STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Amber Ensign,

Appellant,

v.

Case Nos. 2015-TFR-08-0153
2015-WHB-08-0154

Northwest Ohio Education Service Center,

Appellee,

ORDER

These matters came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

After a thorough examination of the entirety of the records, 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 these appeals are **DISMISSED** for a lack of jurisdiction pursuant to sections 124.03 and 124.341 of the Ohio Revised Code.

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 30, 2016.

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 April 6, 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 Numbers: 2015-TFR-08-0153 and 2015-WHB-08-0154

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: April 14, 2016

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Amber Ensign

Appellant

v.

Northwest Ohio Education Service Center

Appellee

Case Nos. 2015-TFR-08-0153
2015-WHB-08-0154

March 7, 2016

Marcie M. Scholl
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

Appellant Ensign filed a notice of appeal with this Board indicating she was appealing a transfer and filing a whistleblower appeal. Along with her notice of appeal, she attached a letter and copies of her emails which she references as the documents for her whistleblower claim.

Unlike a court of general jurisdiction, this Board has only the powers conferred upon it by statute. Section 124.03 of the Ohio Revised Code confers jurisdiction upon the Board over classified employees in the service of the state. The definition of "state service" is found in section 124.01(B) of the Ohio Revised Code and states as follows:

> (B) "State service" includes all offices and positions in the service of the state and the counties and general health districts of the state. **"State service" does not include offices and positions in the service of** the cities, city health districts, and **city school districts of the state**. (Emphasis added).

Since Appellant Ensign is employed by the Northwest Ohio Educational Service Center, an agency which serves several city school districts in several different counties, she is not considered to be an employee in the service of the state. Therefore, this Board does not possess jurisdiction to review her appeal of a transfer.

Even if this Board were to have jurisdiction over Appellant Ensign's transfer appeal, the fact that she states she was reassigned as an office specialist at the Independence Education Center to the same position but at the Educational Service Center in the special education department, does not constitute a transfer. Since

Appellant Ensign's position remained the same and her appointing authority remained the same, the only thing that changed was her job location and that does not constitute a transfer, as that term is defined. An appointing authority has the right to reassign an employee to a different job location within the same classification.

The whistleblower appeal filed by Appellant Ensign, however, is something that this Board does have jurisdiction over pursuant to section 124.341of the Ohio Revised Code. However, in order for this Board's jurisdiction to be invoked, Appellant Ensign must first meet the requirements under that statute. After reviewing the documents she submitted with her appeal, she does not meet those requirements and as such, her appeal must be dismissed.

Section 124.341 of the Ohio Revised Code, 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).

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,** or, in cases where the violation is believed to be a criminal offense, in addition to or instead of filing a written report with the employee's supervisor or appointing authority, the employee made a report with another official or entity named in the statue, 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).

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)). 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.

Assuming arguendo that the writing requirement under *Haddox* is arguably met, the requirement that the written communication identify a violation of state or federal statute, rule, or regulation, or misuse of public resources is not. Appellant Ensign failed to identify any violation of state or federal statute, rule, or regulation, or misuse of public resources in her email to the principal. Instead her email talks about a student and how she perceives he is being treated and possibly bullied. Appellant Ensign did not cite one violation any state or federal statute, rule or regulation or misuse of public resources. Pursuant to the whistleblower statute,

Appellant Ensign's recitation of how a particular student is being treated by others does not constitute a violation of any state or federal statute or regulation as called for under R.C. 124.341. Thus Appellant Ensign's email to the principal fails to satisfy the reporting requirements under R.C. 124.341 and *Haddox*.

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.

Accordingly, Appellant Ensign has failed to demonstrate that she met the requisite reporting requirements set forth in R.C 124.341, by failing to allege any specific violations of statute, rule or regulation. Therefore, she has failed to meet her prima facie burden and it is my **RECOMMENDATION** that these appeals should be **DISMISSED** for a lack of jurisdiction pursuant to sections 124.03 and 124.341 of the Ohio Revised Code.

Marcie M. Scholl

Marcie M. Scholl
Administrative Law Judge