STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Stacey Brown,

Appellant,

v.

Case Nos. 2016-WHB-02-0021
2016-WHB-02-0028

East Cleveland City Schools,

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 Appellant's consolidated appeals are **DISMISSED** for Appellant's failure to establish a *prima facie* "whistleblower" case to invoke this Board's jurisdiction under O.R.C. § 124.341 and Appellee's motion to strike Appellant's post-hearing brief is **DENIED**.

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, November 14, 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 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: 2016-WHB-02-0021, 0028

Transcript Costs: $208.50 Administrative Costs: $25.00

Total Deposit Required: * $233.50

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

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Stacey J. Brown,

Appellant,

v.

East Cleveland City School District
Board of Education,

Appellee.

Case Nos.: 2016-WHB-02-0021
2016-WHB-02-0028

October 19, 2016

Elaine K. Stevenson
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for consideration due to Appellant Stacey J. Brown's (Appellant) filing of two "whistleblower" appeals pursuant to Ohio Revised Code (O.R.C.) § 124.341. (Case Nos. 2016-WHB-02-0021 and 2016-WHB-02-0028). Appellant alleges that the East City School District Board of Education (Appellee) has taken retaliatory action against her for filing a "whistleblower" report under the provisions of O.R.C. §124.341. Appellee filed a motion to dismiss, asserting that this Board lacks jurisdiction over employment actions taken by a city school district such as the East Cleveland City School District. The Board's jurisdiction to consider this matter was confirmed in Am. Sub. H.B. 187, which clarified that "whistleblower law O.R.C. § 124.341 applies to all city school district employees in the classified and unclassified civil service."

Appellant's "whistleblower" appeals were consolidated pursuant to Ohio Administrative Code Rule 124-11-04; the record was developed through procedural orders, questionnaires, and a record hearing, which was held on July 27, 2016. Appellant was present at record hearing and appeared *pro se*. Appellee was present through its representatives, Christian M. Williams, Esq. and Daniel L. Lautar, Esq. Also present was Appellee's management designee Myrna Loy Corley, School Superintendent of East Cleveland City School District. Appellant and Ms. Corley offered testimony. Subsequent to the hearing, the parties filed post-hearing briefs.

It is noted that Appellee has filed a motion to strike Appellant's post-hearing brief for lack of clarity and for references to evidence not introduced on the record. Appellee indicates that it will be prejudiced in its defense if the document is admitted. After a thorough review of both parties' filings, including post-hearing briefs, I find that Appellee will not suffer any prejudice due to Appellant's post-hearing brief. Therefore, I respectfully recommend that the Board deny Appellee's motion to strike.

The threshold issue in this case is whether Appellant has invoked this Board's jurisdiction under O.R.C. § 124.341. In order to invoke this Board's jurisdiction under O.R.C. § 124.341, a civil service employee must first establish that he or she has made a written report identifying a violation or violations of a state or federal statute, rule, or regulation, or a misuse of public resources and that the employee filed his or her report with the employee's supervisor, appointing authority, the state inspector general, or other appropriate legal official. The employee must then establish that after filing such a report, the appointing authority took disciplinary **or** retaliatory action against the employee. For the reasons stated below, Appellant has failed to invoke this Board's jurisdiction under O.R.C. § 124.341.

FINDINGS OF FACT

Based upon a thorough review of the record evidence as a whole, and where relevant, credibility determinations of witness testimony, I make the following Findings of Fact:

1. Appellee is charged with carrying out management duties and responsibilities for the East Cleveland City School District pursuant to O.R.C. §§ 3313.17 and 3313.47. Appellee hired Myrna Loy Corley as the School District's Superintendent.

2. During all relevant times, Appellant has been employed by Appellee as the Dean of Students for Heritage Middle School. Appellant has held this position for approximately seven months. Appellant's immediate supervisor is Gilda Roberts, who holds the position of Principal.

3. In December 2015, Superintendent Corley became aware of an ongoing problem with the professional relationship between Appellant and Principal Gilda Roberts through a series of emails and text messages that she received from Appellant, which included Appellant's December 7, 2015 "outcry" letter. Superintendent Corley attempted to resolve the personnel issues between Appellant and Ms. Roberts via informal meetings that took place on or about December 7 and December 15, 2015. The following individuals were present at least one of the December 2015 meetings: Superintendent Corley, Human Resources Director Byron Lyons, Appellant, Principal Roberts, Director of Curriculum and Instruction Kevin Harrell, who is Ms. Roberts' immediate supervisor, and Monique Ceasor, Curriculum and Instruction Specialist.

