BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

SHANISE ABRAMS Petitioner,	))
	) SEAC NO. 02-14-013
vs.	)
	)
INDIANA DEPARTMENT OF CHILD SERVICES Respondent.	))

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER OF DISMISSAL: WORKING TEST PERIOD

This matter was briefed by the parties' respective counsel on Respondent's Motion to Dismiss for lack of jurisdiction. The ALJ[1] now grants Respondent's Motion to Dismiss for lack of jurisdiction, and enters a final order of dismissal as to the Complaint of Petitioner Abrams because SEAC[2] lacks statutory jurisdiction or the Complaint otherwise fails to state a claim upon which relief can be granted by SEAC as a forum. Under the legislation, SEAC cannot provide review over this type of working test period matter under the Civil Service System. Findings of fact, conclusions of law, and final order of dismissal follow. The dismissal is not on the merits, and without prejudice to Petitioner's rights in any other forum.

I. Motion to Dismiss Standard

Dismissal proceedings test the legal sufficiency of the Complaint. All facts plead in the petitioner's complaint, and reasonable inferences therefrom, are taken as true. 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. Interpretation of Statutes

A facially clear and unambiguous statute need not and cannot be interpreted by a court. However, statutory ambiguity mandates interpretation in order to ascertain and effectuate the general intent of the legislature. *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012); *Fishburn v.*

[1] Administrative Law Judge
[2] State Employees' Appeals Commission

Ind. Pub. Ret. Sys., 2 N.E.3d 814, 824 (Ind. Ct. App. 2014). When confronted with a question of statutory construction, an administrative Commission or ALJ must read the statute plainly, and in any areas of ambiguity follow the General Assembly's legislative intent. *McCabe v. 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).

When a statute is susceptible to more than one interpretation, then the court may consider the consequences of a particular construction. *Sees v. Bank One, Ind., N.A.*, 839 N.E.2d 154, 157 (Ind. 2005); *M.R. v. R.S. (In re Paternity of C.S.)*, 964 N.E.2d 879, 885 (Ind. Ct. App. 2012). The Supreme Court of Indiana recognizes "a strong presumption that when the legislature enacted a particular piece of legislation, it was aware of existing statutes relating to the same subject." *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).

Statutes that occupy the same general subject matter should be construed together in an effort to produce a harmonious statutory system. However, if statutes are in irreconcilable conflict, then the more detailed will prevail as to the subject matter it covers, regardless of which is the later statute. *Lotz v. Hoyt*, 900 N.E.2d 1, 5 (Ind. 2009); *Sanders v. State*, 466 N.E.2d 424, 428 (Ind. 1984); *Indiana Alcoholic Beverage Com. v. Osco Drug, Inc.*, 431 N.E.2d 823, 833-834 (Ind. App. 1982). Our Supreme Court also reminds that form will not trump substance. *Moryl v. Ransone, et al*, 2014 Ind. LEXIS 168 (Ind. March 10, 2014).

III. Findings of Fact

The following facts only relate to those necessary to resolve the motion and come from the record, as construed in Petitioner's favor under the standard of review above.

1. On January 7, 2013, Petitioner Abrams began a working test period in a promotional classified position as a Family Case Manager Supervisor 4 (FCMS 4) in the Respondent DCS's Marion County office.

2. Prior to the promotion, Petitioner vested as a classified (just cause) employee in the lower position of Family Case Manager 2 (FCM 2).

3. On November 26, 2013, following a pre-deprivation meeting, Petitioner Abrams was involuntarily returned by Respondent DCS to status from FCMS 4 to FCM 2. This is the working test period demotion being appealed by Petitioner in this case.

4. Petitioner timely filed her instant complaint up to Step III at SEAC. She also filed a Charge of Discrimination with the federal EEOC[3]. Petitioner contends in relevant part that the demotion violates public policy as being the product of discrimination on a prohibited statutory basis. This is taken as true for purposes of this motion's resolution.

5. Petitioner Abrams has not been discharged or suffered a layoff. She remains employed by Respondent.

6. The issue the ALJ must resolve in this motion is a purely legal one: may a petitioner-employee being demoted from a working test period back down to a vested lower position appeal the demotion under public policy at the SEAC forum? The ALJ determines the answer is "no" based on the Civil Service System's statutory provisions, and the rules of statutory interpretation, and so must dismiss as to this forum.

IV. Conclusions of Law

1. With respect to the promoted FCMS 4 position, Petitioner Abrams was in an initial working test period as defined by statute and State Personnel Department (SPD) regulations. Petitioner only enjoyed vested classified status in the underlying FCM 2 position she was returned or demoted back down to. I.C. 4-15-2.2-23, 34, 42.

