

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Brian Benick,

Appellant,

v.

Case No. 10-WHB-05-0138

Knox County Health Department,

Appellee.

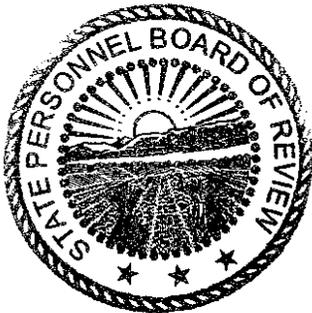
ORDER

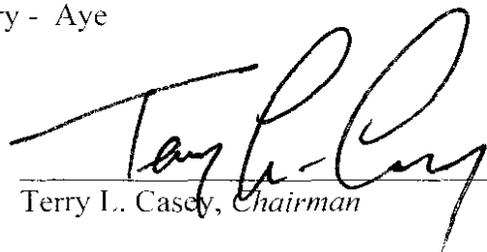
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Appellant's failure to satisfy the reporting requirements set forth in O.R.C. § 124.341.

Casey - Aye
Lumpe - Aye
Tillery - Aye

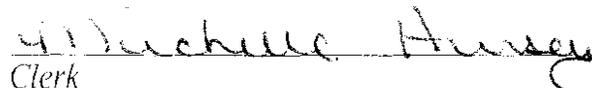



Terry I. Casey, *Chairman*

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, April 13, 2011.


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**

BRIAN BENICK,

Case No. 10-WHB-05-0138

Appellant

v.

March 9, 2011

KNOX COUNTY HEALTH DEPARTMENT,

JAMES R. SPRAGUE

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on due to the September 27, 2010 occurrence of a pre-hearing in this matter and due to the January 26, 2011 occurrence of a record hearing in this matter. Present at hearing was Appellant, who appeared *pro se*. Appellee was present through its designee, Kenneth Lee Rhoades, President of the Knox County Board of Health (KCBOH), and was represented by Charles T. McConville, Knox County Assistant Prosecuting Attorney. Also present were Gary Nicholson, Appellee's Human Resources (HR) Specialist, and Jennifer Springer, Knox County Assistant Prosecuting Attorney, who has served as Appellee's counsel for the past several years.

On or about July 16, 2010, **this Board issued a final Order adopting Appellant's withdrawal of his removal appeal.** At that time, Appellant conceded that his position of Assistant Health Commissioner/Environmental Health Director for the Knox County Health Department (KCHD) fell within the unclassified service.

Subsequent to hearing in the instant appeal, the undersigned determined that there was a need to supplement the record concerning the operation of R.C. 6117.51 and O.A.C. 3701-29-02 in relation to the R.C. 124.341 whistleblower protections claimed by Appellant in the instant appeal. Accordingly, on January 31, 2011, the undersigned instructed the parties to file respective supplementations of the record concerning this topic. Thereafter, the parties timely filed same and the record was thereafter closed on March 1, 2011.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.341.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

At hearing, four witnesses testified.

First to testify was **Brian Benick, Appellant**, a Registered Sanitarian since 1985, who testified on cross, testified on direct in his own case-in-chief, and testified on direct during his rebuttal portion of the hearing.

Mr. Benick served in the dual roles of Assistant Health Commissioner and Environmental Health Director for the KCHD from 2001 until his removal effective April 26, 2010. Prior to that service, Appellant also served with several other health departments. Appellant received his Masters in Public Health degree in 2000 from the Ohio State University.

Next to testify was **Gary Nicholson**, who has served as the KCHD's Human Resources Specialist for the last five years. Mr. Nicholson was present at an April 19, 2010 meeting with Appellant and then-KCHD Health Commissioner Dennis G. Murray. It was at this meeting that Appellant was alleged to have uttered several unprofessional and insubordinate/incendiary statements toward Mr. Murray. Mr. Nicholson was also the KCHD employee who provided Appellant with various pieces of pertinent human resources paperwork and various notices regarding Appellant's being placed on administrative leave with pay and thereafter removed from his position with Appellee.

Next to testify was **Kenneth Lee Rhoades**, who served as Appellee's designee at hearing. Mr. Rhoades was appointed to the KCBOH in 2000 and has served as its President for the last six to seven years.

Mr. Rhoades was present at various pertinent KCBOH meetings, including at the April 26, 2010 regular and executive sessions. He provided both general background and specific analysis regarding the KCBOH's rationale for removing Appellant.

