

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

Melinda Saylor,
Melody Lucas,
Appellants.

Case Nos. 09-WHB-11-0481
09-WHB-11-0482

v.

Darke County,
Emergency Management Agency,

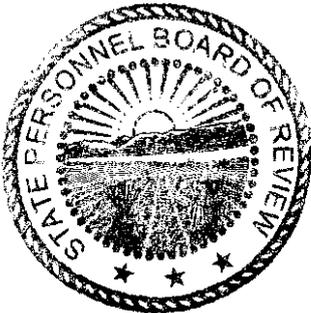
Appellee.

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** for lack of subject matter jurisdiction, pursuant to O.R.C. § 124.341.



Lumpe - Aye
Sfalcin - Aye
Tillery - Aye

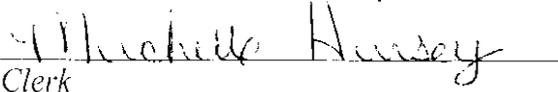


J. Richard Lumpe, *Chairman*

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 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, July 29, 2010.



Michelle Hunsay
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**

Melinda Saylor
and
Melody Lucas

Case No. 09-WHB-11-0481

Case No. 09-WHB-11-0482

Appellant

v.

June 28, 2010

Darke County Emergency
Management Agency,

Appellee

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter came on for consideration due to Appellants' November 16, 2009, filing of appeals alleging that Appellee had taken retaliatory action against them, as prohibited by R.C. 124.341. Appellants clarified in their responses to this Board's November 30, 2009, Procedural Order and Questionnaire that the specific retaliatory action they were appealing was Appellee's failure to appoint them to fill the vacant position of Director.

R.C. 124.341 states, 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.

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 or appointing authority, 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, including, without limitation, doing any of the following:

...

(4) Denying the employee promotion that otherwise would have been received;

...

On March 16, 2010, this Board ordered Appellee to supplement the records by providing the Board with an outline of the hiring process utilized to fill the position of Director. Appellee filed its responses on April 13, 2010; Appellants filed no memorandum *contra*.

CONCLUSIONS OF LAW

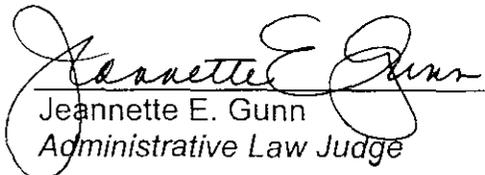
In order to invoke the protection of R.C. 124.341, an employee in the classified or unclassified civil service must meet two threshold requirements: the employee must have properly reported an alleged violation or violations of state or federal statutes, rules, or regulations, or misuse of public resources that the employee became aware of during the course of his or her employment, and the employee must demonstrate that one or more prohibited retaliatory actions must have been taken by Appellee.

In response to this Board's November 30, 2009, Procedural Order and Questionnaire, Appellant Saylor indicated that she filed a written report with her appointing authority via electronic mail on September 1, 2009. Appellant Lucas indicated that she filed her written report on September 8, 2009. I find that the Appellants have produced sufficient evidence to establish their *prima facie* compliance with the reporting requirements contained in R.C. 124.341.

Information contained in the records indicates that Appellee's Director June Mong, whose conduct had been the subject of Appellant's September 1, 2009, written report, resigned from employment with Appellee on September 11, 2009. As noted above, Appellants allege that Appellee took retaliatory action against them for engaging in "whistleblower" activities by failing to appoint them to fill the vacant position of Director. Uncontroverted information contained in the record indicates that the position vacancy was advertised in the local newspaper; thirty-six applications were received and six candidates, including both of the Appellants, were interviewed for the position.

R.C. 124.341(B)(4) provides that an appointing authority may not retaliate against an employee by denying the employee a "promotion that otherwise would have been received." No evidence has been presented by Appellants to establish that they were entitled to an appointment to the Director's position simply because they applied for the position. An appointing authority has discretion in who it hires, and may evaluate the experience and skills of the applicants to determine the best candidate to fill a position. Appellants had an opportunity to apply and interview for the Director position, however, another candidate was ultimately selected. Because Appellee had no obligation to promote Appellants to the position, I find that Appellee did not deny Appellants a "promotion that otherwise would have been received," as prohibited by R.C. 124.341(B).

Therefore, because the Appellants have failed to demonstrate that the action allegedly taken by Appellee was a prohibited retaliatory action set forth in R.C. 124.341(B), I respectfully **RECOMMEND** that the instant appeal be **DISMISSED** for lack of subject matter jurisdiction.


Jeannette E. Gunn
Administrative Law Judge