BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

ERNEST L. PICKENS	)
Petitioner,	)
	) SEAC NO. 10-11-160
vs.	)
	)
WESTVILLE CORRECTIONAL	)
FACILITY BY INDIANA DEPARTMENT	)
OF CORRECTION	)
Respondent.	)

FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On May 18, 2012, Respondent Westville Correctional Facility, part of the Indiana Department of Correction, ("WCF") filed a Motion to Dismiss (the "Motion") the current case by challenging the jurisdiction of the State Employees' Appeals Commission (SEAC) to hear this matter under Section 42 of the Civil Service System (Ind. Code § 4-15-2.2-42) and the Administrative Orders and Procedures Act (AOPA) (I.C. 4-21.5-3). Petitioner Ernest Pickens ("Pickens") responded to the Motion by brief and affidavit on July 6, 2012, Respondent further replied on July 18, 2012, oral argument was heard July 25, 2012. The ALJ has duly considered the parties' filings, arguments and the pleadings, and this matter is ripe for ruling.

Petitioner Pickens is an unclassified (at-will) state correctional officer employee for the Respondent WCF. This Civil Service System case concerns his July, 2011 demotion by Respondent from correctional lieutenant to officer. Under Section 42, an unclassified employee complaint must demonstrate a public policy basis to oppose the challenged employment decision. I.C. 4-15-2.2-24(a-b), 42 (Section 42). Petitioner Pickens challenges his demotion by asserting two potential public policy exceptions. First, Petitioner alleges unlawful retaliation by Respondent WCF against him due to a prior whistle blowing law ("WBL") complaint of alleged illegal activity to his superior(s). As his second claim, Petitioner invokes the at-will exception for refusing illegal activity that would carry personal liability[1] (the "refusal exception"). The controlling pleading is the complaint as effectively amended through July 6, 2012 (the "Amended Complaint").

Respondent WCF's Motion is meritorious and is hereby **GRANTED**. This case is dismissed with prejudice. Petitioner's Amended Complaint, with its factual allegations accepted as true, fails to satisfy the required legal elements for a statutory WBL claim. The problem is that Petitioner's whistle blowing to a superior was not made in writing, which we hold is legally

[1] The refusal must be personal to the employee. The specific kind of liability recognized by existing caselaw has been civil fines, civil monetary penalties or criminal penal consequences. There must be a retaliatory discharge/discipline solely for the employee's refusal to undertake an unlawful action directed by the employer. See Conclusion of Law Nos. 2 and 9.

fatal to a WBL claim under I.C. 4-15-10-4 & 5 and precedent. SEAC must decline to waive (or dilute) the writing requirement because that would deviate from the General Assembly's specific public policy guidance on the subject. As to the refusal exception, it is narrowly construed under precedent and must apply to an employee (Petitioner) himself. Petitioner in this case points to two subordinate co-workers, the dispatchers, who would be potentially liable for their ghost-employment actions. Petitioner was not himself refusing to perform illegal activity. The claim that Petitioner, who was not engaged in ghost employment, would suffer personal liability for the alleged ghost employment of the dispatchers is too attenuated or speculative. If that argument were accepted, it would expand the refusal exception beyond the bounds precedent has set. Instead, Petitioner's second basis for the complaint is more properly viewed as an alternative whistle blowing claim that still does not meet the in writing requirement. Since both public policy claims of the complaint lack an essential element, and no other public policy exception applies[2], this case must be dismissed under Section 42. I.C. 4-15-2.2-24(a-b), 42. The following additional findings of fact, conclusions of law, and final order of dismissal for lack of jurisdiction are entered.

I. Standard of Review

Dismissal proceedings test the legal sufficiency of the complaint, as amended. All facts plead in the non-moving party's complaint, and reasonable inferences therefrom, are taken as true.[3] However, when a party's complaint is legally insufficient or fails to plead essential elements of the claim(s), the complaint should be dismissed. *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705-706 (Ind. 2007); *Huffman v. Office of Envt'l. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004); *Gorski v. DRR, Inc*., 801 N.E.2d 642, 644 (Ind. Ct. App. 2003); and *Steele v. McDonald's Corp. et al*., 686 N.E.2d 137 (Ind. Ct. App. 1997). See also, Ind. Trial Rule 12(b)(1) and (6).