Also testifying was **Jennifer Springer**, a Knox County Assistant Prosecuting Attorney. Ms. Springer has served as Appellee's sole counsel since Fall, 2007 including during the course of events that culminated with Appellant's removal. Ms.

Springer offered background testimony as well as testimony concerning her interaction with Appellant, Mr. Murray, and the KCBOH both at its general and executive sessions.

By resolution, the KCBOH waived its privilege regarding all activities that occurred in its April 26, 2010 executive session. Those activities preceded the KCBOH's determination made in general session (following a return from executive session) to remove Appellant.

The extant record in this matter reflects the following.

Prior to his removal, Appellant served in the dual roles of Assistant Health Commissioner and Environmental Health Director for the KCHD.

On or about April 20, 2010, Appellant was placed on administrative leave with pay. This followed a heated and contentious meeting that Appellant had with then-Knox County Health Commissioner Dennis G. Murray, with HR Specialist Gary Nicholson also in attendance.

On April 26, 2010, the Knox County Board of Health had scheduled a regular meeting. On that same date but prior to the commencement of the meeting, Appellant hand-delivered a four-page document to each Board of Health member at his or her place of residence. At its meeting of April 26, 2010, the Board of Health removed Appellant for the stated reasons of insubordination and unprofessional behavior.

One page of the document Appellant presented to the Board of Health was a letter from and signed by Kay Benick, Appellant's wife and a former manager at the Health Department. This letter informed the Board of Health members of Ms. Benick's previous interaction with Mr. Murray.

The other three pages delineate several complaints put forth by Appellant.

These include complaints regarding concerns with getting approximately 100 Clinton Township homeowners connected to sanitary sewer.

These complaints also include complaints regarding:

Appellant's supervision of two of his subordinates;

Activities that Appellant allegedly performed for Mr. Murray including at Mr. Murray's home;

Mr. Murray's previous supervision of Kay Benick; and

Mr. Murray's overall style of management and the environment of the office allegedly resulting therefrom.

R.C. 124.341 (A) requires, among other things, that the requisite employee file a written report. *This report must identify the violation of law or misuse of public resources of which the employee has become aware, in the course of employment.*

Allegation regarding sanitary sewer hookup

In the instant case, Appellant alleged, among other things, that then-Commissioner Murray and, by extension, the Board of Health, violated the requirements of R.C. 6117.51 ("New public sewer construction projects") and O.A.C. 3701-29-02 ("Sewage disposal requirements.").

Even following the hearing in this matter, the record remained unclear regarding whether Appellee is expressly required either to compel a homeowner to connect to sanitary sewer or otherwise dispositively facilitate another body's order to connect to same. Further, assuming that requirement does lie with Appellee, the record following hearing did not establish that this requirement lies solely with Appellee or establish the timetable Appellee may be under to perform such a duty.

Accordingly, a supplementation of the record was ordered.

Appellant was instructed to file with this Board and with Appellee's counsel an analysis as to why Appellee may bear the responsibility either to itself require a requisite homeowner to complete a hookup to sanitary sewer or to seek enforcement of an order for same and an analysis regarding any mandated timeframe for accomplishing this task.

Appellee was instructed to file with this Board and with Appellant Appellee's response to Appellant's analyses of these issues.

The parties were further apprised that the undersigned would then determine whether Appellant had met his threshold procedural burden regarding these issues. Additionally, the parties were apprised that this determination would be communicated to them through the issuance of a Procedural Order or Report and Recommendation regarding the next appropriate step in the processing of the instant appeal.

From the extant record, including the supplemental pleadings filed by the parties subsequent to record hearing, I find that the KCHD was not required under the present circumstances to order or otherwise seek to compel these approximately 100 Clinton Township homeowners to connect to sanitary sewer.

Thus, as a matter of law, Appellant has failed to demonstrate that a violation of law or other violation existed regarding the acts of the KCHD or of then-Health Commissioner Murray on this topic. Accordingly, Appellant has failed to invoke the protections set forth in R.C. 124.341 regarding these sanitary sewer issues.

Allegation regarding Appellant's supervision of his subordinates

Appellant has alleged that executive management of the KCHD insisted that Appellant document and issue a reprimand for each error that two of Appellant's subordinates may have made in the course of their daily work, which Appellant found to be harsh. Accordingly, Appellant asserts, Appellant had to review every file to ensure accuracy and had to discipline his employees for any error.

