

OPINION NO. 86-033**Syllabus:**

The Unemployment Compensation Board of Review may, in accordance with the specific terms of the schedule of retention pertaining thereto and approved by the State Records Commission, destroy or dispose of its hearing records six months after a decision by the Board of Review becomes final. The hearing records shall be destroyed or disposed of within sixty days after the expiration of the six-month retention period, unless, in the opinion of the Board of Review, they pertain to any pending case, claim, or action.

**To: Ray F. Ross, Chairman, Unemployment Compensation Board of Review,
Columbus, Ohio**

By: Anthony J. Celebrezze, Jr., Attorney General, May 21, 1986

You have requested my opinion whether the Unemployment Compensation Board of Review may lawfully dispose of its hearing records six months after a decision by the Board of Review becomes final. Resolution of your question requires a consideration of several provisions in R.C. Chapter 149 (documents, reports, and records), which govern the retention, disclosure, destruction, and disposal of records maintained by public agencies and offices, and the role of the State Records Administration office with respect thereto.

I commence my analysis with R.C. 149.011(G), which defines the term "records," as follows:

"Records" includes any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public official of the state or its political

¹ The term "public office," as used in R.C. Chapter 149, is defined in R.C. 149.011(A) as including "any state agency, public institution, political subdivision, or any other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government."

The term "state agency," as used in R.C. Chapter 149, is further defined in R.C. 149.011(B), in part, as including "every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government."

subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. (Footnote added.)

See generally 1981 Op. Att'y Gen. 81-019 at 2-76 n.3 (the term "record," as it appears in what is now R.C. 149.011(G), is defined very broadly). With respect to the removal or disposal of those records, R.C. 149.351 provides as follows:

All records as defined in section 149.011 of the Revised Code are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the records commissions provided for under sections 149.38 to 149.42 of the Revised Code. Such records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed unlawfully.

With respect to the removal or disposal of records of a state agency, R.C. 149.333 provides as follows:

No state agency shall retain, destroy, or otherwise transfer its state records in violation of this section.

Each state agency shall submit to the state records administrator all applications for records disposal or transfer and all schedules of records retention and destruction. The state records administrator shall review such applications and schedules and provide written approval, rejection, or modification of the application or schedule. The state records administrator shall then forward the application for records disposal or transfer or the schedule for retention or destruction, with the administrator's recommendation attached, to the auditor of state for review and approval. The decision of the auditor of state to approve, reject, or modify the applications or schedules shall be based upon the continuing administrative and fiscal value of the state records to the state or to its citizens. If the auditor of state disapproves the action by the state agency, he shall so inform the state agency through the state records administrator within sixty days and these records shall not be destroyed. At the same time, the state records administrator shall forward the application for records disposal or the schedule for retention or destruction to the state archivist for review and approval. The state archivist shall have sixty days to select for custody such state records as he determines to be of continuing historical value. Records not so selected shall be disposed of in accordance with this section.

See R.C. 149.35 (if any law prohibits the destruction of records, the State Records Administrator shall not order their destruction or other disposition).

R.C. 149.331 describes the functions of the State Records

Administration program,² which include establishing standards and procedures for the effective management of state records, R.C. 149.331(A), making continuing surveys of record-keeping operations and recommending improvements in current records management practice, R.C. 149.331(B), establishing and operating state records centers, R.C. 149.331(C), and reviewing applications for one-time records disposal and schedules of records retention and destruction submitted by state agencies in accordance with R.C. 149.333, R.C. 149.331(D). Further, R.C. 149.331(J) states that the State Records Administration program shall "establish and publish in accordance with the applicable law necessary procedures and rules for the retention and disposal of state records."

