STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Jennifer Hupp,

Appellant,

v.

Case Nos. 2016-REM-06-0117
2016-MIS-06-0118

Ohio State University,

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 Appellee's Motion is **GRANTED** and these matters are **DISMISSED** for lack of subject matter jurisdiction.

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-06-0117, 0118

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: November 10, 2016

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Jennifer Hupp	Case Nos. 16-REM-06-0117 16-MIS-06-0118
Appellant	
v.	September 1, 2016
Ohio State University	
Appellee	Jeannette E. Gunn *Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on for consideration pursuant to Appellee's Motion to Dismiss, filed with this Board on July 18, 2016. Appellant filed a Memorandum in Opposition on July 26, 2016. Appellee asserts that this Board lacks subject matter jurisdiction over the instant appeal because Appellant voluntarily resigned from employment with Appellee. Appellant argues that she was constructively discharged, or coerced to resign by Appellee.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

Based upon the undisputed information contained in the record, I make the following findings of fact:

Appellant was employed by Appellee from May 2005 through May 19, 2016, as an Oncology Coordinator II. In December 2015, Appellant was notified that Appellee was investigating her October 2015 alleged unauthorized access of patient records. Appellant, through counsel, made a public records request to obtain documents to prepare for her anticipated pre-disciplinary hearing, asking that they be provided at least one week prior to the anticipated hearing.

On May 11, 2016, Appellant received notice that a pre-disciplinary hearing was scheduled for Wednesday, May 18, 2016, at 10:00 a.m. to address charges of failure of good behavior and/or neglect of duty. Appellant received a partial response to her April 2016 public records request on May 17, 2016, and received additional information following her pre-disciplinary hearing on May 18, 2016.

Appellant, accompanied by counsel, attended and participated in the pre-disciplinary hearing on May 18, 2016. The only documents considered at the pre-disciplinary hearing were those provided to Appellant as part of her "hearing packet," reflecting Appellee's reasons for requesting discipline. At the pre-disciplinary hearing, Appellant had an opportunity to speak with regard to the charges made against her and provided the Hearing Officer with a typewritten statement of her objections to the hearing going forward; to Appellee's "denial of my right to submit documentary evidence" sought through her April 2016 public records request; and to Appellee's refusal to allow Appellant's attorney to participate in her pre-disciplinary hearing.

On May 19, 2016, before a recommendation was made by the Hearing Officer, Appellant emailed a signed resignation letter to her direct supervisor, Courtney Kuyper, and sent a copy of the resignation letter to Brandon Gibbs, Employee and Labor Relations Consultant in Appellee's Office of Human Resources. Mr. Gibbs responded to Appellant's resignation letter with correspondence indicating Appellee's acceptance of her resignation, effective May 19, 2016.

CONCLUSIONS OF LAW

The Ohio Revised Code provides this Board with jurisdiction to consider the removal of a classified employee, however, it does not vest the Board with the authority to consider an appeal of a voluntary resignation. Appellee filed a properly supported Motion to Dismiss with the Board, asserting that Appellant resigned her employment with Appellee voluntarily. Pursuant to O.A.C. 124-11-07(A)(2), any response filed by Appellant was required to set forth specific facts demonstrating that there is a genuine issue in dispute.

Based on the facts recited by both parties, there appears to be no dispute with regard to the underlying events leading up to the appeal. Appellant argues, as a matter of law, however, that those events were sufficient to constitute "heavy-handedness and unlawful behavior" on the part of Appellee, and that by such conduct Appellee both coerced and constructively discharged her, since "a reasonable person would have felt compelled to resign under similar circumstances." Appellant alleged that "The University coerced Mrs. Hupp into submitting a letter of resignation by unlawfully withholding public records she

requested to weaken her ability to respond to management's evidence in its 'hearing packet'."

