

ORIGINAL

IN THE SUPREME COURT OF OHIO

JOSEPH C. SOMMER

\* Supreme Court Case No.

14-0230

Appellant

\* On appeal from the Franklin County  
Court of Appeals, 10th Appellate District

vs.

BUREAU OF WORKERS' COMP.

\* Appeals Case 13AP-412

Appellee.

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APPELLANT JOSEPH C. SOMMER'S MEMORANDUM  
IN SUPPORT OF JURISDICTION

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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Whistleblowers are critical to the functioning of government. By misapplying the law in the decision below, the Tenth District Court of Appeals limits the scope of whistleblower protections under R.C. 124.341. State employees will therefore be deterred from reporting wrongdoing they witness, to the great detriment of the state government's operations.

When Appellant was an attorney in Appellee's legal department, Appellee imposed discipline on him for a complaint he had filed with the Ohio Inspector General's Office. The complaint involved possible failure of the Industrial Commission Nominating Council (ICNC) to follow R.C. 4121.02(D), violations of which do not carry criminal penalties.

Appellant appealed the discipline to the State Personnel Board of Review (SPBR), which is responsible for enforcing R.C. 124.341. Throughout the case, the SPBR took the position that Appellant had established a *prima facie* claim of properly complying with R.C. 124.341(A) by reporting in writing an alleged violation of state or federal statutes, rules, or regulations or the misuse of public resources to an appropriate entity. Nevertheless, the SPBR upheld the discipline by saying Appellee's basis for it was legitimate and nonretaliatory.

Appellant appealed that conclusion to the Courts under R.C. 119.12. During the proceedings, two Common Pleas Court Judges had occasion to note the SPBR's interpretation of R.C. 124.341. Neither of them disturbed the SPBR's view of the statute as covering complaints of noncriminal misconduct filed with the Ohio Inspector General.

At the Court of Appeals, the appropriateness of the SPBR's statutory interpretation also was not raised at oral argument. According to the Court's Memorandum Decision, however, the

SPBR's interpretation of R.C. 124.341 was wrong. The Court said the statute provides no protection for complaints of noncriminal wrongdoing filed with the Ohio Inspector General.

The Appeals Court interpreted the statute in a manner that violates the Equal Protection Clauses of the US and Ohio Constitutions. The purpose of R.C. 124.341 is to protect whistleblowers in state government. There is no rational basis for prohibiting discipline of state employees who report criminal wrongdoing to the Ohio Inspector General, while allowing free rein to punish state employees who report noncriminal wrongdoing to that office. Because noncriminal wrongdoing can sometimes cause far more harm to the public than criminal acts, the persons who make either type of report are equally deserving of whistleblower protection.

The importance of protecting both types of reports is likely a reason that the SPBR interpreted R.C. 124.341 as covering complaints of noncriminal statutory violations or other noncriminal wrongdoing reported to the Ohio Inspector General. It is also likely a reason that the Appeals Court's previous cases interpreted R.C. 124.341 as covering those types of complaints. The Appeals Court's Memorandum Decision does not indicate the Court gave the SPBR's position the due deference that must be given to an administrative agency's interpretation of a statute that the agency is responsible for enforcing. Nor does it indicate the Court considered the doctrine of stare decisis when declining to follow relevant precedent.

The enactment of R.C. 124.341 shows that the public has a great interest in state employees not being intimidated from reporting wrongdoing they observe in government. The Appeals Court's interpretation of the statute goes against this strong public interest by declaring that the statute does not protect a broad class of persons that the SPBR and the Appeals Court had previously considered as protected by it. As a result, significant corruption in state

government could be covered up. The unreported wrongdoing could include criminal and noncriminal acts, because in some instances the employees might be unsure what type of misconduct is involved, and thus unsure whether they are protected in reporting it.

### **STATEMENT OF THE CASE AND FACTS**

Appellant was employed as an attorney in Appellee's legal department from December 28, 1987, until July 1, 2011. On May 28, 2009, Appellant used his state computer to send an email to Joseph Montgomery, the then-Deputy Inspector General assigned under R.C. 121.52 to investigate wrongful acts and omissions in the workers' compensation system. The email reported that the ICNC had possibly failed to comply with deadlines in R.C. 4121.02(D) for providing the Governor with lists of candidates for an upcoming six-year term on the Industrial Commission.