Thus, the foregoing provisions in R.C. Chapter 149, along with rules promulgated by the State Records Administration office, establish an orderly scheme for the efficient retention, destruction, and disposal of the records of public agencies and offices. Such records, as defined in R.C. 149.011(G), may not be destroyed or disposed of, in whole or in part, except in accordance with those statutory provisions and administrative rules. R.C. 149.333; R.C. 149.351. In this regard a public agency or office that wishes to destroy or otherwise dispose of its records must submit to the State Records Administrator either schedules of retention or disposal applications, see R.C. 149.331(D); R.C. 149.34(C), which are then forwarded to the Auditor of State for his review and approval, R.C. 149.333. Records covered by specific schedules of retention or disposal applications, once approved by the State Records Administrator and Auditor of State, may then be lawfully destroyed or otherwise disposed of in accordance with the specific terms of such schedules or applications. R.C. 149.333; R.C. 149.351.³

² R.C. 149.33 gives the Department of Administrative Services the responsibility of "establishing and administering a state records program for all state agencies," and establishes within the Department of Administrative Services "an office of state records administration, which shall be under the control and supervision of the director of administrative services or his appointed deputy." Further, the Administrator of the State Records Administration office shall be designated by the Director of Administrative Services. Id.

R.C. 149.34 sets forth the procedures to be followed by all state agencies in working with the State Records Administrator for the purpose of managing efficiently all agency records. In particular, R.C. 149.34(C) provides, in part, that the head of each state agency, office, institution, board, or commission, shall "[s]ubmit to the state records administrator, in accordance with applicable standards and procedures, schedules proposing the length of time each record series warrants retention for administrative, legal, or fiscal purposes after it has been received or created by the agency."

³ Pursuant to authority conferred upon it by former R.C. 149.351, see 1965 Ohio Laws 175 (Am. H.B. 631, eff. Nov. 1, 1965), the State Records Commission, see page six, infra, promulgated rules governing the retention, destruction, and disposal of the records of public agencies and offices. See 1 Ohio Admin. Code 149:1-1-02 (procedures for compiling and submitting disposal lists and schedules of retention);

Turning now to your specific question, whether the Unemployment Compensation Board of Review may lawfully dispose of its hearing records six months after a decision by the Board becomes final, I must determine initially whether those hearing records are "records" as defined in R.C. 149.011(G). R.C. 4141.06 establishes the Unemployment Compensation Board of Review, and pursuant to that section the Board of Review is empowered, in part, to "hear appeals arising from claims for compensation and adopt, amend, or rescind such rules of procedure, undertake such investigations, and take such action required for the hearing and disposition of appeals as it deems necessary." R.C. 4141.28 describes the procedures to be followed in filing claims for unemployment benefits, and pursuing appeals to the Board of Review from decisions of the Administrator of the Bureau of Employment Services regarding such claims. In the case of appeals to the Board of Review, R.C. 4141.28(J) states that all interested parties shall be afforded a "reasonable opportunity for a fair hearing" before the Board or a referee, and that all information in the Administrator's file pertaining to the case "shall automatically become a part of the record in the appeal hearing...[and] shall be considered by the board and the referees in arriving at a decision, together with any other information which may be produced at the hearing." R.C. 4141.28(K) further provides that, "[t]he proceedings at the hearing before the referee, or the board, shall be recorded by mechanical means or otherwise as may be prescribed by the board," but that, "[u]nless said claim is further appealed, such record of proceedings need not be transcribed."

R.C. 4141.28(O) grants the claimant and any other interested party the right to appeal a decision by the Board of Review to the court of common pleas. The appeal shall be taken by filing a notice of appeal, within thirty days after notice of the decision of the Board of Review was mailed to the last known post office address of all interested parties, with the clerk of the court of common pleas, and thereafter a copy of the notice of appeal shall be mailed to the Board of Review and all interested parties, and proof of the mailing of the notice shall be filed with the clerk within thirty days of filing the notice of appeal. *Id.* R.C. 4141.28(O) further provides that the Board of Review, upon receipt of the notice of appeal, "shall within thirty days file with the clerk a certified transcript of the record of the proceedings before the board pertaining to the decision complained of," and that the "appeal shall be heard upon such record certified by the board."