II. Findings of Fact

The amended complaint facts, construed in favor of the non-moving party (Petitioner), are as follows:

1. Petitioner Pickens was an unclassified employee working as a Correctional Lieutenant for Respondent WCF at the time of his demotion to Correctional Officer.

[2] Any reference in the complaint as to discrimination or hostile work environment are not separate claims in the complaint. Petitioner clarified at a prehearing conference that those words were intended to apply to the whistle blowing claim, not a race or sex discrimination claim under Title VII of the federal Civil Rights Act of 1964, as amended. (See, Case Management Order.)

[3] Petitioner submitted an affidavit with his Response to the Motion. That affidavit is understood as submitting jurisdictional facts in the mode of Ind. T.R. 12(b)(1) or perhaps as a supplement to the Amended Complaint. The facts of the affidavit are accepted as true and discussed in the Findings of Fact below. Both the parties have briefed and argued the matter as a Motion to Dismiss, rather than a summary judgment motion. The ALJ therefore declines to convert the Motion to Dismiss to a summary judgment motion under Ind. T.R. 12(b-c). The legal outcome would be the same either way.

2. Petitioner filed his Step III complaint with SEAC on October 15, 2011, which was effectively amended or supplemented on October 31, 2011[4] and in Petitioner's response and affidavit to the Motion on July 6, 2012 (the "Amended Complaint"). Oral argument on the Motion was held July 25, 2012, and a ruling is ripe. The Amended Complaint is the controlling pleading.

3. "I have alleged in my answer to Respondent's first set of Interrogatories that my demotion in this case by my supervisor, Captain Earnest Huff, was in retaliation for certain employees being administered discipline." (Petitioner Pickens' Affidavit of July 6, 2012, ¶1.)

4. Petitioner was a shift supervisor from 6am-6pm during 2010. Two female dispatchers were to leave at 4am, and on some occasions instead of leaving would ride around in a vehicle in other areas of the WCF or leave early before 6am. (Pickens' Aff. ¶¶3-6) Petitioner claims these female dispatchers were thus engaged in ghost-employment contrary to I.C. 35-44.1-1-2(1). (Pickens' Response, pp. 2-3.)

5. The dispatchers received three day suspensions for their conduct presumably due to Pickens having verbally reporting them to Captain Huff or other superiors. (Pickens' Aff. ¶7; Pickens' Resp.; and Am. Compl.[5].) Pickens blew the whistle on the dispatchers. However, it was not pled (nor contended at oral argument), that Pickens made this whistle-blowing complaint about the dispatchers *in writing* prior to the demotion. The Respondent argues that no prior writing was received and this element is lacking. The only writings in the record are the discipline letter *from* Captain Huff *to* Petitioner or the Civil Service complaint and litigation papers filed *after* the discipline. (See Exhibit A to original complaint.)

6. Captain Huff, who outranked Pickens, then became hostile to Pickens, as he was friends with the punished dispatchers. Pickens heard from co-workers that Huff would seek to retaliate against him with write-ups (discipline). In one example, Huff made Pickens come to work despite his wife being in the hospital and the shift already being covered. (Pickens' Resp., pp. 2-3; and Pickens' Aff. ¶¶8-12, 17.)

7. The original complaint, as amended, additionally recounts a separate matter involving a June, 2011 incident. Pickens was accused of failing to inform Captain Vales at that time of another correctional officer, Officer Gonzalez, planning to hand over his radio to another officer in preparation for a (planned) physical altercation with an offender. This incident was Respondent's original reason for the demotion. (Am. Compl.; Pickens' Resp. pp. 2-3; and Pickens' Aff. ¶¶13-16)

8. Pickens disputes that the Gonzalez incident was the real reason for the demotion – he ascribes the demotion to Captain Huff's retaliation for whistle blowing about the dispatchers. Pickens further contends he informed Huff of Gonzalez's alleged actions. Both of these

[4] The first amendment to the Complaint was contained in Petitioner's October 31, 2011 filing that showed the complaint was timely filed.

