

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

ELIZABETH KITCHEN,

Appellant,

v.

Case No. 11-WHB-08-0268

DEPARTMENT OF HEALTH,

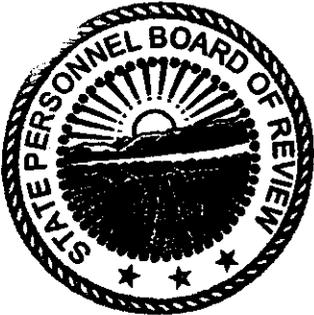
Appellee

ORDER

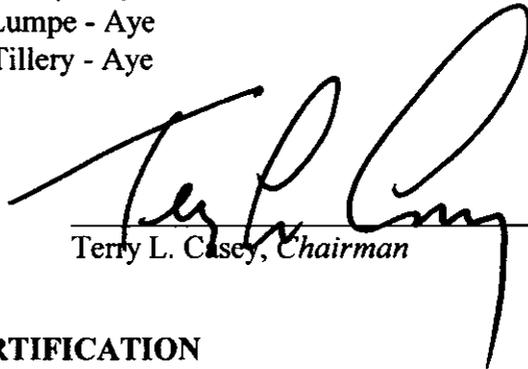
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety record, including 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 Appellee's motion is granted and the appeal is **DISMISSED** for lack of jurisdiction.



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, July 02, 2012.


Erin E. Con
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**

Elizabeth Kitchen,

Case No. 11-WHB-08-0268

Appellant

v.

May 31, 2012

Department of Health,

Jeannette E. Gunn

Appellee

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 October 20, 2011. Appellee asserted that Appellant's appeal was untimely filed, as she alleged that the adverse action taken against her was discipline that she received actual notice of on October 12, 2010.

Appellant argued in her Memorandum in Opposition, filed on November 7, 2011, that the above-referenced matter constituted a "revival" of an earlier-filed appeal. Appellant timely filed an appeal of the October 12, 2010, adverse action (SPBR Case No. 10-WHB-10-0277), but filed a notice of withdrawal with this Board on November 12, 2010. The Board adopted Appellant's withdrawal of the matter and dismissed the appeal on December 6, 2010. Appellant asserts that because 1) her original appeal was filed in a timely manner, 2) her withdrawal of SPBR Case No. 10-WHB-10-0277 was specifically made "without prejudice," and 3) Appellee did not then oppose such form of withdrawal, this Board may exercise jurisdiction over the instant matter. Appellant further asserts that she was on approved disability leave from November 22, 2010, through mid-July 2011, which constitutes a basis for equitable tolling of her time for appeal.

CONCLUSIONS OF LAW

Rule 1 of the Ohio Rules of Civil Procedure provides that the Civil Rules are to be followed in all courts in Ohio in the exercise of civil jurisdiction at law or in equity.

Civil Rule 1(C), however, notes that the Civil Rules "to the extent that they would by their nature be clearly inapplicable, shall not apply . . . (7) in all other special

statutory proceedings” An administrative appeal, such as an appeal before this Board, is a special statutory proceeding; Ohio Administrative Code Section 124 sets forth the Board’s administrative rules and outlines procedures required for processing an appeal. See *Transky v. Ohio Civ. Rights Comm.*, 193 Ohio App.3d 354, 2011-Ohio-1865.

While the Ohio Rules of Civil Procedure provide that an individual may dismiss a matter without prejudice, this Board’s rules make no such provision. O.A.C. 124-11-20(A) allows for the withdrawal of an appeal any time prior to the issuance of the final order of the Board. Once the Board has adopted a withdrawal and issued a final order pursuant to O.A.C. 124-15-04 dismissing the action, however, the only avenue for reopening an appeal is through a Motion for Reconsideration, as referenced in O.A.C. 124-15-05. In this instance, no such Motion was filed by Appellant.

The instant appeal was filed with this Board on July 22, 2011, approximately nine months after the alleged retaliatory action taken against Appellant on October 12, 1010. Appellant’s appeal was filed well outside the thirty-day time limit set forth in O.A.C. 124-1-03(G). Although Appellant argued that her approved disability leave constituted a basis for equitable tolling of her time for appeal, she advanced no statutory provision or case law to support her theory.

Based upon the above analysis, I find that this Board has no jurisdiction to consider the instant appeal. Appellant’s current appeal was untimely filed, and Appellant may not “reopen” a previously withdrawn appeal through any process other than the mechanism outlined in O.A.C. 124-15-05. Therefore, I respectfully **RECOMMEND** that Appellee’s Motion be **GRANTED** and the instant appeal be **DISMISSED** for lack of jurisdiction.


Jeannette E. Gunn
Administrative Law Judge