After pointing out the statutory provisions that may have been violated in 2009, Appellant's email noted his belief that the ICNC had violated the same provisions in 2005, causing the Ohio Senate to fail to perform its duties, under R.C. 4121.02(E), of reviewing the qualifications of the nominee that year. Appellant ended the text of the email by saying: "I am concerned that the council might again be violating the statute. And if the nominating council is composed of scofflaws, what quality of persons can we expect them to submit for appointment to the Commission?" Appellate signed the email as "Joe Sommer, attorney" at the Ohio Bureau of Workers' Compensation, and provided his work phone number.

On November 13, 2009, the Inspector General issued a two-page report on Appellant's complaint. Page 1 said R.C. 4121.02(D) "states that the nominating council shall submit a list of three names of candidates for a vacancy on the three-person Industrial Commission within sixty

days of a vacancy occurring as a result of the expiration of a term.” Page 2 said “the Industrial Commission Nominating Council failed to submit names of candidates for an upcoming vacancy on the Industrial Commission by May 1 (within sixty days of the expiration of the term of William Thompson). . . .” Despite recognizing that the ICNC had failed to comply with a statutory deadline for submitting names to the Governor, the report concluded that no wrongful act or omission had occurred.

On December 17, 2009, Appellee disciplined Appellant with a written reprimand concerning the complaint filed with the Deputy Inspector General. The reprimand said Appellant’s acts were a “Failure of Good Behavior.” It said Appellant was wrong to use his state email to file the complaint and wrong to identify himself as an attorney employed by Appellee. It also charged that Appellant inappropriately called the members of the ICNC “scofflaws.” It further alleged that the complaint compromised the ability of Appellee’s executive staff to work with members of the ICNC. Under Appellee’s records-retention schedule, the discipline is still on Appellee’s records.

Appellant appealed the discipline to the SPBR, claiming that it violated the whistleblower protections of R.C. 124.341. Appellee filed a motion to dismiss with the SPBR’s Administrative Law Judge (ALJ) who had been assigned to the appeal. In a Memorandum in Support of the motion, Appellee did not argue that R.C. 124.341 does not protect employees from discipline for filing complaints of noncriminal misconduct with the Ohio Inspector General. Instead, Appellee argued that R.C. 124.341 does not give the SPBR jurisdiction over written reprimands.

On March 2, 2010, the ALJ recommended that the SPBR grant the motion. The ALJ said Appellant had established a *prima facie* claim of properly complying with R.C. 124.341(A) by

making a written report of an alleged violation of state or federal statutes, rules, or regulations or the misuse of public resources to an appropriate entity. But the ALJ said denial of Appellant's complaint was required by the SPBR's previous decision in *Sites v. ADAMHS Board, Scioto-Lawrence-Adams Counties*, SPBR, No. 09-WHB-04-0213 (Aug. 26, 2009). In that case, the SPBR had adopted an ALJ's recommendation to dismiss an appeal by interpreting R.C. 124.341 as not protecting state employees from written reprimands.

In an April 15, 2010 order concerning the ALJ's recommendation, the SPBR overruled the *Sites* case, saying the holding "did not fully recognize the scope of protections set forth in R.C. 124.341(D)." The SPBR went on to hold that "*an otherwise qualifying written reprimand would constitute a disciplinary action under R.C. 124.341(D).*" (Emphasis sic.) Nevertheless, the SPBR dismissed Appellant's appeal. The SPBR did not disagree with the ALJ's conclusion that Appellant had established a *prima facie* claim of complying with R.C. 124.341(A) by making a written report of an alleged legal violation. The SPBR said, however, that "Appellee reprimanded Appellant not for his reporting of his concern but for the unacceptable and intemperate language that he utilized to do so, pursuant to R.C. 124.341(D)."

Appellant appealed the SPBR's order to the Franklin County Court of Common Pleas. On January 5, 2011, the Court overturned the SPBR's decision by holding that Appellant had not been offered a hearing as required by R.C. 124.341(D). The Court also said: "The Board, in its April 15, 2010 Order, noted that a reprimand would trigger the protection as found within R.C. 124.341 but it did not hold a hearing." The Court remanded the matter to the SPBR for an appropriate evidentiary record to be established and a new decision to be rendered. Appellee did not appeal the Court's order.

