

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

Marcus E. Cunningham,

*Appellant,*

v.

Case No. 08-WHB-04-0185

Summit County Court of Common Pleas,

*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 jurisdiction, pursuant to O.R.C. § 124.341.

Lumpe - Aye

Booth - Aye

Sfalcin - Aye

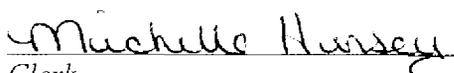


  
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J. Richard Lumpe, *Chairman*

**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 constitute ~~(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 10, 2008.

  
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Michelle Hursey  
Clerk

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

10-10-08

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

Marcus E. Cunningham

Case No. 08-WHB-04-0185

*Appellant*

v.

September 9, 2008

Summit County Court of Common Pleas

Marcie M. Scholl

*Appellee*

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause comes on for consideration on September 9, 2008, upon the filing of Appellee's Motion to Dismiss on August 27, 2008. Appellant Cunningham filed several appeals with this Board on April 21, 2008, check marking the boxes of "removal", "other" and "whistleblower". The appeals were all assigned separate appeal numbers.

In the instant appeal, a Procedural Order and Questionnaire was issued by this Board to Appellant Cunningham on July 14, 2008. Appellant Cunningham timely returned the questionnaire on July 25, 2008. In answer to question number three of the questionnaire, Appellant Cunningham answered "no" to the question of if he filed a written report with his supervisor or other pertinent official. Appellee then filed a Motion to Dismiss on August 27, 2008 on the basis that Appellant Cunningham did not comply with the requirements of the whistleblower statute and that he untimely filed his appeal. For the reasons stated below, Appellee's Motion to Dismiss should be **GRANTED**.

Section 124.341 of the Ohio Revised Code is commonly referred to as the "whistleblower statute". It states as follows, in pertinent 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. In addition to or instead of filing a written report with the supervisor or appointing authority, the employee may file a written report with the office of internal auditing created under section 126.45 of the Revised Code. (Emphasis added).

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 with the supervisor, appointing authority, or the office of internal auditing, 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.

As can be seen from reading the above statute, an employee who is alleging a whistleblower claim must first show that he or she complied with the statute by filing a report, in writing, with any of the enumerated entities in the statute. Courts have held that the requirement to make a filing in writing is paramount to invoke the protection of the whistleblower statute. The court in *Haddox v. Ohio State Attorney Gen.*, (Franklin 2007), 06CVF-08-10391, unreported, stated that "...jurisdiction to invoke whistleblower protection requires that the whistleblower show that she 1) made a written report, 2) transmitted the written report to her supervisor, appointing authority, the state inspector general, or other appropriate legal official; and 3) identified a violation of state or federal statute, rule or regulation or misuse of public resources in the report." The court went on to further hold that "...the requirement of a written communication, specifically addressed to an appropriate individual, is an essential element of whistleblower protection and will be strictly applied."

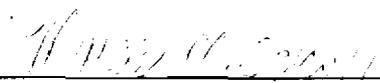
As was argued by Appellee, Appellant Cunningham did not file a written report by his own admission. Therefore, he cannot invoke the whistleblower statute since he did not comply with the requirements of doing so.

Appellee also argued that Appellant Cunningham stated in his questionnaire that he received notice of the alleged actions giving rise to his whistleblower appeal on February 1, 2008. Since his appeal was filed on April 21, 2008, his appeal is untimely. Section 124.341(D) of the Ohio Revised Code provides a thirty day time period for filing an appeal. That section states as follows:

D) If an appointing authority takes any disciplinary or retaliatory action against a classified or unclassified employee as a result of the employee's having filed a report under division (A) of this section, the employee's sole and exclusive remedy, notwithstanding any other provision of law, **is to file an appeal with the state personnel board of review within thirty days after receiving actual notice of the appointing authority's action.** (Emphasis added).

Since Appellant Cunningham stated in his questionnaire that he received notice of the alleged whistleblower activity on February 1, 2008, he would have had thirty days from that date to file an appeal with this Board, or by March 3, 2008. Since he did not file his appeal until April 21, 2008, he is clearly untimely.

Therefore, since Appellant Cunningham did not comply with the whistleblower statute by filing a written report as delineated in the statute and because his appeal was also untimely filed, it is my **RECOMMENDATION** that this appeal be **DISMISSED** for a lack of jurisdiction.

  
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Marcie M. Scholl  
Administrative Law Judge