Thus, hearing records of the Unemployment Compensation Board of Review ordinarily will consist of a variety of materials and items pertaining to a party's claim for unemployment benefits, which serve to document both the initial handling of the claim by the Bureau of Employment Services, and

149:1-1-03 (procedures for the physical destruction of records and nonrecord material). In particular, rule 149:1-1-02(B)(1) describes disposal lists as "one-time applications for authority to destroy or transfer records that have accumulated and are no longer created," and rule 149:1-1-02(B)(2) describes schedules of retention as "applications for continuing authority to destroy or transfer records after specified periods of time or the occurrence of specified events."

subsequent proceedings before the Board of Review with respect to the merits of the claim. For example, in a particular case the hearing records of the Board of Review will ordinarily include copies of notices of appeal to the Board of Review and the court of common pleas, copies of notices of hearings before the Administrator or his deputy and the Board of Review, written statements of the claimant and other parties, obtained by the Bureau of Employment Services for the purpose of making an initial determination on the claimant's application for benefits, transcripts of testimony of the claimant and other parties before the Administrator or his deputy and the Board of Review, copies of the Administrator's initial determination on the claimant's application for benefits and the Administrator's subsequent decision on reconsideration, copies of the decision of the Board of Review on appeal, and copies of all correspondence relative to the case.

Clearly, the foregoing materials serve to "document the organization, functions, policies, decisions, procedures, operations, or other activities" of the Unemployment Compensation Board of Review. R.C. 149.011(G). Thus, I conclude that the hearing records of the Board of Review are "records" as defined in R.C. 149.011(G), and therefore are subject to the provisions of R.C. Chapter 149 regulating the retention, destruction, and disposal of such records. In this regard the hearing records of the Board of Review may not be destroyed or disposed of except as provided by law, in accordance with the approval of the State Records Administrator and the Auditor of State. R.C. 149.333; R.C. 149.351.

According to documentation furnished a member of my staff by the Board of Review, the Bureau of Employment Services has established, pursuant to R.C. 149.34, a schedule of retention for hearing records of the Board of Review.⁴ The schedule of retention was approved initially by the State Records Commission, which until recently performed those functions of the State Records Administrator and the Auditor of State with respect to the review and approval of schedules of retention and disposal applications as described in R.C. 149.333. See Am. Sub. H.B. 238, 116th Gen. A. (eff., in part, July 1, 1985) (establishing the new State Records Administration office within the Department of Administrative Services, under the management of a State Records Administrator who is responsible, along with the Auditor of State, for reviewing and approving, modifying, or rejecting all schedules of retention and disposal applications). The schedule of retention, as approved by the State Records Commission, provides that hearing records of the Board of Review are to be retained for a six-month period after a decision by the Board of Review in a particular case becomes final. Thereafter, the hearing records are to be destroyed within sixty days after the expiration of the six-month retention period, unless, in the opinion of the Board of Review, they pertain to any pending case, claim, or action.

⁴ I am unaware of any provision in R.C. Chapter 149 or R.C. Chapter 4141 (unemployment compensation; employment services) that establishes a specific retention period for hearing records of the Unemployment Compensation Board of Review. See R.C. 149.35 ("if any law provides that records shall be kept for a specified period of time, the administrator shall not order their destruction or other disposition prior to the expiration of such period").

Thus, the Board of Review is authorized to destroy or dispose of its hearing records six months after a decision by the Board of Review in a particular case becomes final. See Pavlic v. Garland Floor Co., 14 Ohio App. 3d 297, 471 N.E.2d 164 (Summit County 1984) (implicitly approving the Board's practice of erasing tape recordings of Board hearings six months after a decision by the Board becomes final).