[5] The pleadings are actually a little muddy about what Pickens reported to his superiors about the dispatchers at the time, but the inference in Petitioner's favor that Pickens verbally complained to Huff or other superiors about the perceived ghost employment is easily enough made. Huff subsequently passed away.

contentions are accepted as true for this Motion's resolution. Pickens otherwise has a good work history and evaluations. Captain Huff also participated in Respondent's decision making as to Petitioner's demotion. (Am. Compl.; Pickens' Resp. pp. 2-3; and Pickens' Aff. ¶¶13-17)

9. Petitioner Pickens cannot demonstrate the ***in writing*** requirement in the WBL, which is the first required legal element for a WBL claim. The Petitioner also cannot satisfy the refusal exception under public policy. It was the dispatchers, not Petitioner Pickens, who were engaged in or potentially liable for the alleged ghost employment.[6] Petitioner did not refuse unlawful conduct at the behest of the employer upon which the retaliation was based. The Amended Complaint pled facts are further discussed as necessary in the Conclusions of Law below.

III. Conclusions of Law & Analysis

1. The general at-will employment law is well settled. "An employee in the unclassified service is an employee at will and serves at the pleasure of the employee's appointing authority." I.C. 4-15-2.2-24(a) (Civil Service System, Section 24(a)). "An employee in the unclassified service may be dismissed, demoted, disciplined, or transferred for any reason that does not contravene public policy." I.C. 4-15-2.2-24(b). "Indiana generally follows the employment at will doctrine, which permits both the employer and the employee to terminate the employment at any time for a good reason, bad reason, or no reason at all." *Meyers v. Meyers Construction*, 861 N.E.2d 704, 706 (Ind. 2007)(internal quotes omitted).

2. Recognized exceptions to the at-will doctrine based on public policy have traditionally only been found where an employee was terminated or disciplined for exercising a statutory right or refusing illegal conduct that would lead to penal consequence. Put another way, the courts ask was the termination or discipline itself illegal in light of applicable statutory law[7]; a merely foolish or arbitrary choice by an employer to terminate or discipline does not invoke an exception. *Baker v. Tremco Inc*., 917 N.E. 2d 650, 653-655 (Ind. 2009); *Meyers*, 861 N.E.2d at 706-707; *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997); *Frampton v. Cent. Ind. Gas Co*., 297 N.E.2d 425 (Ind. 1973); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

3. Correspondingly, a claim that a demotion was arbitrary or unfair does not state an at-will exception allowing SEAC jurisdiction or a claim upon before SEAC which relief can be granted in an unclassified (at-will) Civil Service System case. *Meyers and authorities, supra;* I.C. 4-15-2.2-42. A viable public policy exception must be present for the Amended Complaint to survive.

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[6] Pickens advanced at oral argument that he may have had a policy duty to inform the Respondent about the perceived misconduct of the dispatchers. That is presumed so, but does not save his WBL claim. Pickens did not advise his superiors in writing. The statutory terms of the WBL trump any claim that an oral report triggered an at-will exception to discharge. See Conclusions of Law Nos. 5-8 discussing *Ogden* and the WBL. See also, *Orr,* 689 N.E.2d 712 (an employer can generally break their own internal policies in the at-will context so long as public policy is not implicated.).

[7] Non-comprehensive examples include illegal discrimination on the basis of race, national origin, sex, age, disability, veteran status, religion, free speech, political affiliation or retaliation for filing a discrimination complaint or exercising statutory rights such as workers' compensation rights.

4. Under the standard of review, the questions are whether Petitioner pleads all the required factual elements (taken as true) of a (a) statutory whistle blowing claim (the WBL count); or (b) the illegal conduct refusal exception in the Amended Complaint? We answer both those questions in the negative and so dismiss. Both questions are discussed below in turn.

