



judicial review of the Indiana State Employees' Appeal Commission's ("SEAC") final order of dismissal of her complaint. O'Shell presents several issues for our review of which we find the following restated issue dispositive: whether SEAC lacked jurisdiction over O'Shell's complaint.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

O'Shell was employed by the Indiana Department of Transportation ("INDOT") as a Field Auditor III in the Division of Cost Accounting and External Audit. While employed in that position, O'Shell received a performance appraisal indicating that her work did not meet expectations. She submitted a complaint regarding her performance appraisal with SEAC.

The Chief Administrative Law Judge ("ALJ") for SEAC issued a Notice of Proposed Dismissal of O'Shell's complaint, informing O'Shell that SEAC lacked jurisdiction over her complaint because she was an employee of a non-merit agency and that her complaint did not involve her dismissal, demotion, or suspension without pay. O'Shell submitted an objection to the proposed dismissal, but did not state grounds that would have allowed SEAC to take jurisdiction of her complaint. After the ALJ issued a Final Order of Dismissal, O'Shell sought judicial review of SEAC's dismissal of her complaint. The trial court denied O'Shell's petition for judicial review, finding that SEAC correctly determined that it did not have jurisdiction over O'Shell's complaint. O'Shell now appeals.

## DISCUSSION AND DECISION

O'Shell seeks judicial review of a final agency determination. The Administrative Orders and Procedures Act ("AOPA") governs judicial review of an administrative action and is the exclusive means for judicial review of an agency action. Ind. Code § 4-21.5-5-1. Indiana Code section 4-21.5-5-14 provides that a trial court may provide relief from an administrative decision only if the agency action is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. The burden of demonstrating the invalidity of the agency action is on the party asserting invalidity. Ind. Code § 4-21.5-5-14(a). In reviewing an administrative decision, a court is not to try the facts de novo or substitute its own judgment for that of the agency. Ind. Code § 4-21.5-5-11. Judicial review of disputed issues of fact must be confined to the agency record for the agency action. *Id.*

Pursuant to Indiana Code section 4-15-1.5-6(1), SEAC is empowered:

To hear or investigate those appeals from state employees as set forth in IC 4-15-2, and fairly and impartially render decisions as to the validity of the appeals or lack thereof. Hearings shall be conducted in accordance with IC 4-21.5.

State merit employment rules apply only to those employees in the state service. *See May v. Dep't of Natural Res.*, 565 N.E.2d 367, 370 n.1 (Ind. Ct. App. 1991) ("merit" employees are employees in "state service" as defined in I.C. § 4-15-2-3(1988)).

Employees “ in state service” include the employees of the agencies set forth in Indiana Code section 4-15-2-3.8. Since INDOT is not among the agencies listed, employees of INDOT are not merit employees entitled to the application of the state merit rules.

“‘Non-merit service’ means all public services in all offices and employments, except members of boards and commissions, of all persons in the executive department of state government under the jurisdiction and direction of the governor and the department of personnel pursuant to IC 4-15-1.8-1 as amended, and except those included in the state service as defined by the state personnel act IC 4-15-2.” 31 Ind. Admin. Code 1-1-1. Non-merit state employees can file a complaint with SEAC as permitted by Executive Order 05-14 to challenge only the employee’s dismissal, demotion, or suspension without pay. Because O’Shell did not challenge her dismissal, demotion, or suspension without pay, but rather her unfavorable performance appraisal, SEAC lacked jurisdiction to consider O’Shell’s complaint and correctly dismissed her complaint.

On appeal, O’Shell contends that she is entitled to the protections of Indiana’s “whistleblower acts.” We disagree. First, Indiana Code section 36-1-8-8 affords protection to employees of political subdivisions who report violations of federal, state, or local laws; it does not, however, apply to employees of a state agency. Second, while Indiana Code section 4-15-10-4 protects state employees who report violations of law, the appeal rights are available only to state merit employees. *See* Ind. Code §§ 4-15-2-34 through -35.5.

O’Shell also contends that she was denied due process. Again, we disagree. All INDOT employees, who are non-merit employees, are subject to demotion, discipline,

dismissal, or transfer at the discretion of the commissioner. Ind. Code § 8-23-2-3(f)(1). State merit employees may be disciplined only for cause. Ind. Code § 4-15-2-34. A public employee who can be discharged only for cause has a legitimate claim of entitlement to his position. *See Phlegley v. Ind. Dep't. of Highways*, 564 N.E.2d 291, 295 (Ind. Ct. App. 1990) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 536, 105 S. Ct. 1487, (1985)). On the other hand, the legislature may elect not to confer a property interest in public employment. *Phlegley*, 564 N.E.2d at 295 (citing *Loudermill*, 470 U.S. at 542, 105 S. Ct. at 1493). An employee at will is not entitled to procedural protections attached to a property interest. *Ind. Alcoholic Beverage Comm'n v. Gault*, 405 N.E.2d 585, 589 (Ind. Ct. App. 1980).

None of O'Shell's arguments establish that SEAC had jurisdiction over her complaint, nor do they show that the final order of dismissal was contrary to law. Furthermore, O'Shell did not have a property interest in her public employment that would have entitled her to due process protections in the appeal of her unfavorable performance appraisal. Accordingly, SEAC correctly dismissed O'Shell's complaint, and the trial court properly upheld SEAC's determination.

Affirmed.

RILEY, J., and MATHIAS, J., concur.