

[Cite as *Khalaq v. Ohio Environmental Protection Agency*, 2011-Ohio-1087.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Musa Khalaq, :  
Appellant-Appellant, :  
v. : No. 09AP-963  
Ohio Environmental Protection Agency, : (C.P.C. No. 09CVF-02-2431)  
Appellee-Appellee. : (REGULAR CALENDAR)

---

D E C I S I O N

Rendered on March 10, 2011

---

*E. Dennis Muchnicki and Amy Bittner*, for appellant.

*Michael DeWine*, Attorney General, *Komlavi Atsou* and *Timothy M. Miller*, for appellee.

---

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellant-appellant, Musa Khalaq ("appellant"), appeals from a decision of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR"), which dismissed his appeal for lack of jurisdiction after finding that appellant failed to meet the requirements for being considered a "whistleblower" under R.C. 124.341. For the reasons that follow, we affirm.

{¶2} Appellant is employed as an Environmental Specialist 2 with the Ohio Environmental Protection Agency ("OEPA"), Division of Drinking and Ground Waters, in the Northwest District Office. Appellant's position is a bargaining unit position.

{¶3} On March 15, 2007, appellant sent a letter to the State Board of Registration for Professional Engineers ("SBRPE"), in which he alleged that the OEPA was not complying with R.C. 4733.17 and 4733.01(D). On April 13, 2007, appellant provided a copy of his March 15, 2007 letter to his OEPA supervisor, Linda Benham. Based upon appellant's letter and the subsequent discussions that followed, the OEPA created a new position, Environmental Engineer 3. Appellant applied for this newly created position and was scheduled for an interview. Before the scheduled interview, however, appellant received a ten-day suspension for violating OEPA's conduct and discipline policy. Specifically, appellant's ten-day suspension was based upon the following violations:

[U]sing a state vehicle for personal business on May 28, 2009 in violation of the Ohio EPA's Motor Vehicle Policy; falsifying official Agency documents by claiming time not worked and failing to sign-in and sign-out for hours not worked; Insubordination by not being truthful during an investigatory interview; and, [sic] Failure of Good behavior by failing to maintain the high standards of behavior, conduct and work performance and trust and responsibility imposed on [him] as a public servant.

(Trial court's decision, at 3.) Appellant did not challenge this suspension by filing a grievance. Instead, he served the suspension from July 28, through August 8, 2008.

{¶4} In the midst of his suspension, on August 6, 2008, the OEPA notified appellant that he was no longer being considered for the Environmental Engineer 3

position because of his open disciplinary record. As a result, on September 3, 2008, appellant filed a whistleblower appeal with the SPBR in order to challenge the OEPA's decision not to interview him for the Environmental Engineer 3 position.

{¶5} An administrative law judge ("ALJ") reviewed the matter and recommended the SPBR dismiss the appeal for lack of subject-matter jurisdiction under R.C. 124.341. Appellant filed objections, and the matter was then considered by the SPBR, which adopted the ALJ's recommendations and dismissed the matter for lack of subject-matter jurisdiction. Appellant filed an administrative appeal of the SPBR's dismissal in the Franklin County Court of Common Pleas. On September 15, 2009, the common pleas court affirmed the dismissal. Appellant has timely appealed to this court and presents the following assignments of error:

[I.] BECAUSE THE SPBR ERRONEOUSLY INTERPRETED R.C. SECTION 124.341 TO INCLUDE A REQUIREMENT TO ADDRESS THE [WHISTLEBLOWER] COMPLAINT TO SPECIFIC PERSONS LISTED IN THAT SECTION OF THE REVISED CODE, THE BOARD'S DECISION IS BASED UPON AN ERROR OF LAW WHICH REQUIRES REVERSAL OF THE DISMISSAL OF MR. KHALAQ'S COMPLAINT.

[II.] BECAUSE THE COMMON PLEAS COURT AFFIRMED THE SPBR DECISION ON THE BASIS OF LEGAL ARGUMENTS THAT WERE NEVER PRESENTED TO THE SPBR IN VIOLATION OF THE RULE REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES, THE COURT'S DECISION BELOW IS CONTRARY TO LAW.

{¶6} For ease and clarity, we will address appellant's assignments of error out of order. In his second assignment of error, appellant argues that the common pleas court erred in reaching a determination on an issue that the SPBR never decided. In his first

assignment of error, appellant argues that SPBR and the common pleas court erred by impermissibly adding to the requirements set forth in R.C. 124.341, the requirement that a whistleblower complaint be specifically addressed to an appropriate individual. In presenting these arguments, appellant generally challenges the dismissal of his R.C. 119.12 administrative appeal by the common pleas court.