5. A state employee may seek whistle blower protection under Sections 4 & 5 of I.C. 4-15-10 (The State Employees' Bill of Rights) under the Civil Service System.[8] See, I.C. 4-15-10-4 & 5 (the WBL). However, the claim must state the prima facie case required in the WBL statute. The elements can be summarized as follows (1) a report in writing; (2) about a covered violation of law or misuse of public resources; (3) to a supervisor or inspector general; (4) that triggers employment retaliation. *Id*. The writing requirement is the problem with the complaint here. The SEAC considers, consistent with the recent holding of *Paul Ogden v. Stephen Robertson*, 962 N.E.2d 134, 146 (Ind. App. 2012), that there is no Civil Service System or common law public policy protection for whistle blowing *beyond or outside* of the terms and conditions of the statutory WBL because the General Assembly has passed a specific statute on the subject. *Ogden* at 146.[9] The WBL statute reads as follows:

> Sec. 4. (a) Any employee may report **in writing** the existence of:
> (1) a violation of a federal law or regulation;
> (2) a violation of a state law or rule;
> (3) a violation of an ordinance of a political subdivision (as defined in IC 36-1-2-13); or
> (4) the misuse of public resources;
> to a supervisor or to the inspector general.
>
> (b) **For having made a report under subsection (a)**, the employee making the report may not:
>
> (1) be dismissed from employment;
> (2) have salary increases or employment related benefits withheld;
> (3) be transferred or reassigned;
> (4) be denied a promotion the employee otherwise would have received; or
> (5) be demoted.
>
> I.C. 4-15-10-4(a-b)(emphasis added). See further, I.C. 4-15-10-5 stating: "No employee shall suffer a penalty or the threat of a penalty because he exercised his rights under this chapter [the WBL, part of the State Employees' Bill of Rights]".

[8] I.C. 4-15-10-4(c) states in relevant part: "Notwithstanding subsections (a) and (b), an employee must make a reasonable attempt to ascertain the correctness of any information to be furnished and may be subject to disciplinary actions for knowingly furnishing false information…However, any state employee disciplined under this subsection is entitled to process an appeal of the disciplinary action under the procedure as set forth in I.C. 4-15-2.2-42." See also, *Ogden* at 143-144.

[9] The *Ogden* decision applied the WBL's administrative exhaustion requirement. "If we were to hold that a claimant could seek judicial review based on a right derived from the WBL through common law and therefore, bypass the exhaustion of administrative remedies requirement of the WBL, it would make the exhaustion requirements of the WBL illusory."

6. Since the WBL is the source directing the process for whistle blowers, the complaint-pled facts of the case need be examined with the statutory language. It is clear under the plain language of the WBL statute that only a written report may trigger whistle blowing status or protection under the legislation. The very first line of I.C. 4-15-10-4(a) allows a written report of any qualifying violation or misuse.[10] Section 4(b) then provides that for having made such a written report there cannot be retaliatory employment action. Any other interpretation would read the words "in writing" in section 4(a) out of the statute improperly or ignore that section 4(b) only protects against employment actions covered by section 4(a).[11] Similarly, while Section 5 (I.C. 4-15-10-5) protects employees against rights violated under the entire State Employees' Bill of Rights chapter (of which the WBL is a part), this more general section should not be interpreted to replace the more specific writing and other requirements in Section 4.

An employee is not required to be a whistle-blower under the WBL alone (although they might be by other law or a workplace policy). This is the clear meaning of the permissive word "may" in "may report in writing". But if a state employee does choose to be a whistle blower then the report must be ***in writing*** in order to trigger the anti-retaliation provision of Section 4(b) or Section 5. The legislative intent of requiring a written report of whistle blowing is fairly self-evident. Only a written report (as opposed to a verbal report) offers a concrete, tangible complaint to the agency, supervisor or inspector general from which to investigate from. Written reports both help improve accuracy of memory and help avoid self-serving memories about who said what when in later proceedings. This is true both as to any later claim of retaliation (Sections 4(a-b)), any claim that the employee was being unreasonable (See Section 4(c)) or, most importantly, for the inspector general or state agency investigating and hopefully taking corrective action upon a meritorious whistle blowing claim. The writing requirement promotes the effectiveness of the statute. Writings help both the employee and employer be more specific about the complaint made. Finally, written reports promote transparency of the public function.[12] Written reports are harder to bury or forget for the government entity involved. The use of the words "in writing" in Section 4(a) are critical to how the General Assembly intended the whistle blowing process to proceed. The writing requirement in the WBL is mandatory.

