

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

ERNEST J. WILLIAMS,

Appellant,

v.

Case No. 06-OSH-02-0046

CITY OF COLUMBUS,

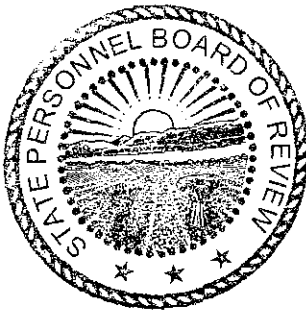
Appellee.

ORDER

This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the record and 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 appeal be **DISMISSED** for lack of subject matter jurisdiction, pursuant to O.R.C. § 4167.13(A), (B) and (C).



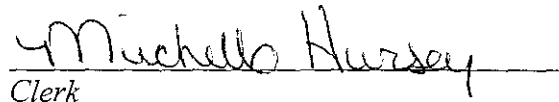
Tracy – Aye
Lumpe – Aye
Booth – Aye


Roger W. Tracy, *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, August 17, 2006.


Clerk

NOTE: Please see the reverse side of this Order or the attachment to this Order for information regarding your appeal rights.



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

Ernest J. Williams,

Case No. 06-OSH-02-0046

Appellant

v.

June 6, 2006

City Of Columbus,

Christopher R. Young

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on for consideration on June 5, 2006, upon the February 24, 2006, filing of an "OSHA" appeal by the Appellant, and upon the Appellant's response to the undersigned's procedural order and questionnaire issued on May 10, 2006, received by this Board on May 22, 2006, and upon Appellee's motion to dismiss filed on May 24, 2006, and upon the Appellant's response to Appellee's motion to dismiss filed on May 31, 2006. To date, no additional commentary has been offered by either party or requested.

In analyzing the case at hand, the ultimate question which needs to be address was whether or not the Appellant, through the filing of her appeal as and OSHA appeal, under Chapter 4167., properly invoked this Board's jurisdiction so as to consider the Appellant's appeal on its merits.

For clarification, let us review the procedures that must be followed in order for this Board to invoke its limited jurisdiction concerning "OSHA appeals". In general, Ohio Revised Code Chapter 4167. states that the Workers' Compensation Administrator is to operate and enforce the Public Employment Risk Reduction Program created by this Chapter, (See Revised Code Section 4167.02(A)). As part of the statutory enforcement program, Revised Code Section 4167.13(A) prohibits a public employer from discharging or discriminating against any public employee who undertakes certain actions or exercises their right afforded under Revised Code Chapter 4167. Specifically, Revised Code Section 4167.13 states:

- (A) No public employer shall discharge or in any manner discriminate against any public employee because the

public employee, in good faith, files any complaint or institutes any proceeding under or related to this chapter, or testifies or is about to testify in any proceeding, or because of the exercise by the public employee, on his own behalf or on the behalf of others, of any right afforded under this chapter.

In addition, Revised Code Sections 4167.13(B) and (C) identifies five different "remedies" for a public employee who believes that he or she has been discharged or otherwise discriminated against in violation of Revised Code Section 4167.13(A) as follows:

- (B) Any public employee who believes he had been discharged or otherwise discriminated against by any public employer in violation of division (A) of this section may elect any one of the following remedies:
 - (1) File, within sixty days after the violation occurs, a complaint with the state personnel board of review. The state personnel board of review may restrain violations of division (A) of this section and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay and reasonable interest thereon.
 - (2) Pursue any grievance or appeal procedure provided for an action based upon a violation of division (A) of this section under a collective bargaining agreement entered into pursuant to Chapter 4117. of the Revised Code.
 - (3) Pursue any grievance or appeal procedure provided for an action based upon a violation of division (A) of this section under a municipal or county charter;
 - (4) Pursue any grievance or appeal procedure provided for an action based upon a violation of division (A) of

this section under section 124.34 of the Revised Code;

- (5) Pursue any grievance or appeal procedure provided for an action based upon a violation of division (A) of this section under any other grievance or appeal procedure or any other right or remedy provided by law.
- (C) An employee may elect only one of the remedies provided for in divisions (B)(1) to (5) of this section and is barred from asserting an action based upon a violation of division (A) under any other remedy provided in division (B) of this section.

