BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

JORDAN GELSOMINI Petitioner,	)	ISSUED
	) SEAC No. 03-19-027	AUG 08 2019
vs.	)	
	)	STATE EMPLOYEES' APPEALS COMMISSION
INDIANA ADJUTANT GENERAL'S OFFICE Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Introduction and Summary

On June 6, 2019, Respondent Indiana Adjutant General's Office ("Respondent") by counsel, filed a Motion to Dismiss Petitioner's Complaint[1] ("Motion"). Petitioner Jordan Gelsomini ("Petitioner"), pro se, failed to file a response The ALJ has duly considered the parties' filings, arguments and the pleadings, and this matter is ripe for ruling.[2]

This case considers Petitioner's challenge of his termination on February 7, 2019 for inappropriate behavior. Petitioner alleges that he did not engage in such behavior and makes references to his job duties changing after he spoke with his supervisor regarding Respondent's acceptance of certain youth into a program it runs. Petitioner also makes vague references to other employees being targeted by Respondent, but makes no specific mention of any particular incident involving himself.

After review of the pertinent pleadings noted above, the ALJ finds Respondent's Motion meritorious and hereby **Grants** it. Petitioner's Complaint, with its factual allegations accepted as true, fails to both state a claim upon which relief could be granted and allege a violation of a law, rule, or public policy exception to Indiana's at-will employment law. Thus, this case must be dismissed under I.C. § 4-15-2.2-42. The following additional findings of fact, conclusions of law, and final order of dismissal for lack of jurisdiction are entered.

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[1] The ALJ allowed Petitioner to file an amended complaint, which he did on May 5, 2019.

[2] Commission proceedings are governed by the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5 *et seq.* *See* I.C. § 4-15-1.5-6(1). Accordingly the Commission has delegated to its Administrative Law Judges pursuant to I.C. § 4-21.5-3-28 of the AOPA, the authority to issue final orders in this class of proceedings.

Motion to Dismiss Standard

Dismissal proceedings test "the legal sufficiency of the complaint." *Right Reason Publications v. Silva*, 691 N.E.2d 1347, 1349 (Ind. Ct. App. 1998). All facts plead in Petitioner's complaint, and reasonable inferences therefrom, are taken as true. *Bee Windows, Inc. v. Turman*, 716 N.E.2d 498, 500 (Ind. Ct. App. 1999). However, when a party's complaint is legally insufficient or fails to plead essential elements of the claim, the complaint or deficient claim 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 12(b)(6).

Findings of Fact

The facts relevant to the instant Motion's resolution, and construed in favor of the non-movant Petitioner, are as follows:

1. Petitioner was employed at Respondent's Hoosier Youth Challenge Academy ("Academy") as a Cadre Supervisor (Pet'r Compl.).

2. In October, 2018, Petitioner began voicing his concerns about the types of applicants being accepted into the Academy (Pet'r Am. Compl.).

3. Petitioner spoke to his supervisor about his concerns on several occasions thereafter, but was told the Academy needed to meet certain recruitment goals (Pet'r Am. Compl.).

4. Following these meetings, Petitioner lost his position as part of the Academy's "command group" (Pet'r Am. Compl.).

5. Petitioner also lost his chairmanship of the Cadet Assessment Comity ("CAC"), which was listed as the 3rd in command at the Academy (Pet'r Am. Compl.).

6. Finally, information Petitioner would normally be privy to was instead going to his subordinates, employees were being hired and promoted without Petitioner's knowledge, and other duties of Petitioner were also revoked, such as his ability to interview applicants for the Academy (Pet'r Am. Compl.).

7. On January 19, 2019, Petitioner was alleged to have forced his way into a female employee's room at the Academy (Pet'r Compl.).

8. Respondent subsequently conducted an investigation, during which Petitioner was suspended without pay (Pet'r Compl.).

9. On February 7, 2019, Petitioner was terminated as a result of the investigation.

Conclusions of Law

1. SEAC is a creature of statute, charged with fairly and impartially administering Civil Service System appeals. Ind. Code § 4-15-2.2 *et seq*. SEAC's jurisdiction over such appeals is divided into classified (just cause claims) and unclassified (at-will claims). Ind. Code §§ 4-15-2.2-23, 24. Petitioner was an unclassified employee at all relevant times.