7. Since the writing requirement is in the WBL statute, it is a fixture of legislative intent that cannot be avoided in determining what is a public policy claim under Section 42 of the Civil Service System. *Ogden, supra.* SEAC should not deviate from the clear or plain terms of a statute in construing it. See, *McCabe v. Comm, Ind. Dep't of Ins*., 949 N.E.2d 816, 819 (Ind. 2011). The Indiana Supreme Court has expressed a deep reluctance for judges to expand public policy exceptions, including in the at-will employment context, in the absence of statutory

[10] "The first step in statutory interpretation is determining if the legislature has spoken clearly and unambiguously on the point in question. If a statute is clear on its face, no room exists for judicial construction. However, if ambiguity exists, it is then open to construction to affect the intent of the General Assembly. Where ambiguity exists, to help determine the framers' intent, we must consider the statute in its entirety…". *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 828-929 (Ind. 2011)(internal citations omitted). The cardinal rule of statutory interpretation is to ascertain the intent of the drafter by "giving effect to the ordinary and plain meaning of the language used." *Id.*

[11] The writing requirement is mirrored in the criminal code. I.C. 35-44.2-1-1 (P.L. 126-2012) provides a state supervisor can face a class A misdemeanor for retaliating against a state employee for reporting "in writing" a violation.

[12] The sunshine upon the governmental process, transparency is a policy goal furthered by a writing requirement in Indiana's whistle blowing process. See, I.C. 5-14 (the Open Door Law(s)).

commands. *Baker* at 653-655; *Wior v. Anchor Industries Inc*., 669 N.E.2d 172 (Ind. 1996). Legislative public policy is determined in the political process by our elected General Assembly.

8. Petitioner Pickens did not create a written report of the alleged ghost employment of the dispatchers when he blew the whistle on them to Captain Huff. Petitioner's whistle blowing report was verbal. Correspondingly, at most, only retaliation for a verbal report was undertaken by Respondent through Captain Huff. The only written documents came after Picken's discipline in the discipline/appeal process. The lack of this first element is fatal to the Petitioner's WBL cause of action under the Civil Service System. The inquiry comes to rest there. Respondent WCF was entitled to demote Petitioner Pickens, whether for a good, bad or for no reason, in the absence of a public policy limitation.

9. As to the refusal of illegal conduct exception, Petitioner Pickens is correct that a potential public policy exception exists. Petitioner creatively attempts to apply that exception to these facts. Petitioner cites *McClanahan v. Remington Freight Line*, 517 N.E.2d 390, 393-4 (Ind. 1988)[13] in which our Supreme Court recognized a narrow exception to the employment at-will doctrine applies when an employee is discharged for refusing to commit an illegal act for which he would be personally liable. This 'illegal conduct refusal' exception remains narrow, but has been kept alive and well by subsequent cases.

In *Meyers* in 2007, the Supreme Court reaffirmed the at-will doctrine and declined to find an exception for alleged wrongful discharge for the assertion of a claim for unpaid wages. *Meyers*, 861 N.E.2d 704, 706-8 citing the 1996 case of *Wior*, 669 N.E.2d at 177-8 (distinguishing *Frampton* by declining to extend an exception to a manager who was terminated for refusing to follow a superior's order to fire an employee for filing a worker's compensation claim). However, *Meyers* also traced the history of recognized public policy exceptions, thus recognizing *McClanahan* as still good law. *Meyers* reiterated the narrowness of at-will exceptions, and helpful to these purposes, refined the discussion of the refusal exception. An employee may assert a retaliatory discharge/discipline claim where the discipline is in retaliation for refusal to violate a legal obligation that carries personal liability in the form of a civil fine, monetary penalty or criminal penal consequence to the employee. *Meyers* at 706-7 (parsing the many Indiana cases that either rejected or recognized at-will exceptions in applied situations); *McGarty v. Berlin Metals*, 774 N.E.2d 71, 78-9 (Ind. App. 2002)(an employee had a wrongful discharge claim for refusal to file a fraudulent tax return.); *Walt's Drive-Away Service v. Powell*, 638 N.E.2d 857-8 (Ind. App. 1994)(Holding that a discharged employee for a trucking company could bring a claim for wrongful discharge because he would have been subject to civil or criminal penalties if his employer had forced him to drive more hours than the law allows.); and *Haas Carriage, Inc. v. Berna*, 651 N.E.2d 284, 288 (Ind. App. 1995)(employee had a wrongful termination claim for his own refusal to carry an unlawful load). See also, *Tony v Elkhart County*, 851 N.E.2d 1032 (Ind. App. 2006)(wrongful/constructive discharge can occur if employee is exercising a statutory right and is then terminated for the same); and *Call v. Brass*,