The ALJ issued a second Report and Recommendation on October 5, 2012. This occurred after the parties had agreed to proceed based on briefs and affidavits instead of a formal hearing. The ALJ again said Appellant had established a *prima facie* claim of properly complying with R.C. 124.341 by making a written report of alleged wrongdoing. But the ALJ recommended that the discipline be affirmed, and that Appellant's appeal under R.C. 124.341 be dismissed. The ALJ said Appellee had "a legitimate and non-retaliatory basis" for disciplining Appellant. Specifically, the ALJ said Appellant referred to the members of the ICNC in an inappropriate manner in the complaint, and thus compromised Appellee's ability to work with them. The ALJ also said the discipline was legitimate because in using his work email to make the complaint and identifying himself as an attorney, Appellant gave the impression he was speaking on behalf of Appellee's legal department. As further support for the discipline, the ALJ quoted from Paragraph 5 of the Preamble to the Ohio Supreme Court's Rules of Professional Conduct.

In an order issued on December 20, 2012, the SPBR said it "adopts the Recommendation of the Administrative Law Judge" and dismissed Appellant's appeal. Appellant appealed the SPBR's order to the Franklin County Court of Common Pleas.

The Trial Judge upheld the SPBR's order in a decision issued on April 22, 2013. She noted that "The ALJ found that Mr. Sommer had made a written report of an alleged violation of state or federal law to an appropriate entity under R.C. 124.341." But she said the record contains evidence that Appellant was disciplined not for making a report under R.C. 124.341, but for inappropriately referring to the ICNC members in the report and improperly identifying himself in it. The Judge also said the SPBR's reference to the Rules of Professional Conduct was inconsequential.

Appellant appealed the Court's decision to the Tenth District Court of Appeals. Appellant argued that in connection with a state employee's complaint of governmental wrongdoing filed under R.C. 124.341(A), Division (D) permits discipline only "for purposely, knowingly, or recklessly reporting false information." He also argued that the SPBR did not have jurisdiction to interpret and enforce the Ohio Supreme Court's Rules of Professional Conduct. The Appeals Court said those arguments were moot because R.C. 124.341 does not protect state employees from discipline for complaints of noncriminal wrongdoing filed with the Ohio Inspector General. In the Court's words: "We find that appellant's conduct does not fall within the scope of R.C. 124.341(A) because the statute did not authorize appellant to report to the Inspector General the alleged non-criminal statutory violations that were the subject of appellant's e-mailed report. Accordingly, appellant was not protected by R.C. 124.341(B) against the imposition of discipline." Memorandum Decision, ¶ 6.

In support of his position on these issues, Appellant presents the following argument.

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law 1: A Court cannot decline to follow its previous interpretation of a statute without considering the principle of stare decisis.**

Although the Appeals Court said R.C. 124.341 does not cover complaints of noncriminal wrongdoing sent to the Ohio Inspector General, the Court did not take that position in prior cases. Under the standard those cases used for determining the statute's coverage, Appellant's complaint to the Inspector General was protected.

The Court previously said: "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.” (Emphasis added.) *Khalaq v. Ohio Environmental Protection Agency*, 10<sup>th</sup> Dist. No. 09AP-963, 2011-Ohio-1087, 2011 WL 824593, ¶ 10, citing *Vivo v. Ohio Bur. of Workers’ Comp.*, 10<sup>th</sup> Dist. No. 09AP-110, 2009-Ohio-6417, 2009 WL 4651976, ¶ 17, which cites *Wade v. Ohio Bur. of Workers’ Comp.*, 10<sup>th</sup> Dist. No. 98AP-997, 1999 WL 378409 (June 10, 1999).

Under that standard, Appellant’s complaint to the Ohio Inspector General met all three requirements for the statute’s protection. Also under the standard, a complaint of noncriminal misconduct filed with the Ohio Inspector General is protected by R.C. 124.341. But the Court did not mention the standard in this case. And by holding that noncriminal complaints to the Ohio Inspector General are not protected by R.C. 124.341, the Court in effect overruled it.

The doctrine of stare decisis is a long revered means of ensuring continuity and predictability in the legal system, preventing arbitrary administration of justice, and providing a clear rule of law by which citizens can organize their affairs. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 43. A court can decline to follow a precedent only when there is “special justification.” *Id.* at ¶ 44.

