

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

Mary Louise Allen,

Appellant,

v.

Stark State College,

Appellee,

Case Nos. 2015-RED-09-0177
2015-WHB-09-0178
2015-INV-09-0179

LIFTING OF STAY AND ISSUANCE OF FINAL ORDER

These matters came on for consideration upon Appellant's April 27, 2016 filing of a motion for reconsideration. On May 2, 2016, this Board issued a Stay in the instant matters. On May 16, 2016, Appellee filed its memorandum *contra* to Appellant's motion for reconsideration.

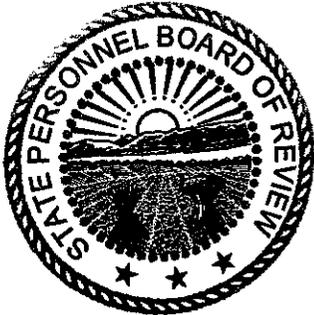
In her motion for reconsideration, Appellant appears to have some questions regarding the process this Board utilizes to review the record of a case, following the assigned Administrative Law Judge's (ALJ) issuance of a Report and Recommendation (R and R) in that case. As such, the parties should note the following.

Once the ALJ issues the R and R in a case, there is an opportunity for the parties to file objections to the content of the R and R. If objections are filed, the opposing party has an opportunity to file a response to the objections.

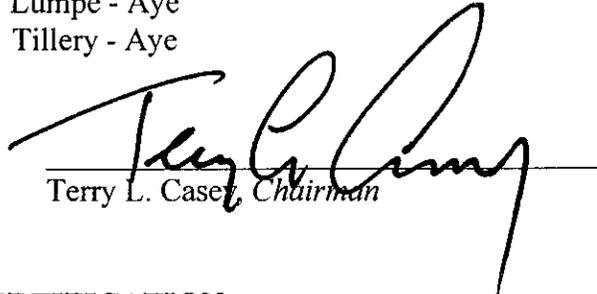
Once the time has run for the filing of objections and responses thereto, *each Board member separately reviews the entirety of the record in a case.* This includes any objections and responses that are timely and properly filed, as well as the rest of the record in the case. The Board members do not discuss with each other outside of a Board meeting the merits of a case that comes to them *via* the R and R process. The Board members are permitted to, and sometimes do, discuss the merits of such a case in a publically open and previously announced Board meeting. Prior to the beginning of the Board meeting, if any Board member requests a more comprehensive discussion on various aspects and details of a particular case, it will be separated out and reviewed more fully during the meeting. This is what occurred with the three instant cases. The Board's decision on that day was to adopt the Recommendation of the ALJ to dismiss these three cases. A final Order on these cases was then prepared and issued in a timely manner. Following the issuance of a final Order, either party then generally has an opportunity to appeal the final Order to the appropriate Court of Common Pleas.

In each of the above three cases, the Board members have conducted the aforementioned comprehensive case review and find no reason to set aside the final Order issued in these matters on April 22, 2016. Accordingly, that final Order stands as issued.

Wherefore, it is hereby **ORDERED** that the **STAY** issued in these matters on May 2, 2016 is **LIFTED** and the **final ORDER** in these matters issued on April 22, 2016 **STANDS AS ISSUED**, pursuant to R.C. 124.03, R.C. 124.341, R.C. 124.56, and O.A.C. 124-15-04, and O.A.C. 124-15-05.



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 the foregoing is ~~(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, May 23, 2016.


Anne E. Conn
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 May 31, 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-RED-09-0177, et seq

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: June 7, 2016

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

Mary Louise Allen

Case No. 2015-WHB-09-0178

Appellant

v.

February 1, 2016

Stark State College

Jeannette E. Gunn

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on for consideration pursuant to Appellant's Response to the Board's November 2, 2015, Procedural Order and Questionnaire. Appellant filed an appeal with this Board on September **, 2015, stating that Appellee had taken retaliatory action against her as a result of her alleged whistleblower activities. Appellant requested and was granted an extension of time to fully respond to the Board's Procedural Order and Questionnaire.

