SEAC ISSUED
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BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

LISA G. SCHECKEL Petitioner,	))) SEAC NO. 01-14-002
vs.	))
INDIANA DEPARTMENT OF CHILD SERVICES Respondent.	)))

FINAL ORDER OF DISMISSAL: WORKING TEST PERIOD

You are notified the Administrative Law Judge, acting on behalf of the State Employees' Appeals Commission, now enters a final order of dismissal as to the Complaint of Petitioner Scheckel because SEAC lacks statutory jurisdiction or the Complaint otherwise fails to state a claim upon which relief can be granted. The reasons for the initial proposed dismissal are set forth in the ALJ's January 13, 2014, "Notice of Proposed Dismissal: Working Test Period" entered previously (the "Notice"). The Notice is hereby incorporated by reference.

Petitioner Scheckel timely responded to this Notice on January 28, 2014 (the Response). The record and Response has been duly considered. The following focuses discussion on the Response, which is somewhat different than the Complaint. Additional conclusions of law, joined to the Notice's findings and conclusions, are made herein.

I. Additional Conclusions of Law[1]

Conclusion 1. Petitioner is in an initial working test period as defined by statute, the employer and SPD regulations. (See Complaint, Notice and Response). However, the Complaint argued that Petitioner Scheckel was actually classified (a just cause) employee, not in a working test period. The Notice determined that Petitioner was still in a working test period as a matter of law, and not classified. Working test periods are carved from SEAC review by the legislation. Therefore the Notice concluded that SEAC lacked jurisdiction under I.C. 4-15-2.2, 23 to 24, 34 and 42.

Conclusion 2. In review, I.C. 4-15-2.2-34 states, in pertinent part:

> "(e) Sections 23 [classified service discipline] and 42 [Complaint Procedure] of this chapter do not apply to an employee who is removed during a working test period for the initial classification in the state classified service to which the employee is appointed."

[1] These are primarily conclusions of law, but do contain references to pled facts in the Complaint or Response. Each finding of fact or conclusion of law shall be deemed the reverse as necessary.

Conclusion 3. Petitioner's Response changes paths from the Complaint and now asserts that SEAC has jurisdiction based on a public policy exception. Specifically, the Response claims that DCS violated public policy by not following the child protection assessment process or by pressuring Petitioner to change a '311 form'. This is either (a) a claim that public policy trumps the jurisdictional limit of Section 34, quoted above, or (b) a claim that Petitioner is really unclassified, and to be reviewed under the at-will review standards, of Section 24. Neither argument is correct.

Conclusion 4. The legislation clearly and unambiguously leaves a gap that working test period cases of this type[2] do not maintain jurisdiction with SEAC. Despite being expressly discussed in other sections of the statute, public policy is not listed as an appealable exception to working test period cases. I.C. 4-15-2.2-23, 24, 34, and 42. The Section 34 provision quoted above states that " Sections 23 [classified service discipline] and 42 [Complaint Procedure] of this chapter do not apply to an employee...".

Conclusion 5. The ALJ does note that Section 23 relates to classified matters, not unclassified; but the General Assembly's use of the word "and" in the Section 34 statute (quoted above) requires that Section 42 also does not apply to working test cases. The statute clearly carves out the alternative possibility of unclassified treatment for working test cases. In sum, the legislation is clear that initial working test periods are a third kind of case, neither classified nor unclassified, which SEAC does not have jurisdiction over.

Conclusion 6. Furthermore, the legislature's omission of mention of the public policy exception as to working test periods, where public policy is deliberately mentioned in other parts of the Civil Service System, cannot be presumed accidental under the rules of statutory construction. The omission must be given effect. *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012); *Wagler v. West Boggs Sewer Dist., Inc.*, 898 N.E.2d 815, 818 (Ind. 2008); *Lincoln Bank v. Consell Const.*, 911 N.E.2d 45, 50 (Ind. Ct. App. 2009). The direction of SEAC's recent and existing precedent concurs – SEAC dismisses initial working test period cases. *Final and non-Final Orders* in *Wims v. DCS*, SEAC 12-13-107 (2013-2014), and *Final and Non-Final Orders* in *Cox v. DCS*, SEAC No. 07-13-058 (2013).

Conclusion 7. The Civil Service legislation creates three state job categories, not two: classified, unclassified and working test period. Section 34 is clear that Section 42 (the appeals process) is not available to an initial working test period, such as Petitioner. Restated, a working test period employee does not 'fall through' the statute to become unclassified and subject to public policy review by the SEAC forum. Rather, Section 34 shows that working test periods are a third category. Petitioner is in working test period, and the legislation requires SEAC to dismiss.

Conclusion 8. This was a choice of the General Assembly in drafting the statute that SEAC may not rewrite. A facially clear and unambiguous statute need not and cannot be interpreted by a court or administrative body. *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012); *McCabe v.*

[2] The only express statutory exception in Section 34(f) relates to discharge after a second working test period following a promotion from an earlier vested classified status. There is no application of that exception here. The fact that the legislation has such a specific exception provision shows the General Assembly carefully carved its scope. The ALJ must heed the legislature's drafting of the statute.

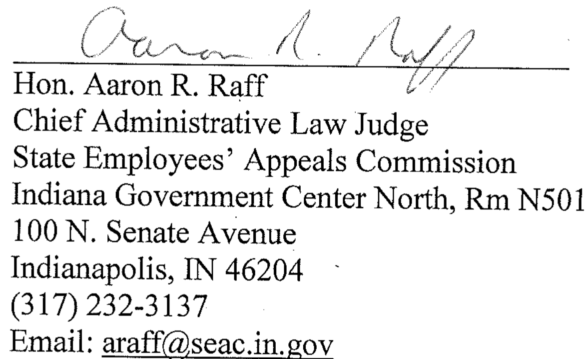
Comm. Ind. Dep't of Ins., 949 N.E.2d 816, 819 (Ind. 2011); *Siwinski v. Town of Ogden* Dunes, 949 N.E.2d 825, 828-829 (Ind. 2011); and *Fishburn v. Ind. Pub. Ret. Sys.*, 2 N.E.3d 814, 824 (Ind. Ct. App. 2014).

Conclusion 9. SEAC should dismiss with prejudice only as to this SEAC forum. This is not a determination on the merits, just a 'working test' jurisdictional gap in Civil Service System coverage. The dismissal is therefore without prejudice to Petitioner as to any other forum. This action is fully consistent with recent SEAC precedent. See, for example, Final and Non-Final orders in *Wims v. DCS*, SEAC 12-13-107 (2013-2014)(no SEAC coverage over initial working test periods, but dismissal is to forum only.).

II. Final Order

The Complaint, and this action, is hereby **DISMISSED** with prejudice as to this forum, but without prejudice as to any other forum. This is the Final Order of the Commission in this matter. A person who wishes to seek judicial review must file a petition in an appropriate court within thirty (30) days of this order and must otherwise comply with I.C. 4-21.5-5.

DATED: April 8, 2014



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