In determining whether to overrule one of its previous decisions, an Appeals Court uses the same standard as the Ohio Supreme Court uses for determining whether to overrule one of its decisions. *State ex rel. E. Ohio Gas Co. v. Bd. of Cty. Comm. of Stark Cty.*, 5<sup>th</sup> Dist. No. 2012 CA 00019, 2012-Ohio-4533, 980 N.E.2d 1056, ¶ 20. The Ohio Supreme Court uses a three-part test for making that determination: “[I]n Ohio, a prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical

workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 48.

In this case, although the Appeals Court declined to follow its own precedent regarding the types of complaints protected by R.C. 124.341, the Court did not apply any of the three factors that the Ohio Supreme has established for deciding whether to not follow a precedent. The Appeals Court did not even mention the precedent.

Appellant, Appellee, and the SPBR had all relied on the previous statement of the law throughout the entire proceedings in this case. By abruptly announcing a change in the law in the Memorandum Decision, without raising even the possibility of a change at the oral argument, the Court gave them no opportunity to argue against an action that takes away significant protections from those who report wrongdoing in state government.

The Court’s failure to acknowledge, consider, and follow its own precedent was unfair and contrary to the law on stare decisis.

**Proposition of Law 2: Before rejecting an administrative agency’s interpretation of a statute that the agency is responsible for enforcing, a Court must give due deference to the agency’s interpretation and consider whether the interpretation is unreasonable.**

Throughout the proceedings in this case, the SPBR consistently took the position that R.C. 124.341 provides protection to complaints of noncriminal wrongdoing filed with the Ohio Inspector General. In taking a contrary position, the Appeals Court did not mention the SPBR’s interpretation of the statute, which the agency is responsible for enforcing.

The Court was required to provide much more respect and consideration to the SPBR’s position: “Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement

responsibility." *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17-18, 734 N.E.2d 775 (2000), citing *Collinsworth v. W. Elect. Co.*, 63 Ohio St.3d 268, 272, 586 N.E.2d 1071 (1992).

Moreover, "This court has long recognized that long-standing administrative interpretations [of statutes] are entitled to special weight." *Cleveland v. Pub. Util. Comm.*, 67 Ohio St.2d 446, 451, 424 N.E.2d 561 (1981). Further, "It is a fundamental tenet of administrative law that an agency's interpretation of a statute that it has the duty to enforce will not be overturned unless the interpretation is unreasonable." *State ex rel. Clark v. Great Lakes Constr. Co.*, 99 Ohio St.3d 320, 2003-Ohio-3802, 791 N.E.2d 974, ¶ 10.

The SPBR has been interpreting R.C. 124.341 since it was enacted in 1990. But the Appeal's Court's decision has no indication the Court gave due deference to the SPBR's interpretation of it. Nor is there any indication the Court examined whether the SPBR's interpretation was entitled to special weight. There is also no indication the Court determined that the SPBR's interpretation was unreasonable. All of those determinations are required before a Court can overturn an administrative agency's interpretation of a statute that the agency is charged with enforcing.

The Appeals Court would have had a difficult time saying the SPBR's interpretation was unreasonable, when the Court itself had been using the same interpretation for years. (See Proposition of Law No. 1, above, at pp. 7-8.) But the Court did not mention the prior judicial and administrative interpretations.

Because ignoring the SPBR's position can in no way be viewed as giving due deference to it, the Court's decision is contrary to law.

**Proposition of Law 3: If R.C. 124.341 is interpreted as protecting state employees who report criminal violations to the Ohio Inspector General but not state employees who report noncriminal violations to that investigatory official, the Equal Protection Clauses of the US and Ohio Constitutions are violated.**

The Equal Protection Clauses of the US and Ohio Constitutions “are functionally equivalent and require the same analysis.” *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 11. The Clauses “require that individuals be treated in a manner similar to others in like circumstances.” *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 6. They prevent “governmental decisionmakers from treating differently persons who are in all relevant respects alike.” *Park Corp. v. Brook Park*, 102 Ohio St.3d 166, 2004-Ohio-2237, 807 N.E.2d 913, ¶ 19, quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992). If a statute does not involve a suspect classification or fundamental right, a “rational-basis analysis” is used to determine whether it complies with the Equal Protection Clauses. *State ex rel. Vana v. Maple Hts. City Council*, 54 Ohio St.3d 91, 92, 561 N.E.2d 909 (1990).

