

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

EARL D. MACK JR,

*Appellant,*

v.

Case Nos. 05-TFR-11-0435  
06-TFR-01-0011

DEPARTMENT OF PUBLIC SAFETY,

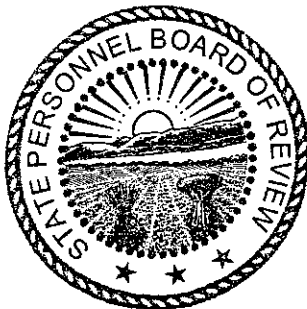
*Appellee.*

**ORDER**

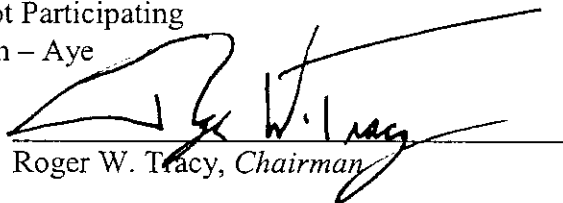
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

After a thorough examination of the 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Wherefore, it is hereby **ORDERED** that the instant appeals be **DISMISSED** as moot since Appellant's transfer was rescinded by Appellee and Appellant has not suffered any other loss that this Board has authority to remedy, pursuant to O.R.C. 124.03(A) and 124.33.



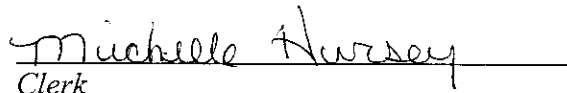
Tracy – Aye  
Lumpe – Not Participating  
Booth – Aye

  
Roger W. Tracy, *Chairman*

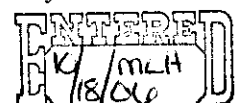
**CERTIFICATION**

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, OCTOBER 18, 2006.

  
Michelle Hursey  
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**

Earl D. Mack Jr,

*Appellant*

v.

Dept. Of Public Safety,

*Appellee*

Case No. 05-TFR-11-0435

Case No. 06-TFR-01-0011

September 7, 2006

Christopher R. Young

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This matter comes on for consideration on September 7, 2006, upon the consolidated appeals captioned above, and upon the Appellant's May 10, 2006, Motion for Summary Judgment, and upon Appellee's Memorandum in Opposition to Appellant's Motion for Summary Judgment filed on June 6, 2006, and upon the Appellant's Reply to Appellee's Opposition to Appellant's Motion for Summary Judgment filed June 12, 2006, and upon the Appellee's Motion to Dismiss Appeal Due to Lack of Jurisdiction filed on June 22, 2006, and upon the Appellant's Opposition to Appellee's Motion to Dismiss filed on June 26, 2006, and in consideration of Appellant's case law filed with this Board on June 26, 2006, and upon the Appellee's Reply Memorandum in Support of Motion to Dismiss filed on June 30, 2006, and upon the Appellant's Surreply in Opposition to Appellee's Motion to Dismiss filed July 13, 2006.

**FINDINGS OF FACT**

For clarification, the Appellant, Earl D. Mack, was initially hired as a classified employee with the State of Ohio in the Department of Liquor Control on October 25, 1992. Thereafter, Ohio Department of Liquor Control was subsequently made a part of the Ohio Department of Public Safety Investigative Unit (hereinafter Appellee). In 1995, the Appellant was promoted to an Agent-in-Charge (hereinafter AIC) with the Ohio Department of Public Safety and since 1997 he has served as an AIC of the Toledo Enforcement District, located in Toledo, Ohio.

On August 10, 2005, his immediate supervisor, Acting Deputy Chief Scott Pohman, advised the Appellant that he was to be transferred to Columbus, Ohio to perform administrative duties, effective September 5, 2005. Thereafter, Mr. Polhman sent Mr. Mack an email on August 12, 2005, regarding Mr. Polhman's receipt of Mr. Mack's written memorandums objecting to the transfer. Mr. Mack clearly objected to being transferred and had asked his department to reconsider the transfer. (See Mack's August 11 & 12, 2005 memos to Mr. Polhman). After making requests to resume his position as an AIC in the Toledo Enforcement District, the Appellant filed an appeal to this Board contesting the transfer. In Mr. Mack's appeal, the Appellant asserted, *inter alia*, that his transfer was involuntary, was not for the good or efficient operation of the department and was improper as it was in excess of thirty days. The above noted action was filed under SPBR Case No. 05-TFR-11-0435, and was eventually consolidated with SBPR Case No. 06-TFR-01-0011, under SPBR Case No. 05-TFR-11-0435.

