

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

REBECCA J. SCHMERSAL,

Appellant

v.

Case No. 08-WHB-07-0457

UNIVERSITY OF TOLEDO,

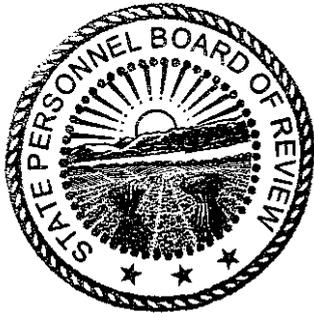
Appellee

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** since Appellant failed to invoke this Board's jurisdiction under section 124.341 of the Ohio Revised Code.



Lumpe - Aye
Booth - Aye
Sfalcin - Aye

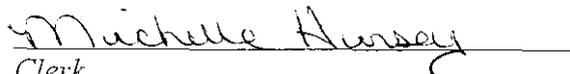


J. Richard Lumpe, *Chairman*

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 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, February 5, 2009.



Michelle Hursey
Clerk

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

2509

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

Rebecca J. Schmersal

Case No. 08-WHB-07-0457

Appellant

v.

November 20, 2008

University of Toledo

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 November 20, 2008. Appellant Schmersal filed a notice of appeal with this Board on July 25, 2008. One of the boxes she marked on the notice of appeal was that of "whistleblower". On September 17, 2008, this Board issued a Procedural Order and Questionnaire to the Appellant. On September 29, 2008, Appellant Schmersal filed her response to the questionnaire.

Section 124.341 of the Ohio Revised Code governs "whistleblower" appeals filed with this Board. The pertinent part of the statute states:

(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.

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.

(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 authorized by division (A) of this section...

(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...

As can be seen from reading the provisions of section 124.341(A) of the Ohio Revised Code, this statute protects an employee only if the following requirements have first been satisfied: (1) the employee filed a written report with either the employee's supervisor or appointing authority identifying a violation of state or federal statutes, rules, regulations or the misuse of public resources, or, in cases where the violation is believed to be a criminal offense, in addition to or instead of filing a written report with the employee's supervisor or appointing authority, the employee made a report with another official or entity named in the statute, and (2) after filing a report under division (A), the appointing authority took disciplinary or retaliatory action against the employee as a result of the employee's filings.

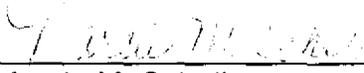
In *Haddox v. Ohio State Attorney General*, (Franklin 2007), 06CVF-08-10391, the Franklin County Court of Common Pleas restated these conditions as prerequisites to whistleblower jurisdiction under section 124.341 of the Ohio Revised Code. The court in *Haddox* noted that “[j]urisdiction to invoke whistleblower 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.” See *Haddox v. Ohio State Attorney General*, (Franklin 2007), 06CVF-08-10391, (citing *Wade v. Ohio Bureau of Worker’s Compensation*, 1999 Ohio App. LEXIS 2614, Franklin App. No. 98AP-997 (June 10, 1999) unreported citing to *State ex rel Cuyahoga Cty. SPBR*, 82 Ohio St. 3d 496, 696 N.E.2d 1054 (1998) and to *Chubb v. Ohio Bur. Of Worker’s Comp*, 81 Ohio St. 3d 275, 690 N.E.2d 1267 (1998)).

The *Haddox* court went on further to explain 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.” *Haddox v. Ohio State Attorney General*, (Franklin 2007), 06CVF-08-10391, (citing *Wade v. Ohio Bureau of Worker’s Compensation*, 1999 Ohio App. LEXIS 2614, Franklin App. No. 98AP-997 (June 10, 1999) unreported citing to *Kuch v. Structural Fibers, Inc.*, 78 Ohio St. 3d. 134, 141, 677 N.E.2d 308 (1997)). Therefore, in order to invoke this Board’s jurisdiction, an employee must first establish that he or she complied with the reporting requirements of section 124.341 of the Ohio Revised Code.

A Procedural Order and Questionnaire was issued by this Board to Appellant Schmearsal. In her reply, Appellant Schmearsal indicated she did not file a written report either with her supervisor or other pertinent official named in the whistleblower statute. In accordance with section 124.341 of the Ohio Revised Code and consistent with case law and similar state and federal procedures, an employee filing a whistleblower appeal is assigned both the burden of proof and the initial burden of production. The employee’s initial burden of production includes demonstrating that the employee filed a report with the appropriate entity, specifically fulfilling the requisite reporting requirements of the pertinent whistleblower statute and that thereafter disciplinary retaliatory action was taken against the employee as a result of the employee having filed a report pursuant to that statute.

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Since Appellant Schmersal has failed to demonstrate that she met the requisite reporting requirements set forth in section 124.341 of the Ohio Revised Code, she cannot be afforded protection as a whistleblower under this statute. Therefore, I respectfully **RECOMMEND** that the instant appeal be **DISMISSED** for lack of subject matter jurisdiction.



Marcie M. Scholl
Administrative Law Judge

:mms