Appellee disputes this assertion.

Specifically, Gary Nelson indicated that Appellant was holding, reviewing, and then, himself, filing all pertinent files regarding this matter, essentially micromanaging and doing ministerial work that should have been tasked to a KCHD employee more suited for same. Further, Mr. Nelson averred, Appellant did not provide notice to the two aforementioned subordinates prior to issuing them e mail reprimands on a late Friday afternoon. Mr. Nelson stated this was in contradiction to KCHD policy regarding notice and corrective opportunities. Lastly, Mr. Nelson stated that Appellant here severely overinterpreted any direction given to Appellant regarding the work of these two subordinates.

The Court of Appeals for Franklin County has held that, as a matter of law, written reports of a supervisor to his or her superiors (that arise in the ordinary course of work and that express a concern regarding the work performance of one of the supervisor's subordinates) do not cloak the supervisor with whistleblower protection (See *Haddox v. Ohio Attorney General* 2008 WL 3918077 (Ohio App. 10 Dist.1, 5)). This is particularly so when the communications fail to identify any violation of law or misuse of resources (*Haddox, supra*).

In the instant case, it is difficult to tell whether Appellant is complaining that: 1) he was removed in part for reporting concerns regarding his subordinates; 2) he was removed in part for disciplining his employees for any error and thereafter reporting to the KCBOH that this was inconsistent with the policy of the KCHD; or 3) some other concern regarding these actions.

Without making a finding regarding the veracity of the witnesses on this point, let us assume for the sake of argument that Appellant correctly interpreted the instructions from his superiors, disciplined his subordinates accordingly, and reported that discipline to the KCBOH. Nonetheless, Appellant's report does not lend him whistleblower protection, in accordance with the pronouncements set forth in *Haddox, supra*.

Allegation regarding activities that Appellant allegedly performed at Dennis Murray's home

Appellant alleged that, for an unspecified time, he performed activities for then-Health Commissioner Murray at Mr. Murray's home or involving Mr. Murray's children. Appellant further alleges that he performed at least some of these activities without giving his express consent.

Appellant did not provide for the record any independent first-hand corroborating testimony or other evidence to substantiate this allegation. Appellant had the opportunity to call Mr. Murray or any other person who would have potentially had first-hand knowledge concerning this allegation but chose not to do so.

It is noted that the undersigned has not made a determination regarding the accuracy of this allegation. Yet, in accordance with O.A.C. 124-9-02, Appellant's oral and written statements regarding this allegation cannot be further considered,

because they are hearsay statements that wholly lack the requisite circumstantial guarantee of reliability to establish their proper evidentiary foundation.

Allegation regarding Dennis Murray's previous supervision of Appellant's wife, former KCHD employee Kay Benick

On April 26, 2010, Appellant provided a one-page letter to the KCBOH that was written by Kay Benick, Appellant's wife and a former employee of the KCHD. Appellant also provided testimony at hearing regarding the contents of the letter and regarding other statements that had allegedly been made to Appellant regarding his wife's interaction with then-Health Commissioner Murray.

The Court of Appeals for Franklin County has held that, as a matter of law, a document authored by another and presented to the requisite authority does not cloak the presenter with whistleblower protection. (See *Haddox, supra*, at 1,5)

However, assuming for the sake of argument that such a document could be utilized for this purpose, Appellant failed to call the alleged author of the document, Kay Benick, as a witness. Accordingly, any assertion as to the truth of Appellant's allegation regarding his wife's interaction with Mr. Murray is hearsay that wholly lacks the requisite circumstantial guarantee of reliability to establish its proper evidentiary foundation.

Allegation regarding Dennis Murray's overall style of management and the alleged attendant office environment

Appellant alleged in his letter to the KCBOH that Mr. Murray's alleged overbearing style of management, his alleged misplaced humor, and his lack of sensitivity to the needs of his employees created an untenable work environment. Again, however, Appellant's report fails to identify any violated provisions of law or misuse of resources.

It is true that the instant record would not support the contention that Mr. Murray was an exemplary supervisor/executive manager. Yet, general allegations of this type, while troubling, do not appear to invoke the whistleblower protection that is brought on by a whistleblower's reporting of specific violations of law or reporting of specific misuses of resources.