2. Initial working test periods are expressly carved from SEAC review by the legislation. The same rule applies to demotions back down to a lower classified status, following a promotion into a classified review period position. The key language is in I.C. 4-15-2.2-34(f), which directly applies here. Section 34 states, in pertinent part:

   "(b) Subject to subsection (c) [which relates to fraud and is inapplicable here], the appointing authority may remove an employee for any reason at any time during the employee's working test period.

   (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.

   (f) The removal of an employee in the classified service from a working test period for a promotion from one (1) classification to another classification is not appealable, unless the removal results in the employee's dismissal or layoff."

3. Petitioner Abrams clearly does not enjoy vested classified status with respect to the promoted FCMS 4 position. She was in a working test period as to the FCMS 4.

[3] Equal Employment Opportunity Commission, a federal agency

4. Instead, Petitioner argues that SEAC has jurisdiction to review the demotion based on a public policy exception. Specifically, Petitioner argues the demotion is discriminatory in violation of the law. 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 still covered by the unclassified provisions, and to be reviewed under the public policy (at-will) review standards, of Section 24. Neither argument prevails as a matter of law.

5. The legislation clearly and unambiguously leaves a gap that working test period cases of this type[4] 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 where a petitioner-employee is demoted from a working test promotion back down to a prior vested position. I.C. 4-15-2.2-23, 24, 34, and 42.

6. Section 23 relates to classified matters, not unclassified; but the General Assembly's use of the word "and" in the Section 34(e) 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 or promotional working test periods are a third kind of case, neither classified nor unclassified, which SEAC does not have jurisdiction over.

7. 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. In particular, public policy is the basis that unclassified (at-will) employees appeal under. I.C. 4-15-2.2-24, 42. 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).

8. The direction of SEAC's recent and existing precedent concurs. For example, SEAC dismisses initial working test period cases. *Final and non-Final Orders* in *Scheckel v. DCS*, SEAC No. 01-14-002 (2014)(dismissing a working test claim that raised similar, albeit not identical arguments); *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).

[4] The only express statutory exception in Section 34(f) relates to discharge or lay off following a promotion from an earlier vested classified status. There is no application of that exception here. Petitioner was not discharged or laid off. 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.

9. Section 34(e-f) is clear that Section 42 (the appeals process) is not available to an initial working test period or a working test promotion, if demotion back down occurs, such as Petitioner's precise status here.

10. Therefore, 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 with specific respect to the demotion, and the legislation requires SEAC to dismiss.

11. SEAC should dismiss with prejudice only as to re-filing in this SEAC forum. This is not a determination on the merits, just a working test period jurisdictional gap in Civil Service System coverage.[5] Only the General Assembly could change this gap by amending the applicable statutes. The dismissal is therefore without prejudice to Petitioner's rights as to any other forum. The ALJ notes that Petitioner believes she has a possible remedy in other forums on some but not all claims, like the federal EEOC. This is consistent with SEAC precedent, *supra*. Working test period cases are dismissed without prejudice to other forums.

12. All prior sections are incorporated as necessary. Any conclusions of law which are findings of fact, or the reverse, are so deemed.[6]

IV. Final Order of Dismissal

The Complaint, and this action, is hereby **DISMISSED** with prejudice only as to re-filing in this forum. This dismissal is not on the merits and without prejudice as to Petitioner's rights in 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: July 15, 2014

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm N501

[5] One particular public policy argument that Petitioner makes is that her age discrimination claim might be totally barred by sovereign immunity in another forum. SEAC has previously held that unclassified or classified employees (working test employee rights were not addressed) may raise age discrimination claims before SEAC for equitable relief. *Eugene Young v CSBC-DOC*, SEAC 07-12-077 (2012) citing *Montgomery v. The Board of Trustees of Purdue University*, 849 N.E.2d 1120, 1122, 1125-7 (Ind. 2006). However, the gap is not as wide as Petitioner argues if SEAC dismisses here. As SEAC reviewed before in the *Eugene Young v. DOC* case, Petitioner could potentially seek federal *Ex Parte Young* style injunctive or equitable relief, an exception to sovereign immunity, in federal court under the federal ADEA regardless of the statutory gap here. Petitioner is not without any remedy. *Id.*

[6] The ALJ is generally delegated to issue final orders in this class of proceedings by SEAC. See also I.C. 4-15-2.2-42 and I.C. 4-21.5-3-24.

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