2. 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). "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).

3. 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 personal criminal liability. Put another way, the courts ask whether the termination in question was illegal in light of applicable statutory law. A merely foolish or arbitrary choice by an employer to terminate or discipline does not invoke an exception. *See, Baker v. Tremco Inc.,* 917 N.E.2d 650, 653-655 (Ind. 2009); *Meyers v. Meyers Construction,* 861 N.E.2d 704, 706-707 (Ind. 2007); *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).

4. "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,* 861 N.E.2d at 706 (Ind. 2007) (quoting *Montgomery v. Bd. of Trustees of Purdue Univ.*, 849 N.E.2d 1120, 1128 (Ind. 2006); *Cantrell v. Morris*, 849 N.E.2d 488, 494 (Ind. 2006); *Sample v. Kinser Ins. Agency*, 700 N.E.2d 802, 805 (Ind. Ct. App. 1998), *trans. not sought*. Correspondingly, a claim that a termination was arbitrary or unfair does not state an at-will exception allowing SEAC jurisdiction. Nor does such an assertion state a claim for which relief can be granted in an unclassified—at-will—Civil Service System case. *Meyers,* 861 N.E.2d at 704; I.C. § 4-15-2.2-42. A viable public policy exception must be present for the Complaint to survive.

5. At the outset, the ALJ again notes that Petitioner failed to file a reply to Respondent's Motion.

6. When an appellee fails to file a response brief, the Court (here SEAC) need not develop his arguments. *See Santana v. Santana*, 708 N.E.2d 886, 887 (Ind. Ct. App. 1999).

7. Therefore, the ALJ will only briefly touch upon Petitioner's contentions.

8. In his original complaint, Petitioner makes a vague allegation that Respondent's investigation was never discussed with him, nor was he presented with any evidence from it.

9. Despite Petitioner's dissatisfaction with not knowing about the details of the investigation, "the law is clear that an agency authorized to conduct investigations has broad authority to control the conduct and timing of its investigation." *Beam v. Gonzales*, 548 F. Supp. 2d 596, 610 (N.D. Ill. 2008) (citation omitted). Therefore, Respondent's actions regarding its investigation were justified.

10. Next, Petitioner states that some of his job duties changed after he began discussing his dissatisfaction about the quality of the Academy's applicants in October, 2018.

11. Specifically, Petitioner mentions in his Complaint that Respondent's Deputy Director took over the chairmanship of the Cadet Assessment Comity from Petitioner and also mentions that others in Petitioner's department were getting hired and promoted without Petitioner knowing as well as the fact that he no longer was involved in interviews for Academy applicants.

12. None of the above, however, rise to the level of an actionable claim. Personal perception that a job assignment was "personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action." *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994) (citation omitted).

13. Petitioner finally makes other vague references in his complaint about other employees who were allegedly retaliated against if they went against Respondent's wishes. Petitioner states that seven (7) different department heads left Respondent due to such retaliation.

14. However, Petitioner fails to show how any of these alleged incidents apply to him. Petitioner does not state, for example, that any of those employees were terminated, or were otherwise subject to disciplinary action. In order to recover on a disparate treatment theory, Petitioner must (among other things) show a link between the comparators and himself. *See Khowaja v. Sessions*, 893 F.3d 1010 (7th Cir. 2018). Having failed to do so, Petitioner cannot show that he was discriminated against.

15. No other public policy exception has been raised by Petitioner, and therefore, the ALJ concludes that SEAC lacks subject matter jurisdiction to further consider Petitioner's Complaint. Thus, Respondent's Motion must be granted.

Prior sections are hereby incorporated by reference, as needed. 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.

Final Order of Dismissal

Respondent's Motion to Dismiss is GRANTED. This action is hereby dismissed with prejudice. All case management deadlines are vacated.

This is the 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 Ind. Code § 4-21.5-5.

DATED: August 8, 2019

Hon. Gabriel Paul
Chief Administrative Law Judge
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