[13] *Remington* and *Meyers* follow the bed-rock case line of *Frampton v. Central Gas Company*, 297 N.E.2d 425 (1973)(when an employee is discharged solely for exercising a statutorily conferred right there is a public policy exception to the general employment at-will doctrine. In *Frampton*, it violated public policy to discharge an employee for exercising worker's compensation rights provided by the legislature.)

533 N.E. 2d, 1225-6 *trans. denied* (Ind. App. 1990)(employee was wrongfully terminated for answering a jury summons[14]).

Review of the foregoing authorities shows that public policy exceptions to at-will employment are construed narrowly, and must be based on express statutory rights or statutory liability. *Meyers* at 706-7 We find no Indiana case where the refusal to commit illegal conduct exception may apply to an employee who complains that other employees are breaking the employer's rule or the law. The *Wior* decision expressly rejected a similar theory. The refusal to perform illegal conduct exception has been applied in caselaw only when the employee him/herself refuses to commit illegal conduct. Informing on the public employer of the alleged wrongful actions of co-employees is in fact whistle-blowing covered potentially by the WBL. However, the WBL requires a written whistle blowing complaint upon which the employer's wrongful retaliation was subsequently based to allow a public policy claim.

Petitioner here points to two subordinate co-workers (the dispatchers), who would be potentially liable for their ghost-employment actions.[15] Petitioner was not himself directly involved in or refusing to perform illegal activity. The claim that Petitioner, who was not engaged in ghost employment, would suffer fines or criminal liability for the alleged ghost employment of the dispatchers is too attenuated or speculative. If that argument were accepted, it would expand the refusal exception beyond the bounds the General Assembly or case precedent has set. Instead, Petitioner's refusal exception count is more properly viewed as an alternative whistle-blowing claim that still does not meet the in writing requirement.

10. In summary, since Petitioner does not meet the writing requirement of the WBL statute, his claim for relief under a public policy exception does not state a claim upon which relief can be granted under Section 42 of the Civil Service System. I.C. 4-15-2.2-42. Without a written report before the discipline, there is no legal suggestion that Respondent could violate the WBL. The refusal of illegal conduct exception does not apply either because Petitioner complains of the dispatcher's conduct, not that he was ordered to act unlawfully on pain of demotion. Petitioner's illegal conduct exception claim is an alternative whistle blowing count that also fails the writing requirement. No other public policy exception has been raised in the Amended Complaint. No relief can be granted to Petitioner under the Amended Complaint. SEAC lacks subject matter jurisdiction for this complaint. Petitioner's Amended Complaint must be dismissed.

11. To the extent a given finding of fact is deemed a conclusion of law, or a conclusion of law is deemed to be a finding of fact it shall be given such effect.[16]

[14] See present I.C. 35-44.1-2-11 to 12 (it is a misdemeanor to discharge/discipline employees for answering jury and witness summons.)
[15] See I.C. 35-44.1-1-3 (ghost employment).
[16] Commission proceedings are additionally governed by AOPA. The Commission has delegated to its ALJ(s) pursuant to I.C. 4-21.5-3-28 of the AOPA, the authority to issue final orders in this class of proceedings.

IV. Final Order of Dismissal

Respondent's Motion to Dismiss is meritorious and GRANTED. The Amended Complaint, and this action, is hereby DISMISSED with prejudice. All case management deadlines are vacated.

This is a final order of the Commission. 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: August 29, 2012

Hon. Aaron R. Raff
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