It is my understanding that the practice of the Board of Review has been, and continues to be, to destroy or dispose of its hearing records only in accordance with the specific terms of the schedule of retention approved by the State Records Commission. Further, insofar as no provision in Am. Sub. H.B. 238 abrogates, nullifies, or repeals any prior action on the part of the State Records Commission in approving schedules of retention and disposal applications, I conclude that the Board of Review may continue to destroy or dispose of its hearing records in accordance with the specific terms of the schedule of retention pertaining thereto and approved by the State Records Commission. See generally R.C. 1.58(A)(1)(providing, in part, that the amendment or repeal of a statute does not affect the prior operation of the statute or any prior action taken thereunder); Cincinnati v. Thomas Soft Ice Cream, Inc., 52 Ohio St. 2d 76, 79, 369 N.E.2d 778, 780 (1977) (repeals by implication are not favored and will not be given effect unless the provisions of the purported repealing act are so totally inconsistent and irreconcilable with the existing enactment as to nullify it); Lucas County Board of Commissioners v. Toledo, 28 Ohio St. 2d 214, 217, 277 N.E.2d 193, 194 (1971) (same).

As a final point, I note that R.C. 4141.28 does not state when a decision by the Board of Review becomes "final." For purposes of this opinion, I shall presume that this term was employed in the schedule of retention approved by the State Records Commission with reference to the expiration of the thirty-day time period provided in R.C. 4141.28(O) for an appeal to the court of common pleas of a decision by the Board of Review. R.C. 4141.28(O) provides, however, that an appeal from the Board's decision

shall be taken within such thirty days by the appellant by filing a notice of appeal with the clerk of the court of common pleas. Such filing shall be the only act required to perfect the appeal and vest jurisdiction in the court. Failure of an appellant to take any step other than timely filing of a notice of appeal does not affect the validity of the appeal, but is grounds only for such action as the court deems appropriate, which may include dismissal of the appeal.

Division (O) goes on to require that the appellant mail a copy of the notice of appeal to the Board, which must then file a transcript of the record with the clerk of the court of common pleas. Several courts of appeal have held, that while a claimant or other interested party is required by R.C. 4141.28(O) to file a copy of the notice of appeal with the Board of Review within the time prescribed by R.C. 4141.28(O), failure to timely file a copy of the notice with the Board does not deprive the court of common pleas of jurisdiction to hear the case. See Sams v. Ohio Bureau of Employment Services, 10 Ohio App. 3d 204, 205-206, 461 N.E.2d 309, 311 (Cuyahoga County 1983)(R.C. 4141.28(O), as amended effective September 25,

1981,⁵ "specifically limits the jurisdictional prerequisite to timely filing a notice of appeal with the court of common pleas....It is clear that failure to serve the board is no longer a jurisdictional requirement, although such action is still required"; Bohacek v. Bureau of Employment Services, 9 Ohio App. 3d 59, 61, 458 N.E.2d 408, 410 (Cuyahoga County 1983)("[t]he requirement of filing a notice of appeal with the board of review as a prerequisite to conferring jurisdiction upon the court of common pleas was specifically eliminated in the amended version of [R.C. 4141.28(O)], effective on September 25, 1981..."). As a result, there have been instances where an appellant has timely filed a notice of appeal with the clerk of the court of common pleas, but has failed to timely serve a copy with the Board and the Board has destroyed its hearing records in accordance with its retention schedule, unaware that a notice of appeal had been filed.

In this regard, some courts have implicitly upheld the Board's practice of destroying or disposing of its hearing records in those instances in which a party has failed to mail a copy of the notice of appeal to the Board of Review within the time prescribed by R.C. 4141.28(O), notwithstanding the party's timely filing of the notice of appeal with the clerk of the court of common pleas. See, e.g., Kirk v. Bureau of Employment Services, 19 Ohio App. 3d 265, 483 N.E.2d 1211 (Cuyahoga County 1984); Pavlic v. Garland Floor Co.; Hemrick v. F.E. Avery & Co., No. 83AP-8 (Franklin County Ct. App. July 19, 1983)(unreported); Willis v. Sears, Roebuck & Co., No. 81CV-10-5784 (Franklin County C.P. August 25, 1982)(unreported). In those cases the courts sustained motions to dismiss filed on behalf of the Administrator of the Bureau of Employment Services because R.C. 4141.28(O) permits a court the discretion to dismiss the appeal should a party fail to provide the Board of Review a copy of the notice of appeal. In Kirk, for example, appellant timely filed his notice of appeal of the Board's decision with the clerk of the court of common pleas, but did not serve the Board with a copy of such notice until eight months after the thirty-day appeal time had expired. The Board of Review, because it did not receive a copy of appellant's notice of appeal within the time prescribed by R.C. 4141.28(O), apparently destroyed the transcript of appellant's hearing before the Board six months after the thirty-day appeal time had expired, in accordance with the specific terms of the schedule of retention approved by the State Records Commission. The court of appeals ruled that the Board of Review was, in this instance, justified in destroying the transcript, since the Board could not be expected to retain the transcript for eight months in the absence of being timely notified that an appeal of its decision had been commenced:

