STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Christopher Vermillion,

Appellant,

v.

Case Nos. 2016-REM-04-0077
2016-FRN-04-0078

Department of Transportation,

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 the instant appeals are **DISMISSED** for lack of jurisdiction, pursuant to R.C. 124.34

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, October 26, 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 November 2, 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: 2016-REM-04-0077, 0078

Transcript Costs: $120.00 Administrative Costs: $25.00

Total Deposit Required: * $145.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: November 10, 2016

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Christopher Vermillion	Case Nos. 16-REM-04-0077 16-FRN-04-0078
Appellant	
v.	September 15, 2016
Department of Transportation	
Appellee	Jeannette E. Gunn *Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

These causes came on to be heard on September 7, 2016. Appellant was present at record hearing and was represented by Reed D. Searcy, Attorney at Law. Appellee was present at record hearing through its designee, Deputy Director Kirk Slusher, and was represented by Tracy M. Nave and Matthew J. Karam, Assistant Attorneys General.

Appellant alleges that he was forced to resign his position with Appellee, thereby resulting in a *de facto* removal from employment.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

Appellant was employed by Appellee in its District 1 Office in the position of Transportation Manager 1 from October 2015 through April 19, 2016. In his position as Transportation Manager 1, Appellant supervised Highway Technicians in the performance of their duties, assigned work, and performed the other duties listed in his position description.

Following its investigation of an incident which occurred in December 2015, Appellee charged Appellant with multiple violations of Appellee's Work Rules and Discipline Policy. On or about April 13, 2016, Appellant participated in a pre-disciplinary meeting and had an opportunity to respond to those charges. Appellant stated at record hearing that he did not agree entirely with the charges, but acknowledged that he should have taken different action in the incident from which the charges arose. The pre-disciplinary hearing officer found just cause for discipline.

On April 19, 2016, Appellant was asked to come into the Kenton garage, where he met with Deputy Director Kirk Slusher and Labor Relations Officer Machell Price. Appellant was served with a copy of an executed R.C. 124.34 Order of Removal at that meeting and Deputy Director Slusher told him that April 19, 2016, would be Appellant's last day of employment with Appellee. Deputy Director Slusher offered Appellant an opportunity to resign, rather than be terminated; he stated that if Appellant chose to resign, any employment reference would be neutral.

Appellant confirmed that he had received a copy of the pre-disciplinary hearing officer's report and had an opportunity to review it prior to his April 19, 2016, meeting with Mr. Slusher and Ms. Price. He stated that he was not surprised to receive some discipline as a result of the December 2015 incident, but was surprised that he was being removed.

Appellant testified that he chose to resign, as he believed it was the most beneficial of the two options for him and his family. He completed the resignation paperwork and then filled out papers provided to him by Ms. Price regarding leave conversion, healthcare benefits and returning state property. Appellant confirmed that he knew that he had the option to resign, despite the fact that Appellee had provided him with an executed Order of Removal.

Ms. Price processed a Personnel Action Request for Appellant's resignation on April 20, 2016. On April 21, 2016, she was notified that the Personnel Action had been completed.

CONCLUSIONS OF LAW

The Ohio Revised Code provides this Board with jurisdiction to consider a classified employee's removal, however, the Board has no authority to consider an appeal of a voluntary resignation. Appellant in the instant matter alleges that he was forced to resign his position of employment with Appellee and bears the burden to prove his case by a preponderance of the evidence.

The record reflects that Appellant made a decision to resign from employment on April 19, 2016, rather than be removed from his position of Transportation Manager 1, and provided Appellee with a signed resignation letter. The court in *Kinney v. Department of Administrative Services*, 14 Ohio App.3d 33 (1984) held that when a resignation is the product of an appointing authority's wrongful overt acts of coercion or duress, the resignation is involuntary and ineffective and constitutes a removal, the merits of which an employee should be permitted to contest. The *Kinney* court further noted, however, that where an

employee is permitted to resign as an alternative to being removed on meritorious charges there is no coercion and the resignation is voluntary.

Revised Code Section 124.34 provides that an employee may be disciplined for violation of an appointing authority's work rules; in the instant appeal, Appellee demonstrated a good faith belief that Appellant's conduct constituted a violation of its work rules and discipline policy. Appellant was provided with an option to resign from his position, or to face discipline based upon his conduct. Appellant acknowledged that he was provided with his options prior to making a decision and made the choice to tender his resignation.

Appellant stated that when making his choice he was concerned about his loss of income, as he has a family to support and financial obligations. There is no question that he was faced with an upsetting and difficult choice between two unpleasant options. A resignation resulting from personal emotional distress, however, has been held not to be the equivalent of a forced resignation under duress from the employer, *Riedinger v. Ohio State University*, No. 85AP-1044 slip op. (April 22, 1986). Conflicting testimony was presented regarding Deputy Director Slusher's alleged comment that "things would not go well" for Appellant if he chose to proceed with the anticipated discipline; I find that Appellant failed to prove by a preponderance of the evidence either that Deputy Director Slusher made the alleged statement or that, even if the statement were made, it constituted a threat or material misrepresentation of fact upon which he relied in submitting his resignation.

Based upon my review of all of the testimony and evidence contained in the record, I find that Appellant was not coerced into resigning, nor did he resign under duress. Because Appellant voluntarily resigned, this Board is without jurisdiction to review the merits of the appeal.

Appellant's counsel argued in closing statements that this Board has jurisdiction to consider the merits of the instant appeal because Appellee served Appellant with an executed removal order prior to Appellant's submission of his resignation, thereby activating his right to appeal. Appellant's argument must fail.

R.C. 124.34 provides that a classified employee who has been reduced, suspended, fined or removed may file an appeal of the action with this Board. The statutory right to appeal (and this Board's jurisdiction) arises from the <u>underlying disciplinary action</u> taken by the appointing authority, rather than from service of an order of reduction, suspension, fine or removal. See, *State ex rel. Shine v. Garofalo* (1982), 69 Ohio St.2d 253. Service of a disciplinary order stating the reasons for

the action is a procedural step with which an appointing authority must comply in effectuating discipline, and is not the equivalent of the actual disciplinary action.[1]

In the instant matter, Appellee suspended the disciplinary process upon its receipt and acceptance of Appellant's voluntary resignation. No underlying disciplinary action was taken by Appellee and, therefore, no right of appeal pursuant to R.C. 124.34 exists.

Therefore, because Appellant voluntarily resigned his employment with Appellee and because Appellee took no appealable disciplinary action against Appellant, I respectfully **RECOMMEND** that the instant appeals be dismissed for lack of jurisdiction, pursuant to R.C. 124.34.

Jeannette E. Gunn
Administrative Law Judge

1 As evidenced by this Board's own administrative rules, the right to appeal a disciplinary action exists even where no disciplinary order has been issued. O.A.C. 124-1-03.