Consequently, the State Personnel Board of Review's Revised Code Chapter 4167. jurisdiction must be premised upon an alleged violation of Revised Code Section 4167.13(A). Thus, an employee must assert that he or she has been discharged or otherwise discriminated against because the employee, in good faith: 1) files any complaints or institutes any proceeding under or related to Revised Code Chapter 4167.; or 2) testifies or is about to testify in a proceeding; or 3) because of the exercise by the public employee, on his own behalf or on the behalf of others, of any right afforded under Revised Code Chapter 4167. Further, an "OSHA" appeal, not falling under the purview of Revised Code Chapter 124.34, the burden of proof remains, at all times, with the Appellant, (See Revised Code Section 4167.13(B)(1)). Additionally, the Appellant bares the burden of production to establish, by a preponderance of the evidence, the existence of the elements of Appellants *prima facie* appeal.

Therefore, the undersigned issued a procedural order along with a questionnaire on May 10, 2006, to develop the record as to inquire as to whether the Appellant had sufficiently invoked this Board's jurisdiction under Revised Code Chapter 4167. As previously mentioned, the Appellant responded to the issued questionnaire on May 22, 2006, and the Appellee also filed the instant motion to dismiss on May 24, 2006, along with the Appellant's reply to that motion to dismiss on May 31, 2006.

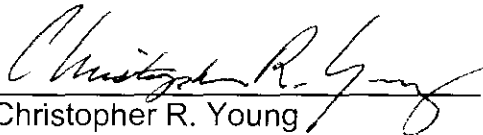
As was previously stated, the undersigned issued a procedural order and questionnaire that revealed, along with Appellee's Motion to Dismiss, that the Appellant did in fact file another grievance in relation to the Appellant in this matter. Specifically, the Appellant did file a notice of appeal after he had already filed a grievance with AFSCME Local 1432 on February 21, 2006, Case number 39-06 before he had filed this appeal, which was filed with this Board on February 24, 2006. The record in this matter also shows that the Appellant did file an appeal to this Board under and in contemplation of 4167.13(B)(4), which provides that one can pursue any grievance or appeal procedure provided for an action based upon a violation of division (A) of this section 124.34 of the Revised Code. The Appellant in this matter appealed after he had already filed a grievance before the filing of this claim. Further, the Appellee asserted in its motion to dismiss that the Appellant filed the above grievance to this Board, before the filing of this appeal under Ohio Revised Code Section 4167.13(B)(4). Additionally, the Appellee contends that pursuant to Ohio Revised Code Section 4167.13(B)(1) through (5), an employee, such as Appellant herein, may elect one, and only one of the five available remedies. Moreover, the Appellee contends that this election of only one of the remedies, as outlined in Ohio Revised Code Section 4167.13(B)(1) through (5) bars an employee from inserting an action based upon a violation of Ohio Revised Code Section 4167.13(A) under any other remedy provided for under 4167.13(B). Thus, the Appellee contends that a public employee may only elect one and only one remedy provided for by Ohio Revised Code Section 4167.13(B)(1) through (5) to redress an alleged retaliation violation. The undersigned concurs with this line of reasoning.

Given the express language contained in Ohio Revised Code Section 4167.13(C), the public employee may elect only one of the five different listed remedies contained in Ohio Revised Code Section 4167.13(B) is not afforded an unfettered right to file various appeals or other grievances. As a result of the Appellant's election to first opt to file an appeal of her removal before filing the instant appeal does act as a bar to filing the instant appeal, and/or as an "OSHA" claim pursuant to Ohio Revised Code Section 4167.13(B)(4) and Ohio Revised Code Section 4167.13(C). As such, the Appellee's motion to dismiss is well taken and the Appellant's appeal pursuant to the "OSHA" claim should be dismissed.

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RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the Appellant's appeal be **DISMISSED** for lack of subject matter jurisdiction pursuant to Ohio Revised Code Section 4167.13(A), (B) and (C).


Christopher R. Young
Administrative Law Judge

CRY: