

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

TRACEE POLLARD-ANDERSON,

Appellant,

v.

Case No. 11-WHB-07-0239

ASHLAND COUNTY
DEPARTMENT OF JOB & FAMILY SERVICES,

Appellee

ORDER

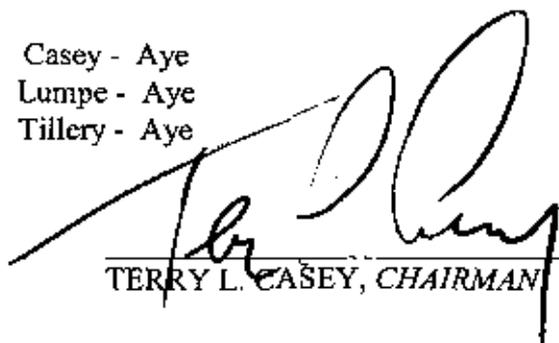
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 this appeal be **DISMISSED** for lack of jurisdiction, pursuant to Ohio Revised Code § 124.341.



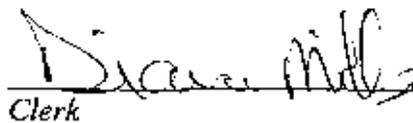
Casey - Aye
Lumpe - Aye
Tillery - Aye


TERRY L. 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 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, September 19, 2011.


Clerk

NOTE: Please see the reverse side of this Order or the attachment to this Order for information regarding your appeal rights. 9-19-11

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

Tracee Pollard-Anderson,

Case No. 11-WHB-07-0239

Appellant

v.

August 16, 2011

Ashland County Department of
Job & Family Services,

Appellee

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on pursuant to Appellee's Motion to Dismiss filed with this Board on July 27, 2011, Appellant's Memorandum in Opposition, filed with the Board on August 3, 2011, and Appellee's Reply in Support of its Motion, filed on August 8, 2011.

Appellant indicated in her response to this Board's July 18, 2011, Procedural Order and Questionnaire, that she had filed a written report pursuant to R.C. 124.341(A) with her supervisor. She provided copies of those materials that she alleged constituted that written report, specifically:

- 1) Letter and final report of ODJFS' Child Protection Oversight and Evaluation Stage 7 Review for Appellee, dated February 19, 2010;
- 2) Letter with attachments from Ashland County Prosecuting Attorney Ramona Rogers addressed to the Chiefs of Police of Ashland and Loudonville, Ohio, the Ashland County Sheriff and Appellee's Director, dated March 16, 2006;
- 3) Pages 7 and 8 of ODJFS' Amended Child Protection Oversight and Evaluation Stage 6 Review for Appellee, dated August 27, 2007;

- 4) An email with attachments addressed to Appellee's Director regarding the review of policy and documents for PCSA Foster Care, dated April 18, 2011;
- 5) An email with attachments addressed to Appellee's Director referencing OAC 5101:2-42-89, dated April 18, 2011;
- 6) An email addressed to Appellee's Director, Appellant and Cassandra Strawser regarding SACWIS access, dated April 27, 2010;
- 7) An email addressed to Appellant regarding the author's concerns "with not filing cases in court," dated June 25, 2010; and
- 8) An email addressed to Appellee's Director from Appellant which states, in its entirety, "This is a good issue to have a meeting about."

Appellee requests that this Board grant its Motion to Dismiss based upon Appellant's alleged failure to comply with the reporting requirements of R.C. 124.341(A).

CONCLUSIONS OF LAW

In a whistleblower appeal, the employee bears the burden to prove, by a preponderance of the evidence, that the disciplinary or retaliatory action taken by the employee's appointing authority was the result of the employee making a report under R.C. 124.341(A). Case law has established that the framework for the order and presentation of evidence first articulated by the United States Supreme Court in *McDonnell Douglas v. Green* (1973), 411 U.S. 792, is appropriate in a whistleblower appeal brought under O.R.C. 124.341. See, *Mark Leslie v. Ohio Department of Development* (2006), Franklin County No. 05CVF-05-4401, unreported.

An employee must first establish a *prima facie* case to support his or her claim under O.R.C. 124.341. The burden of production then shifts to the appointing authority to rebut the employee's evidence by articulating a legitimate, non-retaliatory reason for its employment decision. If the appointing authority satisfies that burden of production, the burden of persuasion shifts to the employee to prove

that the appointing authority's stated reason is a pretext for retaliation.

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:

- (1) Removing or suspending the employee from employment;
- (2) Withholding from the employee salary increases or employee benefits to which the employee is otherwise entitled;
- (3) Transferring or reassigning the employee;

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

(5) Reducing the employee in pay or position.

In order to establish a *prima facie* case, an employee in the classified or prohibited retaliatory actions were taken by Appellee.

In response to this Board's April 14, 2010, Procedural Order and Questionnaire, Appellant indicated that she filed a written report with her appointing authority and provided the above-referenced documents which she alleged constituted such report(s). Upon a review of the documents provided in support of Appellant's assertion, I find that only one of those submitted was actually authored by Appellant. This Board has consistently held, and case law affirms, that an employee seeking the protection of R.C. 124.341 must have authored the written report contemplated by the statute. See, *Ressler v. Ohio Dept. of Transportation* (Nov. 5, 2009) 10th Dist. No. 09AP-338, 2009-Ohio-5857; *Haddox v. Ohio Attorney General* (Aug. 26, 2008), 10th Dist. No. 07AP-857, 2008-Ohio-4355; *Harlow v. Ohio Dept. of Youth Services* (Sept. 2009) SPBR Case No. 09-WHB-02-0050. I find that the third-party documents submitted by Appellant are insufficient to establish her compliance with the reporting requirements of R.C. 124.341.

I further find that the single document written by Appellant, a brief email to Appellee's Director, Gary Hannon stating simply "This is a good issue to have a meeting about", is insufficient to establish Appellant's compliance with the reporting requirements of R.C. 124.341. The Tenth District Court of Appeals held in *Wade v. Ohio Bur. of Workers' Comp.* (June 10, 1999), 10th Dist. No. 98AP-997, that in order to comply with the requirements of R.C. 124.341, an employee must submit: (1) a written report, (2) that was transmitted to his/her supervisor, appointing authority, the state inspector general, or other appropriate legal official, (3) which identified a violation of a state or federal statute, rule, or regulation, or a misuse of public resources. *Id.* See also *State ex rel. Cuyahoga Cty. v. State Personnel Bd. of Review* (1998), 82 Ohio St.3d 496. The *Wade* Court further held that the report