{¶7} "[A] party adversely affected by the SPBR's decision may appeal that decision to the common pleas court." *Ressler v. Ohio Dept. of Transp.*, 10th Dist. No. 09AP-338, 2009-Ohio-5857, ¶11. When presented with an administrative appeal, under R.C. 119.12, the common pleas court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111. The Supreme Court of Ohio has defined reliable, probative, and substantial evidence as follows:

- (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

(Footnotes omitted.) *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571.

{¶8} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence.

*Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the common pleas court's determination that the board's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the common pleas court abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. Absent an abuse of discretion on the part of the common pleas court, a court of appeals cannot substitute its judgment for that of the board or the common pleas court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. However, on the question of whether the board's order was in accordance with the law, this court's review is plenary. *McGee v. Ohio State Bd. Of Psychology* (1993), 82 Ohio App.3d 301, 305, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶9} Our analysis must begin with an examination of R.C. 124.341, which provides in relevant 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. 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.

\* \* \*

(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;

\* \* \*

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

\* \* \*

(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. If the employee files such an appeal, the board shall immediately notify the employee's appointing authority and shall hear the appeal. The board may affirm or disaffirm the action of the appointing authority or may issue any other order as is appropriate. The order of the board is appealable in accordance with Chapter 119. of the Revised Code.

{¶10} To invoke the jurisdiction of SPBR and receive the protections afforded under R.C. 124.341, a state employee must show: (1) a written report, (2) that was transmitted to his/her supervisor, appointing authority, the state inspector general, or other appropriate legal official, and (3) which identified a violation of a state or federal

statute, rule, or regulation, or a misuse of public resources. *Vivo v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 09AP-110, 2009-Ohio-6417, ¶17, citing *Wade v. Ohio Bur. of Workers' Comp.* (June 10, 1999), 10th Dist. No. 98AP-997; see also *Haddox v. Ohio State Atty. Gen.*, 10th Dist. No. 07AP-857, 2008-Ohio-4355, ¶21, discretionary appeal not allowed, *Haddox v. Ohio State Atty. Gen.*, 120 Ohio St.3d 1506, 2009-Ohio-361; see also *Ressler* at ¶14. The burden is on the employee to demonstrate these procedural requirements by a preponderance of the evidence. *Vivo* at ¶19, citing *Wade*; *Robins v. Ohio Dept. of Liquor Control* (June 25, 1996), 10th Dist. No. 96APE01-38, and *Contreras v. Ferro Corp.* (1995), 73 Ohio St.3d 244.

{¶11} In the instant matter, the ALJ found that appellant failed to provide evidence demonstrating that he filed a whistleblower report with an appropriate entity. Accordingly, the ALJ recommended that the SPBR dismiss appellant's appeal for lack of subject-matter jurisdiction. In his objections, appellant argued that the ALJ improperly assumed facts that were not in the record. Specifically, he questioned the ALJ's analysis of a series of emails exchanged amongst appellant, Linda Benham and Ellen Gerber. He argued that the ALJ improperly assumed that these emails constituted the "report" forming the basis of his whistleblower complaint. Instead, by way of an affidavit, appellant averred that he delivered a copy of the March 15, 2007 letter to his supervisor, Linda Benham. According to appellant, this should have been sufficient to afford whistleblower protection under R.C. 124.341. Upon the SPBR's review, it was not.

{¶12} In his appeal to the common pleas court, appellant argued that the SPBR erroneously interpreted the procedural requirements for whistleblower protection. In this

regard, the common pleas court found that the March 15, 2007 letter was not a whistleblower report because it was not addressed to a named authority under R.C. 124.341. It further held that the content of the letter did not meet the requirements of R.C. 124.341 because it did not identify a violation of law or misuse of a public resource. The court analyzed email communications transmitted amongst appellant and his supervisors and determined that they did not meet the requirements to be considered a whistleblower report. It further noted that any oral discussions amongst appellant and his supervisors had no protection under R.C. 124.341. Finally, the court held that appellant failed to demonstrate a nexus between the alleged retaliatory action and his March 15, 2007 letter. After undertaking this analysis, the common pleas court concluded that appellant was not afforded whistleblower protections under R.C. 124.341. As a result, the court affirmed the dismissal of appellant's whistleblower complaint.