In deciding that R.C. 124.341 provides whistleblower protection to persons who report criminal misconduct to the Ohio Inspector General but not those who report noncriminal misconduct to that investigatory official, the Appeals Court determined that the statute classifies two types of whistleblowers differently. Because this classification does not involve a suspect class or fundamental right, the Equal Protection Clauses require a rational-basis analysis of it.

Under that analysis, a statute does not violate the Equal Protection Clauses if the classification it creates is rationally related to a legitimate governmental interest. *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 15. Classifications “are invalid only if they bear no relation to the state’s goals and no ground can be conceived to justify them.” *State v. Thompkins*, 75 Ohio St.3d 558, 561, 664 N.E.2d 926 (1996).

A two-step procedure is used for the rational-basis test: “We must first identify a valid state interest. Second, we must determine whether the method or means by which the state has chosen to advance that interest is rational.” *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 9.

The state’s interest in enacting R.C. 124.341 was described in *Haddox v. Ohio Atty. Gen.*, 10<sup>th</sup> Dist. No.07AP-857, 2008-Ohio-4355, 2008 WL 3918077. The Court said “the primary objective of R.C. 124.341 is to protect state employees who report [legal] violations or misuse [of public funds] from retaliation.” *Id.*, at ¶ 44. The Court also said the General Assembly had the “laudatory goal of protecting whistleblowers.” *Id.* at ¶ 33.

The Appeals Court’s decision suddenly leaves unprotected by R.C. 124.341 an entire class of state employees – namely, those who report noncriminal wrongdoing to the Ohio Inspector General. This is despite the fact that R.C. 121.46 gives those employees, along with all other persons, the right to report to the Ohio Inspector General any “wrongful act or omission” in state government. R.C. 121.41(G) defines a wrongful act or omission as “an act or omission, committed in the course of office holding or employment, that is not in accordance with the requirements of law or such standards of proper governmental conduct as are commonly accepted in the community and thereby subverts, or tends to subvert, the process of government.” That definition includes both criminal and noncriminal acts and omissions.

By denying whistleblower protection to state employees who exercise their statutory right to report noncriminal wrongdoing to the Ohio Inspector General, the Appeal’s Court’s interpretation of R.C. 124.341 is not rationally related to the state’s goal of protecting whistleblowers. In fact, it could not be more directly opposed to it.

The Court's distinction between the protections provided to the two types of whistleblowers is further irrational because noncriminal misconduct can sometimes cause far more harm than criminal wrongdoing. For example, last year a Common Pleas Court determined that the Bureau of Workers' Compensation's violation of noncriminal statutes governing the setting of employer premiums had caused \$859 million in damages to employers in a class-action lawsuit. *San Allen Inc. v. Buehrer*, Cuyahoga Cty. Case No. CV-07-644950 (March 20, 2013). The decision is under appeal, but the point here is that most criminal violations do not cause nearly that much in damages.

According to R.C. 1.47(A), the General Assembly is presumed to have intended to comply with the US and Ohio Constitutions in enacting statutes. The Appeals Court's novel interpretation of R.C. 124.341 results in a violation of the Equal Protection Clauses of both Constitutions. The violations were not present under the SPBR's interpretation of the statute or the Appeals Court's previous interpretation of it.

Therefore, the Appeals Court's latest interpretation should not stand.

**Proposition of Law 4: For making a report protected by R.C. 124.341, a state employee can be disciplined only for purposely, knowingly, or recklessly reporting false information.**

Division (C) of R.C. 124.341 says that in making a report of wrongdoing under the statute, the employee "shall make a reasonable effort to determine the accuracy of any information reported. . . ." The division goes on: "The employee is subject to disciplinary action . . . as determined by the employee's appointing authority, for purposely, knowingly, or recklessly reporting false information. . . ."

Because R.C. 124.341(C) specifies the acts for which an employee can be disciplined in connection with making a complaint under the statute, other acts are excluded by the canon of

statutory construction *expressio unius est exclusio alterius* (“the mention of one is the exclusion of another”). See *State v. Droste*, 83 Ohio St.3d 36, 39, 697 N.E.2d 620 (1998).