In response to specific questions set forth in the Board's November 2, 2015, Procedural Order and Questionnaire, Appellant stated that multiple retaliatory actions had resulted from her initial 2011 report to Appellee of concerns regarding a colleague's academic credentials. Appellant indicated in her response that her written report alleged violations of:

"Taxpayer Fraud/Collusion (don't know code), Open Public Meetings Act violations, ORC 2921.01, 2921.03, 2921.04, 2921.05, 2921.11, 2921.12, 2921.21, 2921.22, 2921.24, 2921.31, 2921.32, 2921.43, 2921.44, 2921.45, 2921.52, Color of Law (Campus Security ignorance/harassment), Privacy Act violation (released confidential information against me in public records request), intentional malfeasance (code? For corrupting files sent in response to my public records request)"

Appellant failed to provide a copy of the initial written report from which she alleged Appellee has taken retaliatory action.

CONCLUSIONS OF LAW

This Board has jurisdiction to consider retaliatory discipline arising pursuant to the report of violations of state or federal statutes, rules, or regulations; or the misuse of public resources. See, R.C. 124.341.

In a "whistleblower" appeal, the employee bears the burden to prove, by a preponderance of the evidence, that the disciplinary or retaliatory action taken by the employee's appointing authority was the result of the employee making a report under the pertinent statute. Case law has established that the framework for the order and presentation of evidence first articulated by the United States Supreme Court in *McDonnell Douglas v. Green* (1973), 411 U.S. 792, is appropriate in a whistleblower appeal brought under O.R.C. 124.341. See, *Mark Leslie v. Ohio Department of Development* (2006), Franklin County No. 05CVF-05-4401, unreported.

An employee must first establish a *prima facie* case to support his or her claim under R.C. 124.341. In the event that the employee is able to successfully demonstrate the existence of a *prima facie* case, the burden of production shifts to the appointing authority to rebut the employee's evidence by articulating a legitimate, non-retaliatory reason for its employment decision. If the appointing authority satisfies that burden of production, the burden of persuasion returns to the employee to prove that the appointing authority's stated reason is a pretext for retaliation.

R.C. 124.341 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.

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 with the supervisor or appointing authority, 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.

(B) Except as otherwise provided in division (C) of this section, no officer or employee in the classified or unclassified civil service shall take any disciplinary action against an employee in the classified or unclassified civil service for making any report authorized by division (A) of this section, including, without limitation, doing any of the following:

- (1) Removing or suspending the employee from employment;
- (2) Withholding from the employee salary increases or employee benefits to which the employee is otherwise entitled;
- (3) Transferring or reassigning the employee;
- (4) Denying the employee promotion that otherwise would have been received;
- (5) Reducing the employee in pay or position.

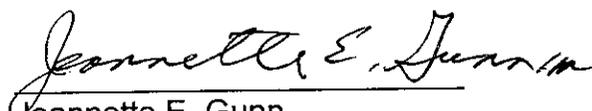
In order to establish a *prima facie* case, Appellant must demonstrate that she properly reported an alleged violation or violations of state or federal statutes, rules, or regulations, or misuse of public resources that she became aware of during the

course of his or her employment, and she must demonstrate that one or more prohibited retaliatory actions were taken by Appellee.

As previously indicated, Appellant failed to provide this Board with a copy of the initial written report from which she alleged Appellee has taken retaliatory action. Appellant attached copies of two Employee Complaint forms filed in August 2015, to her Response to the Board's November 2, 2015, Procedural Order and Questionnaire. Upon a review of the documents provided, I find that neither of the forms provided showed a direct reference to specific violations of state or federal statutes, rules, regulations or the misuse of public resources addressed to an appropriate individual. I further find that neither form identified retaliatory action taken as a result of their being filed.¹

Based upon an examination of the information contained in the record, I find that Appellant has failed to demonstrate her compliance with the reporting requirements of R.C. 124.341 and to establish a *prima facie* case, consequently, this Board lacks jurisdiction to consider the instant appeal.

Therefore, I respectfully **RECOMMEND** that this appeal be **DISMISSED** for lack of jurisdiction.


Jeannette E. Gunn
Administrative Law Judge

¹ Appellant also attached a copy of an Employee Complaint form filed in December 2015, after the instant appeal was filed with this Board; Appellee could not have taken retaliatory action that formed the basis of Appellant's September appeal for the filing of a document not in existence at the time the September appeal was filed.