Appellant's Position Fell Within the Unclassified Service

Appellant has conceded that his position fell within the unclassified service, as noted, above. Thus, the KCBOH could remove Appellant as an at-will employee for any reason or no reason, as long as the KCBOH did not remove Appellant in violation of law. Therefore, unless Appellant can demonstrate his compliance with the procedural prerequisites set forth in R.C. 124.341, his case cannot be considered regarding his substantive claims.

Appellee's Allegations Regarding Appellant's Alleged Insubordination and Unprofessional Behavior

In the instant case, Appellant asserts that he was removed for reporting the five alleged violations reviewed, above.

Conversely, Appellee asserts that Appellant was removed for insubordination and unprofessional behavior, as reflected in Appellee's letter of removal and in its Resolution effectuating that removal.

Among other things, Appellee's witnesses have asserted that Appellant was removed for his alleged confrontational attitude and insulting statements made during his April 19, 2010 meeting with then-Health Commissioner Murray and Human Resources Specialist Nicholson.

Appellee's witnesses have further asserted that Appellant was removed for his alleged high-handed treatment of various citizens and government officials concerning the Clinton Township sewer connection issue.

Appellee's witnesses have additionally asserted that Appellant was removed for his failure to observe the chain of command and failure to inform his superiors when he issued an alleged caustic e mail to the President of Kenyon College. This was after Appellant received a parking ticket, because his personal car, which he was driving (appropriately) for KCHD business, was ticketed on Kenyon College property for being parked illegally.

Thus, Appellee concludes, Appellant's speech and conduct precluded Appellant from being able to continue to serve either as Assistant Health Commissioner or as Environmental Health Director.

Aside from Appellant's contentions specifically reviewed, above, Appellant also asserts that, at the April 19, 2010 meeting with Mr. Murray and Mr. Nicholson, Mr. Murray specifically asked Appellant what was troubling Appellant and Appellant responded with full candor and truthfulness. Appellant asserts it was wrong to remove him for responding honestly and forthrightly to a question from his supervisor.

Further, Appellant asserts that he was only carrying out the duty of the KCHD in attempting to move along a lengthy and complex process regarding the sewer connections and that he did, in fact, obey instructions to hold up on a letter that was to have been sent on or about April 19, 2010.

Finally, Appellant asserts that he should have been permitted to resolve the issue of his parking ticket himself; since he was in his own car on official KCHD business. Indeed, Appellant asserts that his conduct in this matter did not reflect on the KCHD; since it was his own vehicle that was ticketed and since Kenyon College was wrong to issue him this ticket in the first place, in his opinion.

CONCLUSIONS OF LAW

This case presents this Board with the question of whether Appellant has demonstrated that he met the threshold procedural requirements of R.C. 124.341? Fulfilling those requirements permits this Board to assess the merits of Appellant's whistleblower appeal.

Based on the Findings set forth, above, and for the reasons set forth, below, this Board should determine that Appellant has failed to meet his threshold procedural burden and dismiss this case accordingly.

First, we have found, above, that Appellant failed to set forth a violation of law or misuse of resources regarding the role that the KCHD played concerning sanitary sewer hookups for approximately 100 homeowners in Clinton township.

Secondly, we found that Appellant failed to set forth a violation regarding his somewhat amorphous claim that he was required to implement a disciplinary scheme that was inconsistent with KCHD policy; since whatever this claim may have been, it fell within the ordinary responsibilities of a supervisor to his or her subordinates.

Thirdly, we found that Appellant's claims regarding activities he allegedly performed on then-Health Commissioner Murray's home or for his children were hearsay that lacked a requisite circumstantial guarantee of reliability.

Fourthly, we found that the letter from Kay Benick to the KCBOH cannot be claimed as a written report authored by Appellant that would potentially cloak him with whistleblower protections. Additionally, we found that Appellant's allegations regarding then-Commissioner Murray's interactions with Appellant's wife when she was an employee of the KCHD were hearsay that lacked a requisite circumstantial guarantee of reliability.

Finally, we found that Appellant's generalized allegations regarding then-Health Commissioner Murray's style of management and the office environment allegedly resulting therefrom fail to state a specific violation of law or misuse of resources.

In summary, then, none of Appellant's five allegations satisfies the procedural requirements of R.C. 124.341 that would have potentially provided Appellant with whistleblower protection. Because that protection is not provided to Appellant, the instant appeal should be dismissed.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **DISMISS** the instant appeal for Appellant's failure to satisfy the reporting requirements set forth in R.C. 124.341.


JAMES R. SPRAGUE
Administrative Law Judge