{¶13} By way of his second assignment of error in his appeal to this court, appellant argues that the common pleas court erred by considering the content of the March 15, 2007 letter because it was neither raised before nor considered by the SPBR. Stated differently, appellant argues that the OEPA waived any challenge to the content of the March 15, 2007 letter by failing to raise it before the SPBR.<sup>1</sup>

{¶14} It is well-settled that the subject-matter jurisdiction of a court may not simply be bestowed or conferred upon it. See *Fertec, L.L.C. v. BBC & M Eng., Inc.*, 10th Dist. No. 08AP-998, 2009-Ohio-5246, ¶15, citing *Bush v. Beggrow*, 10th Dist. No. 03AP-1238,

---

<sup>1</sup> While appellant's brief refers to a purported failure to exhaust administrative remedies, during oral argument before this court, appellant conceded that his argument is actually that the OEPA waived the challenge to the content of the March 15, 2007 letter.

2005-Ohio-2426, ¶7, citing *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 1997-Ohio-366. It is equally well-settled that the issue of subject-matter jurisdiction may not be waived. *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, ¶45.

{¶15} With regard to the SPBR, it is an administrative body that derives its jurisdiction from R.C. Chapter 124 and possesses only that authority conferred thereunder. *Ketron v. Ohio Dept. of Transp.*, 61 Ohio App.3d 657, 659, quoting *Hansen v. State Personnel Bd. of Review* (1977), 51 Ohio App.2d 7, 13.

{¶16} In *Ohio Fresh Eggs, L.L.C. v. Boggs*, 183 Ohio App.3d 511, 2009-Ohio-3551, this court reviewed statutes conferring subject-matter jurisdiction upon the Ohio Environmental Review Commission and held that the "authority \* \* \* conferred by the General Assembly cannot be extended by an administrative agency." *Id.* at ¶28, citing *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377. We believe the rationale supporting this rule applies equally herein. The authority conferred upon the SPBR by the General Assembly may not be extended by a party's failure to raise an argument. Indeed, the issue of subject-matter jurisdiction may not be waived and, instead, may be raised at any time. Were we to accept the argument advanced in appellant's second assignment of error, we would effectively be forced to extend the limited jurisdiction of the SPBR beyond that which is conferred by statute. We therefore reject the contention that the OEPA waived the argument regarding the content of the March 15, 2007 letter. Therefore, in conducting its review, the court of common pleas did not err when it

analyzed the content of the March 15, 2007 letter. We accordingly overrule appellant's second assignment of error.

{¶17} Upon our review of the March 15, 2007 letter, it is clear that the court of common pleas did not abuse its discretion in affirming the dismissal of appellant's whistleblower complaint. Appellant's letter failed to identify a violation of a state or federal statute, rule, or regulation, or a misuse of public resources. Instead, it merely stated that the position of section manager was previously filled by a professional engineer ("PE"), which permitted him to sign off on plans and documents. According to the letter, after his retirement, another PE assumed the duties of signing off on the plan documents. Appellant's letter then alleged that the OEPA "recently" had hired a non-licensed engineering manager to replace the previous manager who "will" oversee other non-licensed engineering staff. (Trial court's decision, at 7.) As a result, appellant alleged that the "practice of reviewing and signing off on plans [is] currently not being met." (Trial court's decision, at 8.) Further, he asked for the SBRPE to look into the matter and "make a decision on whether or not the agency is in compliance with the current regulations[.]" (Trial court's decision, at 8.)

{¶18} Again, appellant's letter fails to identify a violation of law or misuse of public resources. Instead, by way of speculation and supposition, it suggests that a non-licensed engineer may potentially violate statutes at some point in the future. Further, the letter suggests that because the newly hired manager's predecessor was a PE, he necessarily had to be one too. There is nothing indicating that the job functions necessitated such qualifications. Indeed, we see nothing in the letter that indicates that

the non-licensed engineer was hired to engage in the practice of engineering. Moreover, whether the practice of signing off on plans was currently being met, on a temporary or interim basis, still does not equate to an identification of a violation, as appellant suggests. See *Vivo* at ¶30 ("written report must provide sufficient detail to at least identify and describe the alleged violation or misuse of public resources[.]"). Furthermore, the fact that the OEPA may have created a new engineering position based in part upon appellant's letter does not change the content of that letter. Because appellant's letter fails to identify a violation of law or misuse of public resources, we find that the trial court did not abuse its discretion in affirming the dismissal of appellant's whistleblower complaint. We therefore overrule appellant's first assignment of error.

{¶19} Based upon the foregoing, we find that appellant failed to meet the written report requirement set forth in R.C. 124.341. As a result, the SPBR did not err in dismissing appellant's appeal for lack of jurisdiction. Furthermore, the Franklin County Court of Common Pleas did not err in affirming this dismissal. Having overruled appellant's first and second assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

SADLER and FRENCH, JJ., concur.

---