4. Superintendent Corley's attempts to mediate and counsel Ms. Roberts and Appellant to improve their working relationship proved unsuccessful.

5. On January 20, 2016, Ms. Corley directed Mr. Lyons to issue written notices to both Appellant and Principal Roberts requiring them to attend a conference with Ms. Corley on January 22, 2016. The notices indicated that the purpose of the meeting was to discuss allegations of unprofessional conduct, and stated, in part as follows: "As the result of this conference may lead to disciplinary action, you may choose to have legal representation."

6. The meeting regarding possible misconduct between Appellant and Ms. Roberts began on January 22, 2016; however, it was interrupted by news that Ms. Roberts' mother was near death. Superintendent Corley immediately suspended the conference so that Ms. Roberts could be with her mother, who died later that evening. Ms. Roberts then took bereavement leave.

7. Although Superintendent Corley intended to resume the January 22, 2016 meeting at a later date, it was never completed due to the allegations and subsequent investigation of Appellant's conduct during a student assembly on February 2, 2016.

8. On February 2, 2016, during a student assembly in the Heritage Middle School cafeteria, Appellant addressed the student body in a, erratic, rambling and unprofessional manner. Certain statements made by Appellant upset a student, who was directed to leave the cafeteria. The student later reported the incident to his mother and the School Administration.

9. Upon learning of the February 2, 2016 student assembly incident that same day, Superintendent Corley relieved Appellant of her duties, with pay, pending the outcome of an investigation into her conduct. On February 2, 2016, Appellant was issued a notice of her relief from duties by the Director of Human Resources and was escorted from Heritage Middle School.

10. Superintendent Corley and Human Resources Director Lyons conducted an investigation regarding Appellant's conduct during the February 2, 2016 student assembly. The parents of the student who was instructed to leave the assembly were interviewed. The student instructed to leave the assembly provided a written statement. JodiLyn Solomon, a school employee who recorded part of Appellant's speech during the assembly, also provided a written statement.

11. On February 10, 2016, Appellee sent Appellant a notice of a pre-disciplinary conference to address allegations of Appellant's inappropriate conduct in the performance of her job duties.

12. On February 17, 2016, Appellant attended her pre-disciplinary conference regarding her conduct during the February 2, 2016 assembly. Present at the

conference were Superintendent Corely, Human Resources Director Lyons, Principal Roberts, and Appellant. During this meeting, Superintendent Corley addressed Appellant's unprofessional and inappropriate behavior during the February 2, 2016 student assembly. The Superintendent also addressed the ongoing issues between Appellant and Principal Roberts. In an effort to provide work direction and focus for Appellant, Superintendent Corley also gave Appellant her preliminary performance evaluation for the school year. Appellant was given an opportunity to respond to the allegations made against her.

13. As of the date of the hearing, Appellee had taken no action as a result of the February 17, 2016 pre-disciplinary conference. Appellant has remained on leave of absence, with full pay and benefits, through the time she filed her second "whistleblower" appeal on February 23, 2016.

14. Appellant testified that her December 7, 2015 "outcry" letter addressed to Superintendent Corley and her Analysis Survey she completed and submitted to Superintendent Corley on October 14, 2015 are her "whistleblower" reports under O.R.C. § 124.341.

CONCLUSIONS OF LAW

O.R.C. 124.341, states, in relevant 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 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.
>
> (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 or filing a complaint as authorized by division (A) of this section....

As noted above, in order to invoke this Board's jurisdiction under O.R.C. § 124.341, a civil service employee must first establish that he or she has made a written report identifying a violation or violations of a state or federal statute, rule, or regulation, or a misuse of public resources. The employee's report must be filed with either the employee's supervisor, appointing authority, or other appropriate official named in the statute. The employee must then establish that after filing such a report, the appointing authority took disciplinary or retaliatory action against the employee. See *Haddox v. Ohio State Attorney General*, (Franklin 2007), 06CVF-08-10391, (citing *Wade v. Ohio Bur of Workers' Comp*, (June 10, 1999), 10th Dist. No. 98AP-997 unreported citing to *State ex rel. Cuyahoga Cty. v. State Personnel Bd. of Review (1998),* 82 Ohio St.3d 496 and to *Chubb v. Ohio Bur. of Workers' Comp,* 81 Ohio St. 3d 275 (1998).