Indeed, R.C. 124.341 specifically excludes other acts from being the subject of discipline. Division (B) states: “*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 or filing a complaint as authorized by division (A) of this section. . . .*” (Emphases added.) This language specifies that discipline is permitted only for purposely, knowingly, or recklessly reporting false information as described in division (C). Nothing else about the content of a report authorized by division (A) can be used to discipline the employee.

Because R.C. 124.341(C) lists the acts for which an employee can be disciplined in connection with filing a complaint under the statute, but does not say those acts include the use of intemperate language in the complaint, the statute protects Appellant from discipline over the complaint, regardless of whether the language in it was intemperate. Under divisions (B) and (C) of the statute, the alleged use of such language in a complaint is not a legitimate basis for discipline.

For the same reasons, discipline cannot be imposed for the manner in which the employee accurately identifies himself or herself in the complaint. That act cannot be considered “reporting false information.”

In this case, there is no way to separate Appellee’s discipline from the complaint filed with the Inspector General’s Office. The discipline was imposed solely because of what Appellant wrote in the complaint, and not for anything he said or did outside of writing and filing

it. If he had not filed the complaint and instead discarded it, the reasons that Appellee used for disciplining him would not have existed.

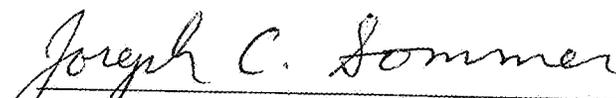
The Appeals Court itself stated that “pursuant to R.C. 124.341(B), an employee in the classified or unclassified civil service who has ‘[made] any report authorized by division (A)’ of R.C. 124.341 is protected against disciplinary action *imposed in consequence of the making of that report.*” (Emphasis added.) Memorandum Decision, ¶ 13.

Because Appellant did not report false information in a complaint filed under division (A) of R.C. 124.341, divisions (B) and (C) of the statute protect him from discipline imposed in consequence of making the report. The statute therefore prohibited the discipline.

### CONCLUSION

As previously interpreted by the Appeals Court and the SPBR, R.C. 124.341 provides whistleblower protection to state employees who report noncriminal wrongdoing to the Ohio Inspector General. Appellant requests that the Supreme Court of Ohio accept jurisdiction over this case and vacate the Appeal’s Court’s decision that the statute provides those employees with no whistleblower protection.

Respectfully submitted,

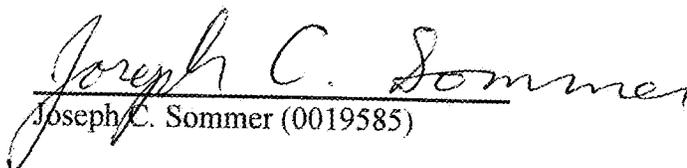


Joseph C. Sommer (0019585)

Appellant pro se

**CERTIFICATE OF SERVICE**

I certify that on February 11, 2014, a copy of the foregoing document was served by ordinary US mail upon Appellee's counsel, Timothy M. Miller, Assistant Attorney General, Employment Law Section, 30 East Broad Street, 23<sup>rd</sup> Floor, Columbus, Ohio 43215-3167.

  
Joseph C. Sommer  
Joseph C. Sommer (0019585)

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Joseph C. Sommer, :  
Appellant-Appellant, :  
v. : No. 13AP-412  
Bureau of Workers' Compensation, : (C.P.C. No. 13CVF-0058)  
Appellée-Appellee. : (ACCELERATED CALENDAR)

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MEMORANDUM DECISION

Rendered on December 30, 2013

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*Joseph C. Sommer, pro se.*

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

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APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶1} Appellant, Joseph C. Sommer ("appellant"), appeals, pursuant to R.C. 119.12, from a judgment of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR"). We affirm.

{¶2} The SPBR order affirmed the imposition of discipline on appellant—a written reprimand—by his employer, appellee Ohio Bureau of Workers' Compensation ("BWC"). Appellant asserts that, in disciplining him, BWC violated R.C. 124.341, one of Ohio's whistleblower statutes.

{¶3} The SPBR found that appellant was not entitled to whistleblower protection under R.C. 124.341 because he had failed to prove that the cause of his reprimand was his filing of a protected report. The SPBR found instead that the BWC reprimanded appellant because the content of his report, sent via e-mail to the office of

the Inspector General of Ohio, gave a false impression that he was speaking on behalf of the BWC or its legal department, thereby impeding the BWC's work. The SPBR found that to be a legitimate justification for discipline.