[R.C. 4141.28(O)] makes it clear that the board has no duty to file the transcript until it receives the notice of appeal. In the case at bar, Kirk served the board with such notice on October 5, 1982, eight months after the final decision. Apparently, the board, pursuant to its regulations, retains a transcript for six months after the final decision. The transcript is then destroyed to reduce storage and cassette tape costs. R.C. 4141.28(O), supra, requires the claimant to file an appeal to the court of common pleas within thirty days of the final decision. The

⁵ 1981-1982 Ohio Laws 1995, 2004 (Am. H.B. 152, -eff. Sept. 25, 1981).

statute was amended to prevent the harsh result of automatic dismissal whenever a claimant failed to file notice of the appeal with all interested parties within thirty days. However, we hold that a delay of eight months in filing such notice with the board is too long to require the board to furnish a transcript. While failure to timely serve the notice of appeal with the board may or may not result in a dismissal, the claimant has the responsibility to justify his delay in timely serving the board and thereby allowing it to file the transcript.

Kirk v. Bureau of Employment Services, 19 Ohio App. 3d at 267, 483 N.E.2d at 1213.

On the other hand, I am aware of a recent case in which a court of appeals affirmed a finding by a court of common pleas that hearing records of the Board of Review, which were disposed of six months after the appeal period had run, were unlawfully destroyed, notwithstanding the party's failure to mail a copy of her notice of appeal to the Board, as required by R.C. 4141.28(O). Siniff v. Bureau of Employment Services, No. 85AP-18 (Franklin County Ct. App. December 17, 1985)(unreported). The court, however, did not elaborate upon this point other than to say that the Bureau of Employment Services had not demonstrated that the court of common pleas, in determining whether the decision of the Board of Review to destroy its records was a lawful and reasonable exercise of its authority, had "acted improperly."

As noted above, the Board of Review's retention schedule provides that the hearing records of the Board are to be retained for six months after a decision of the Board becomes final. The hearing records are then to be destroyed within sixty days after the expiration of the six-month retention period, unless, in the opinion of the Board, they pertain to any pending case, claim, or action. The more prudent course of action for the Board to follow in this regard may be to retain its hearing records for such a period of time, up to sixty days beyond the six-month period specified in the Board's schedule of retention, until the Board is reasonably certain that no interested party has filed a notice of appeal of a decision rendered by the Board in a particular case. While I cannot predict with certainty how a particular court may view the matter, Kirk indicates that the Board is justified in destroying its hearing records eight months after the thirty-day appeal time has expired if no notice of appeal has been served on the Board within that time. Of course, if the Board is aware that a case is pending, it should retain any hearing records which pertain to that case, even though sixty days have elapsed since the expiration of the six-month retention period.

Accordingly, it is my opinion, and you are advised, that the Unemployment Compensation Board of Review may, in accordance with the specific terms of the schedule of retention pertaining thereto and approved by the State Records Commission, destroy or dispose of its hearing records six months after a decision by the Board of Review becomes final. The hearing records shall be destroyed or disposed of within sixty days after the expiration of the six-month retention period, unless, in the opinion of the Board of Review, they pertain to any pending case, claim, or action.