At the hearing, Appellant was asked to identify the document or documents that constitute her "whistleblower" report(s). Appellant identified her December 7, 2015 "outcry" letter to Superintendent Corely and her October 14, 2015 response to Superintendent Corley's Analysis Survey as her "whistleblower" documents. Neither of these of two documents constitutes a "whistleblower" report under O.R.C. § 124.341.

A review of the Appellant's December 7, 2015 "outcry" letter reveals that the central focus of this letter is Appellant's dissatisfaction with Principal Roberts' behavior toward her and Principal Roberts' leadership of Heritage Middle School. Appellant details numerous alleged incidents of Ms. Roberts' behavior toward her, ranging from rude greetings to issues with her attire. The December 7, 2015 letter also describes a number of allegedly errant decisions or actions on the part of Ms. Roberts that Appellant believes were detrimental to the teaching environment at Heritage Middle School. Although Appellant's letter mentions school education issues, such as "Focus School," "Positive Behavior Interventions and Supports," and "Value Added=Above/At Status", the letter does not identify a violation or violations of state or federal statute, rule, or regulation or the misuse of public resources as required by O.R.C. § 124.341.

The other document Appellant identified as a whistleblower report is the Analysis Survey she completed on October 14, 2015. The Analysis Survey was disseminated to staff at Shaw High School and Heritage Middle School during a meeting in October 2015. Superintendent Corley testified that all teaching staff members were required to answer the survey questions regarding teaching issues and concerns. Superintendent Corley further testified that she used the survey to gather information in order to better address issues and concerns in the School District. Although Appellant's completed survey contains her opinions, suggestions, and concerns regarding how to provide the best educational environment for the students at Heritage Middle School, Appellant's survey response does not identify a violation or violations of state or federal statute, rule, or regulation or the misuse of public resources as required by O.R.C. § 124.341.

Therefore, since the evidence demonstrates that Appellant failed to establish the first element of her *prima facie* case of "whistleblowing" under O.R.C. § 124.341, it is not necessary to address the other element. Nonetheless, Appellant argues that she suffered retaliation because Superintendent Corley conducted a meeting on January 22, 2016 with Appellant, Principal Roberts, and other staff members to discuss personnel concerns that Appellant raised in her letter. Appellant further argues that Appellee's decision to conduct an investigation and hold a pre-disciplinary meeting with Appellant on February 17, 2016 to address her conduct during a student assembly is a form of retaliation.

Assuming, *arguendo*, that Appellant had filed a "whistleblower" report under O.R.C. § 124.341, the weight of the testimonial and documentary evidence contained in the record establishes that Appellee's actions with regard to Appellant were an effort to manage interpersonal conflict in the workplace and to address Appellant's behavior during a student assembly. The January 22, 2016 meeting was called partly in response to Appellant's request for action on the part of the Superintendent, not as a means to retaliate. Both Appellant and Principal Roberts received notices and both employees were confronted at the same time regarding problems with their work relationship. With regard to the pre-disciplinary meeting, Appellee's primary reason to hold the February 17, 2016 pre-disciplinary conference was to provide notice regarding Appellant's erratic behavior during the February 2, 2016 student assembly. The Superintendent also addressed the ongoing issues between Appellant and Principal Roberts. In an effort to provide work direction for Appellant, Superintendent Corley instructed Principal Roberts to provide Appellant with her preliminary performance evaluation for the school year at the pre-disciplinary conference. Appellant was given an opportunity to respond to the allegations made against her. As of the date of the hearing, Appellee has taken no action with regard to the pre-disciplinary meeting. Because Appellant has provided no evidence to establish that Appellee's actions are retaliatory in nature, Appellant also failed to establish the second element of a *prima facie* case of retaliation under O.R.C. § 124.341.

Based on the foregoing, I respectfully recommend that Appellant's consolidated appeals be **DISMISSED** since Appellant failed to establish a *prima facie* "whistleblower" case that invoked this Board's jurisdiction under O.R.C. § 124.341. I further recommend that Appellee's motion to strike Appellant's post-hearing brief be **DENIED**.

Elaine K. Stevenson
Administrative Law Judge