{¶4} The trial court upheld the decision of the SPBR, finding that there was reliable, probative, and substantial evidence to support it. The trial court further found that the SPBR had not invaded the exclusive jurisdiction of the Supreme Court of Ohio by referencing in its decision that the Preamble to the Ohio Rules of Professional Conduct requires that attorneys who criticize public officials do so with restraint and avoid intemperate criticisms. See Prof.Cond.R. Preamble.

{¶5} Appellant timely appeals, asserting two assignments of error:

1. The Trial Judge incorrectly interpreted R.C. 124.341 as not protecting a state employee from punishment for reporting statutory violations in a manner that did not include false information.
2. The Trial Judge did not uphold the Ohio Supreme Court's exclusive jurisdiction to interpret and enforce the Rules of Professional Conduct.

{¶6} We find that appellant's conduct does not fall within the scope of R.C. 124.341(A) because the statute did not authorize appellant to report to the Inspector General the alleged non-criminal statutory violations that were the subject of appellant's e-mailed report. Accordingly, appellant was not protected by R.C. 124.341(B) against the imposition of discipline. We therefore affirm the judgment of the common pleas court, albeit for different reasons than relied upon by that court.

{¶7} We first address the standard of review applicable in R.C. Chapter 119 appeals. In an administrative appeal filed pursuant to R.C. 119.12, the trial court must review the agency's order to determine whether such order "is supported by reliable, probative, and substantial evidence and is in accordance with law." *Fletcher v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-46, 2012-Ohio-3920, ¶ 8. In reviewing the trial court's order, the court of appeals must apply the following standard:

In reviewing the trial court's determination that an order is supported by reliable, probative, and substantial evidence, our role is confined to determining whether the court of common pleas abused its discretion. \* \* \* However, *in*

*determining whether an order was in accordance with law, this court's review is plenary.*

(Citation omitted.) (Emphasis added.) *Id.*, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

{¶8} The parties do not dispute the facts underlying this appeal. The BWC employed appellant as an attorney in its legal department from 1987 until he retired in July 2011. On May 28, 2009, appellant sent an e-mail to the Deputy Inspector General of Ohio. In his e-mail, appellant reported that he was "concerned that the Industrial Commission nominating council might not be following the requirements of R.C. 4121.02(D)." (Nov. 23, 2011 affidavit.) The e-mail suggested that appellant believed that the nominating council had also failed to meet the statutory timeline in the prior year. Appellant rhetorically asked in the e-mail "if the nominating council is composed of scofflaws, what quality of persons can we expect them to submit for appointment to the commission?"

{¶9} R.C. 4121.02(D) establishes certain statutory deadlines for submission to the governor of the names of possible appointees to the Industrial Commission of Ohio by a ten-member Industrial Commission Nominating Council. As relevant herein, R.C. 4121.02 provides that, "within sixty days of a vacancy occurring as a result of the expiration of a term and within thirty days after other vacancies occurring on the commission, the nominating council shall submit an initial list containing three names for each vacancy."

{¶10} On December 17, 2009, the BWC Assistant General Counsel issued a written reprimand to appellant, in which appellant was advised that he had violated BWC policy by sending the e-mail to the office of the Inspector General. The reprimand stated that, in sending the e-mail, appellant compromised the ability of the BWC Director and other BWC leaders to work with the members of the Industrial Commission Nominating Committee. He was further advised that his actions constituted a failure of good behavior.

{¶11} The record reflects that BWC removed the written reprimand from appellant's personnel file on December 17, 2010—one year after the date of the written reprimand. Removal of the written reprimand was consistent with Ohio Adm.Code

123:1-46-07(A), which provides: "All records relating to oral and/or written reprimands will cease to have any force and effect and shall be removed from an employee's personnel file twelve months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve months."

{¶12} The whistleblower statute at issue, former R.C. 124.341, in effect on the date of appellant's e-mail, provided as follows:

(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.*

*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, appointing authority, or the office of internal audit, 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. \* \* \**

(B) Except as otherwise provided in division (C) of this section<sup>1</sup>, 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 \* \* \**.

(Emphasis added.)