Thereafter, the Ohio Department of Public Safety made a decision to seek the approval from the Ohio Department of Administrative Services for Mack's temporary transfer to become permanent. On January 13, 2006, the Ohio Department of Administrative Services sent the Ohio Department of Public Safety written authorization for the permanent transfer of Mr. Mack to Columbus, Ohio. Subsequently, on January 13, 2006, the Appellant, without prior written notice or opportunity to object to said permanent transfer, was notified that he was being permanently transferred to the Columbus, Ohio to perform administrative duties and that within 180 days he would be required to relocate within 60 miles his new assignment in Columbus, Ohio. As a result, the Appellant filed an appeal to this Board on January 17, 2006, under SBPR Case No. 06-TFR-01-0011, alleging that the permanent transfer was in violation of Chapter 124 of the Ohio Revised Code, including Section 124.33. It was from these two alleged actions that the present appeals are before this Board, which have been consolidated, as they arose together.

Further, it should be noted that during the time period of Mr. Mack's transfer to Columbus, Ohio, from January 13, 2006, until June 23, 2006, Mr. Mack elected not to move his permanent residence from Toledo, Ohio to Columbus, Ohio. Further, during the above noted time period, the Ohio Department of Public Safety paid Mr. Mack a *per diem* allowance that covered the cost of his temporary housing in Columbus, Ohio, as well as allowed him the use of a state vehicle to cover his day-to-day travel expenses. Additionally, it should be noted that on June 21, 2006,

written notice was given to the Appellant that his permanent transfer to Columbus, Ohio was being rescinded and that effective June 25, 2006, he was returned to his former duties as AIC of the Toledo Enforcement District. (See Affidavit of Kevin L. Page)

### CONCLUSIONS OF LAW

In Appellant's motion for summary judgment filed on May 10, 2006, he has requested that this Board find that the permanent transfer be null and void as the Ohio Department of Public Safety failed to comply with the mandatory notice provision contained within O.R.C. Section 124.33 prior to the Appellant's transfer. The Appellant has requested that this Board also order the Appellee to reinstate the Appellant to his former position as AIC in the Toledo Enforcement District with restoration of all rights and benefits, including any lost overtime he would have earned.

Subsequent to the Appellant filing his motion for summary judgment, the Appellee filed its motion to dismiss appeal due lack of jurisdiction on June 22, 2006. The Appellee in its motion states that the Appellee has rescinded the permanent transfer of the Appellant effective June 25, 2006 and that the Appellant was returned to his former position as AIC of the Toledo Enforcement District. Further, the Appellee asserts that since Mr. Mack has not suffered any other loss that this Board has authority to remedy, it submits that this appeal is now moot and that Board no longer has jurisdiction over this matter.

Thus, the issue before this board at this time is whether the matter before it is in fact moot or not. And if not, what other remedy can be afforded to the Appellant. The clear answer to whether the issue before this is moot or not is answered in the affirmative.

Revised Code Chapter 124 nowhere defines when a case is "moot". However, Black's Law Dictionary does define "moot" to mean:

A case is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. *Leonhart v. McCormick*, D.C.Pa.,

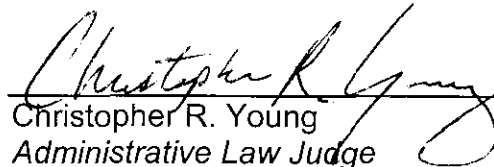
395 F.Supp. 1073, 1076. Question is "moot" when it presents no actual controversy or where the issues have ceased to exist. *Matter of Lawson's Estate*, 41 Ill.App.3d 37, 353 N.E.2d 345, 347. (Further citations omitted) Black's Law Dictionary at page 1008, (Deluxe 6<sup>th</sup> Edition 1990)

As noted by the facts in this matter the Appellant is back in his previous position as AIC of the Toledo Enforcement District with no loss in pay and/or in expenses, the only issues which could have been addressed in this transfer appeal. Although the Appellant has claimed a loss of overtime pay if he were to have been during the time period in question in his previous position, which he allegedly lost as a result of being transferred, there is nothing in Ohio Revised Code Chapter 124 that covers this question which this Board has jurisdictional authority to address. The Appellant cited the case of *Stotts v. Department of Transportation, et al.* intending to support its argument that the Appellant is entitled to lost overtime pay, as that case held that the employee in that matter was entitled to reimbursement for travel time (overtime), approximately three hours per day. However, in the case at bar, the Appellant was granted and given a *per diem* allowance that covered the cost of his temporary housing in Columbus, Ohio, and now cannot claim any reimbursement for travel time, as that would unjustly enrich the Appellant.

Thus, there are no issues upon which this Board can rule on since the actions have been rescinded.

### RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the Appellee's motion to dismiss appeal due to lack of jurisdiction be **GRANTED** and that the instant appeal(s) be **DISMISSED**, as these matters are **MOOT**.

  
Christopher R. Young  
Administrative Law Judge

CRY: