streamlined the cleaning process and trained cleaners when he was hired. He did not feel they used cleaners efficiently and he also conducted safety training.

Mr. Haupt testified the training in June was to show everyone how to use the stripper. He stated he was at the training and so were the Sauveys.

Mr. Haupt testified that on July 1, 2015, he went to the second floor of the Washington school building and noticed that the rinse barrel was missing, but other than that, he did not notice anything out of the ordinary. He saw Ms. Conway on the second floor and when he went downstairs, he saw the Sauveys and a few others. He assumed they were on their break or at lunch. He had a conversation with them about equipment, as Mr. Sauvey had expressed there was not enough equipment to do the job and he told him the equipment was on its way. At that point, Mr. Haupt testified Mr. Sauvey did not say anything about being sick or having asthma. Mr. Haupt stated he made it well known that he was disappointed that a bucket of water was not on the second floor.

Approximately 1:00 p.m., Mr. Haupt stated he returned to the building to do a follow-up visit and he went to the second floor to see if the water barrel was there and it was. He saw Shirley, Monica and someone else cleaning furniture and he did not receive a complaint from anyone. He then went to the first floor lunchroom and saw Ms. Chaffin at the soda machine and saw the Sauveys sitting where they had been the last time he was there. He asked them if they were still on break and Mr. Sauvey told him that the chemicals were too strong and he felt weak. Mr. Haupt stated Brandi was also in the room, but Ms. Chaffin had left. He asked if anyone had neurological distress and upon observing them, he opined they looked normal. Mr. Haupt stated he also asked if anyone was having respiratory problems.

Mr. Haupt testified that Ms. Conway is demanding and he had heard rumblings that the Sauveys and she did not get along. He stated he told Mr. Sauvey there was plenty of other work to be done, but somewhere along the line, the words between them became contentious. Mr. Haupt testified Mr. Sauvey stood up and started to take his key fob off and said he and his wife "are not going to work here anymore". Mr. Haupt testified he said "fine – give me your stuff".

On cross examination, Mr. Haupt testified he submitted Appellant's Exhibit 1, his answer to the Sauveys complaint, to PERRP. He stated that when he asked Mr. Sauvey if he was having respiratory problems, Mr. Sauvey did not answer him. Mr. Haupt also stated he gave the Sauveys the option of cleaning furniture anywhere, although he was not specific to the location.

FINDINGS OF FACT

After thoroughly reviewing the testimony of the witnesses and the documents entered into evidence, I find the following facts:

1. The Sauveys were substitute cleaners for Appellee, with Mrs. Sauvey having approximately fifteen (15) months tenure and Mr. Sauvey, approximately four (4) months. Both of them worked approximately forty (40) hours per week.
2. During the month of June, 2015, the Sauveys attended a training regarding the switch to Lysol cleaning products. Also in June, they were assigned to the Palm school, where they were trained by several other employees on how to mix and apply stripper chemicals to the floor. They did not receive a Strip Safety Data Sheet.
3. Both Mr. and Mrs. Sauvey stripped floors at the Palm school for approximately three weeks and did not suffer any adverse affects from the fumes of the stripping solution. While there, they employed the method they were taught, which was to strip approximately one-third of the floor at a time.
4. On June 30 and July 1, 2015, both Mr. and Mrs. Sauvey were assigned to the Washington school to strip floors. They worked with Ms. Conway, the group leader of the cleaners assigned to that building.
5. While applying the stripper solution to the floor of the first room they were assigned to strip, both of the Sauveys began experiencing a burning sensation in the throat, a feeling of being disoriented, nausea and dizziness. They left the floor and went to the first floor break room.
6. While in the break room, they were confronted by Mr. Haupt, who was concerned there was not a bucket filled with clear rinse water on the second floor. The Sauveys returned to the second floor and Mr. Sauvey filled buckets with clear rinse water and then they began stripping the floor in another room. They were overcome by the fumes once again and returned to the first floor.
7. While they were on the first floor, several other employees came in and out of the break/lunch room. Mr. Haupt returned again and asked the Sauveys why there were still in that room. He also asked Mr. Sauvey and others if they had asthma. When Mr. Sauvey told Mr. Haupt he did have asthma and that he and his wife were getting ill from the fumes, Mr. Haupt told them to return to the second floor and do their work. Mr. Sauvey asked Mr. Haupt what he was going to do about the fumes and at that point, Mr. Haupt told

the Sauveys they were done and asked them to turn in their keys and other items they had which belonged to Appellee.

8. Mr. Sauvey then filed a complaint with the Public Employment Risk Reduction Program ("PERRP") on approximately July 15 or 16, 2015. Mr. Haupt filed a response to that complaint on August 22, 2015 and on December 16, 2015, the Ohio Bureau of Workers' Compensation issued Appellee a Violation Notice, stating their "investigation revealed conditions which are not in compliance with (PERRP) Standards". The citations all centered around the stripper chemicals and the need for the employees to use personal protective equipment and the lack of training the employees received in that area.

CONCLUSIONS OF LAW

Normally this Board does not possess jurisdiction over employees of a city school district; however, section 4167.13(B)(1) of the Ohio Revised Code confers jurisdiction on the Board when a public employee believes he or she has been discharged in retaliation for exercising his or her rights under Chapter 4167. of the Ohio Revised Code. Ohio Revised Code sections 4167.01(A)(2) and (B) define "public employer" and "public employee" as:

(A) "Public employer" means any of the following:

(2) Any political subdivisions and their instrumentalities, including any county, county hospital, municipal corporation, city, village, township, park district, **school district**, state institution of higher learning, public or special district, state agency, authority, commission, or board; (Emphasis added).

(B) "Public employee" means any individual who engages to furnish services subject to the direction and control of a public employer, including those individuals working for a private employer who has contracted with a public employer and over whom the national labor relations board has declined jurisdiction.

Therefore it is clear that since Appellee is a school district and Appellants Sauveys are public employees, this Board possesses jurisdiction over their appeals.

In order for the Sauveys to prevail, they had the burden of first proving by a preponderance of the evidence that they complied with the requirements of Chapter 4167. of the Ohio Revised Code, specifically section 4167.06. That statute states as follows:

A) A public employee acting in good faith has the right to refuse to work under conditions that the public employee reasonably believes present an imminent danger of death or serious harm to the public employee, provided that such conditions are not such as normally exist for or reasonably might be expected to occur in the occupation of the public employee. A public employer shall not discriminate against a public employee for a good faith refusal to perform assigned tasks if the public employee has requested that the public employer correct the hazardous conditions but the conditions remain uncorrected, there was insufficient time to eliminate the danger by resorting to the enforcement methods provided in this chapter, and the danger was one that a reasonable person under the circumstances then confronting the public employee would conclude is an imminent danger of death or serious physical harm to the public employee. A public employee who has refused in good faith to perform assigned tasks and who has not been reassigned to other tasks by the public employer shall, in addition to retaining a right to continued employment, receive full compensation for the tasks that would have been performed. If the public employer reassigns the public employee, the public employer shall pay the public employee's full compensation as if the public employee were not reassigned.

B) A public employee who exercises the right to refuse to work under division (A) of this section shall notify by a written statement that is signed by the public employee, as soon as practicable after exercising that right, the administrator of workers' compensation of the condition that presents an imminent danger of death or serious harm to the public employee. Upon receipt of the notification, the administrator or the administrator's designee immediately shall inspect the premises of the public employer. The administrator and the administrator's designee shall comply with section 4167.10 of the Revised Code in conducting the inspection and investigation and in issuing orders and citations.

C) A public employee who refuses to perform assigned tasks under division (A) of this section and fails to meet all of the conditions set forth in that division for the refusal is subject to any disciplinary action provided by law or agreement between the public employer and public employee for a refusal to work, including, but not limited to, suspension, nonpayment of wages for the duration of the refusal to work, and discharge.

In looking at section (B) of that statute, Mrs. Sauvey did not meet the requirement of notifying the administrator of workers' compensation, in writing, of the conditions she perceived to be unsafe. The testimony from Mr. Sauvey established that he was the only one to file a complaint and to sign the complaint. Appellant's Exhibit 3, which was identified as the complaint form to PERRP, contains only the signature of Mr. Sauvey. Therefore, Mrs. Sauvey cannot sustain her *prima facie* burden of showing that she met the requirements of section 4167.06(B) of the Ohio Revised Code and her case must be **DISMISSED** for a lack of jurisdiction.

Thus, it is my **RECOMMENDATION** that case number 2015-OSH-07-0168, assigned to Barbara Sauvey, be **DISMISSED** for a lack of subject matter jurisdiction.

With respect to Mr. Sauvey, however, the evidence has established that he did comply with the statutory requirements by filing a complaint with PERRP. Pursuant to section 4167.06 of the Ohio Revised Code, paragraph (A), ". . .he refused to work under conditions that [he] reasonably believed presented an imminent danger of death or serious harm to himself. . .". As a result of doing so, Mr. Sauvey was told to leave and turn in his keys and other items belonging to the Appellee. In essence, he was fired. Mr. Sauvey has met his burden of proof.

The burden of proof then shifted to Appellee to show that there was a legitimate, non-retaliatory reason for Appellant Sauvey's discharge. Appellee has failed to meet its burden.

Mr. Sauvey testified he applied stripper to the floors at Palm for approximately three (3) weeks without any problem. When he and his wife applied stripper to the floors at the Washington school building, he testified he was overcome by the fumes and could not work in those conditions. He began in one room, applying stripper, took a break due to the fumes, returned to the floor and filled two buckets of water for rinse water which was required to be present but was not earlier, then began stripping again but had to leave once more as he began to feel sick again due to the fumes from the stripping agent.

Mr. Haupt and some of the other witnesses for Appellee did not appear credible. Mr. Haupt testified that no one else complained about the fumes, but he stated when he went to the break room the first time, there were other employees there, but no one was complaining. If no one was complaining, then there would have been no reason for him to ask if anyone had asthma, yet he and Ms. Chaffin both testified that question was asked. Mr. Haupt confirmed that the required buckets of water were not on the second floor, but upon his return, they were. That would confirm Mr. Sauvey's testimony that he did return to the floor and fill those buckets with water, as no one else testified they did so. Ms. Conway testified she

did not see the Sauveys any more that day, but in light of the fact that Mr. Sauvey filled the buckets with water, her testimony does not appear credible.

Ms. Chaffin testified she heard Mr. Sauvey tell Mr. Haupt he had asthma and recalled that Mr. Haupt said something to the effect of "if you cannot do your job, then maybe we do not need you." Mr. Haupt, on the other hand, testified that the Sauveys just stood up at one point and said they were no longer going to work there. Mr. Haupt also testified he asked the Sauveys and others in the room if any of them had "neurological distress" and upon observing them, they all looked normal to him. He did not explain how he could assess a person's feeling of dizziness or nausea or of having a burning sensation in the throat.

Mr. Haupt confirmed that Mr. Sauvey told him he thought the chemicals were too strong and he felt weak. There was no testimony from Mr. Haupt that he talked to Mr. Sauvey about any protective equipment being used to alleviate the fumes and given his concern about safety, one would expect him to have available for the employees' use, all the protective equipment that is needed. There was no testimony that provided any detail to other work that the Sauveys could do, away from the fumes. Instead, it appears that Mr. Haupt did not want to take Mr. Sauvey's explanation that he was not feeling well due to the fumes as the truth. Given the fact that Mr. Sauvey was older than the other employees, perhaps the fumes affected him more. Perhaps, as Mr. Sauvey testified, there was not adequate ventilation in the rooms he was working in that day. Mr. Sauvey testified the fumes did not bother him when he used the stripper solution at Palm and there was no testimony or evidence to the contrary. It appears that Mr. Haupt did not want to give any credence to Mr. Sauvey's concerns, other than to say that his asthma was not supposed to be a problem and now it was a problem. Rather than deal with the problem that was causing Mr. Sauvey's asthma to flare up, Mr. Haupt fired Mr. Sauvey for refusing to work due to Mr. Sauvey's good faith belief that the fumes were making him ill. That is retaliation for refusing to work under dangerous conditions and is prohibited by statute.

There is no reasonable explanation as to why Mr. Sauvey would make up a story like this or why he would file a complaint if he did not in good faith believe that the fumes from the stripper were indeed making him sick. His complaint was investigated and there were found to be violations which needed to be corrected by Appellee. Mr. Sauvey was concerned for his safety and health and that of his wife. He did not have to prove that other employees were also sick. He only had to prove that he had a good faith belief that he may suffer serious harm if he continued to work. Mr. Haupt, on the other hand, had a vested interest in trying to discredit Mr. Sauvey, as he was the person responsible for ensuring the safety of the employees that day. It appears that he took no action to that end other than to fire the one person who complained.

Once Mr. Haupt was put on notice that there may be possible hazardous conditions in the workplace, he had a duty to investigate and work to correct and alleviate the causes. He did not do anything to that end other than to fire Mr. Sauvey without cause. Therefore, it is my **RECOMMENDATION** that Mr. Haupt's action of constructively discharging Mr. Sauvey by telling him he was through working for Appellee and asking for his keys and other items to be turned in be **DISAFFIRMED** and Mr. Sauvey retain his right to continued employment and receive full compensation for the tasks that he would have performed had he not been discharged from his duties, pursuant to section 4167.06(A) of the Ohio Revised Code.



Marcie M. Scholl
Administrative Law Judge