An individual claiming constructive discharge has the burden of producing evidence that a reasonable person would find his or her working conditions so intolerable that he or she would voluntarily resign. *Mauzy v. Kelly Serv., Inc.* (1996), 75 Ohio St.3d 578, paragraph four of the syllabus; *Schwartz v. Comcorp, Inc.* (1993), 91 Ohio App.3d 639; cert denied 66 Ohio St.3d 1509. Appellant makes no assertions in her response to Appellee's Motion to Dismiss that she was subjected to intolerable working conditions other than Appellee's failure to provide public records within the time frame requested, its refusal to postpone the pre-disciplinary hearing to allow for receipt of those documents, and Appellee's refusal to permit Appellant's counsel to participate in the pre-disciplinary hearing.

Uncontroverted facts contained in the record indicate that Appellee denied Appellant's request to postpone the pre-disciplinary hearing to allow for receipt of the public records requested by her counsel. Ultimately some of those records were received by Appellant on the day prior to hearing and some were received shortly after the hearing.[1] Appellee also barred Appellant's counsel from participating in other than a support role during the pre-disciplinary hearing.

The Supreme Court of Ohio in *Kennedy v. Marion Correctional Institution* (1994), 69 Ohio St.3d 20, held that a classified employee is not entitled to either prehearing discovery or a formal evidentiary hearing prior to being disciplined. The *Kennedy* court, citing *Cleveland Bd. of Edn. v. Loudermill* (1985) 470 U.S. 532, and *Local 4501, Communication Workers of Am. v. Ohio State Univ.* (1990), 49 Ohio St.3d 1, noted that nothing more than notice of the charges against the employee, an explanation of the employer's evidence, and an opportunity to respond to the charges are required prior to adverse administrative action. In the present appeal, the evidence contained in the record clearly indicates that Appellant was provided with all three, thereby satisfying the requirements of due process.

While Appellee's failure to provide public records within the time frame requested, its refusal to postpone the pre-disciplinary hearing to allow for receipt of those documents, and its refusal to permit Appellant's counsel to actively participate in the pre-disciplinary hearing may have, understandably, caused Appellant some anxiety, I find that Appellee's actions were not unlawful nor, in the circumstances

---

[1] This Board has no authority to determine whether or not Appellee's actions with regard to Appellant's public records request constituted a violation of the Ohio Public Records Act. Mandamus is the proper remedy to compel compliance with the Public Records Act.

outlined, were they "heavy-handed." Personal distress does not equate to a forced resignation under duress from the appointing authority. *Riedinger v. Ohio State Univ.*, No. 85AP-1044 slip op. (April 22, 1986). I find that Appellee's conduct, as cited by Appellant, was insufficient to create intolerable working conditions that would result in a reasonable person's voluntary resignation from employment and that Appellant was not, therefore, constructively discharged. Nor was Appellant's resignation coerced by Appellee's conduct.

The parties agree that Appellant submitted her resignation letter to her supervisor the day after her pre-disciplinary hearing, prior to any recommendation for discipline being made by the Hearing Officer. Neither party asserts that Appellee solicited Appellant's resignation as an alternative to discipline. No allegations were made to suggest that Appellant received an R.C. 124.34 Order of Removal from Appellee or any other type of "official" written notification of discipline and no allegations were made that Appellee otherwise communicated to Appellant that a decision had been made to terminate her employment. Although Appellant may have considered her removal from employment to be a *fait accompli*, based upon the seriousness of the charges and her own opinion as to the discipline likely to be imposed, the only individual who took definitive action with regard to Appellant's employment status was Appellant herself.

Upon due consideration of the information contained in the record, and construing the motions herein in the light most favorable to Appellant, I find that Appellant voluntarily resigned her employment with Appellee. As such, this Board lacks subject matter jurisdiction over the instant appeal and I respectfully **RECOMMEND** that Appelle's Motion be **GRANTED** and this matter be **DISMISSED**.

Jeannette E. Gunn
Administrative Law Judge