<sup>1</sup> Division (C) of R.C. 124.341 authorizes the imposition of discipline where an employee purposely, knowingly or recklessly reported false information under division (A) of the statute.

{¶13} Accordingly, pursuant to R.C. 124.341(B), an employee in the classified or unclassified civil service who has "[made] any report authorized by division (A)" of R.C. 124.341 is protected against disciplinary action imposed in consequence of the making of that report.

{¶14} We have recognized that "the burden of meeting the procedural requirements of either whistleblower statute [i.e., R.C. 124.341 or 4113.52] is upon the employee, who bears the burden of demonstrating by a preponderance of the evidence the existence of a written report *filed with the appropriate supervisor or other named authority* and providing sufficient detail to identify and describe the alleged violation." *Haddox v. Ohio Atty. Gen.*, 10th Dist. No. 07AP-857, 2008-Ohio-4355, ¶ 21, citing *Wade v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 98AP-997 (June 10, 1999).

{¶15} When appellant e-mailed his concerns to the office of the Inspector General, he did not file a written report of a possible violation of a state statute with either his supervisor or an appropriate named authority. R.C. 124.341 authorizes the filing of a report of a possible statutory violation with the Inspector General only where the employee "reasonably believes that a violation or misuse of public resources is a criminal offense."

{¶16} Appellant unsurprisingly did not suggest in his e-mail that he believed the Industrial Commission Nominating Council had committed a criminal offense in not timely forwarding the names of potential nominees to the governor. Nor is it objectively reasonable to believe that a statutory violation of that nature is criminal. To the contrary, the general rule is that " ' "a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure." ' " *Pruneau v. Ohio Dept. of Commerce, Bur. of Wage & Hour*, 191 Ohio App.3d 588, 2011-Ohio-6043, ¶ 27 (10th Dist.), citing *Hardy v. Delaware Cty. Bd. of Revision*, 106 Ohio St.3d 359, 2005-Ohio-5319, ¶ 22, quoting *State ex rel. Ragozine v. Shaker*, 96 Ohio St.3d 201, 2002-Ohio-3992, ¶ 13, quoting *State ex rel. Jones v. Farrar*, 146 Ohio St. 467 (1946), paragraph three of the syllabus. A directory statute of this nature does not limit the power of the officer to act beyond the prescribed time unless the statute includes negative words importing that the act required shall not be done in

any other manner or time than that designed. *Id.*, citing *Schick v. Cincinnati*, 116 Ohio St. 16 (1927). It is therefore unreasonable to believe that members of the Industrial Commission Nominating Committee acted criminally, even if it was true that they failed to submit nominees to the governor within the timeframe set forth in R.C. 4121.02(D).

{¶17} R.C. 124.341(A) did not authorize appellant to report to the Inspector General the alleged statutory violation he had identified. Rather, to gain the protection provided by R.C. 124.341(B), the non-criminal statutory violation perceived by appellant could only have been reported pursuant to the first paragraph of R.C. 124.341(A), which authorizes the filing of a report with other officials but not with the Inspector General.

{¶18} Appellant's two assignments of error assume that appellant had made a report as authorized by division (A) of R.C. 124.341 and fell within the scope of protection afforded by that statute. Because those underlying assumptions were incorrect, we find that appellant's two assignments of error are moot.

{¶19} The SPBR rejected appellant's contention that his written reprimand was issued in contravention of R.C. 124.341 and refused to disaffirm the written reprimand. The trial court's judgment affirming the action of the SPBR was in accordance with law because appellant was not entitled to the protection afforded by the statute. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

TYACK and CONNOR, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Joseph C. Sommer, :  
Appellant-Appellant, :  
v. : No. 13AP-412  
Bureau of Workers' Compensation, : (C.P.C. No. 13CVF-0058)  
Appellee-Appellee. : (ACCELERATED CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on December 30, 2013, appellant's two assignments of error are moot, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

DORRIAN, TYACK & CONNOR, JJ.

/S/ JUDGE

Tenth District Court of Appeals

**Date:** 12-30-2013  
**Case Title:** JOSEPH SOMMER -VS- OHIO STATE BUREAU WORKERS  
COMPENSATION  
**Case Number:** 13AP000412  
**Type:** JEJ - JUDGMENT ENTRY

So Ordered


/s/ Judge Julia L. Dorrian