**BEFORE THE**
**STATE EMPLOYEES' APPEALS COMMISSION**

IN THE MATTER OF:

| | |
|---|---|
| ROBERT J. KNICK | ) |
| Petitioner, | ) |
| | ) SEAC NO. 03-13-020 |
| vs. | ) |
| | ) |
| INDIANA DEPARTMENT OF | ) |
| HOMELAND SECURITY | ) |
| Respondent. | ) |
| | ) |

**ORDER GRANTING AND DENYING RESPONDENT'S MOTION TO DISMISS IN PARTS**

## I. Introduction and Summary

In this classified Civil Service System[1] case, the ALJ is to presently consider Respondent IDHS's Motion to Dismiss, filed September 18, 2013, and Petitioner Knick's response filed November 20, 2013. A telephonic status conference was also held December 5, 2013, wherein the ALJ had the opportunity to hear brief oral argument from the parties' counsel. Having duly considered the record, the ALJ grants and denies the Motion to Dismiss in parts as discussed herein.

The case involves two consolidated Complaints before SEAC. On March 7, 2013, Petitioner Knick challenged a written reprimand issued by Respondent IDHS on November 28, 2012 ("Claim A", or the "Reprimand"). Claim A includes Petitioner's assertions that the Reprimand lacked just cause or was based on harassment or retaliation. On April 25, 2013, Petitioner Knick challenged a year 2012 Performance Evaluation by IDHS. Petitioner also challenged any related fact file entries and the performance appraisal process.[2] For ease of reference, these arguments are together referred to as "Claim B" or the "Performance Evaluation" claim.

SEAC lacks the statutory authority to hear a claim directly over a Performance Evaluation in a classified Civil Service case. A performance evaluation[3] is not discipline and does not fall under the Civil Service System's classified appeal coverage. Smoother state employment operations, including the beneficial flow of information between

[1] Ind. Code 4-15-2.2

[2] Petitioner identified 'Ongoing Performance Management Policy', his fact file, his Work Profile and Performance Appraisal Report as part of a set of errors by Respondent. (See Complaint 2). Petitioner's Response objected to using the term "Performance Evaluation", but it is the cleanest container for this group.

[3] This also applies to related non-discipline fact file entries or the appraisal process.

agencies and state employees during annual or other evaluation times, as a whole, are also furthered by this holding. Petitioner's Claim B, the Performance Evaluation claim, should be dismissed. I.C. 4-1-6-5 already allows an employee to submit a 200 word written statement to their file opposing any performance evaluation they disagree with, which SPD mentioned at Step II. I.C. 4-1-6-5 is a sufficient remedy.

On the other hand, Petitioner's Claim A, the Reprimand, is fully viable and covered by the Civil Service System's classified appeal coverage. Claim A relates to concrete discipline imposed against the Petitioner – a written reprimand by Respondent IDHS. Petitioner is entitled to challenge the Reprimand as being without just cause, including any alleged harassment or retaliation that led to it. The ALJ construes the Civil Service System harmoniously to find that it covers appeals against classified discipline, including the lowest form of specific discipline in state government, the reprimand. Contrary to Respondent's suggestion, the classified provisions in the Civil Service System do not stop at demotions or suspensions, those provisions cover reprimands too.

Furthermore, while this order dismisses Claim B (only), this order does not diminish either party's right to present factual evidence on the background or circumstances leading to the Reprimand, including how the performance evaluation or appraisal process ultimately impacted the Reprimand. In other words, the 2012 Performance Evaluation is not a separate, stand-alone claim, but instead evidence the parties can debate.

## II. 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 the petitioner's complaint, and reasonable inferences therefrom, are taken as true. *Id.* However, when a party's complaint is legally insufficient or fails to plead essential elements of the claim(s), 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 (6).

## III. Findings of Fact

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

1. Petitioner's Claim A challenges a November 2012 employment Reprimand by Respondent IDHS. Petitioner's Claim B challenges his year 2012 Performance Evaluation and any related assessment process by Respondent IDHS. Both claims were consolidated under this cause and timely reached SEAC at Step III in the Civil Service complaint process.

2. With respect to the Performance Evaluation claim, Petitioner Knick contends in part that his year 2012 performance evaluation and/or fact file was manipulated by Respondent IDHS, contained factual distortions, or otherwise contained an untrue review. This is taken as true for purposes of the Motion's resolution, but the Performance Evaluation claim (only) must still be dismissed as a matter of law.

3. Performance evaluations, even negative or alleged inaccurate ones, provide a valuable product to state employees and agencies/managers alike. A review serves to tell a state employee in writing: 'this is how the state agency currently views your performance'. They are a valuable assessment tool that communicates the employer agency's sense of the employee's status, work expectations and performance. I.C. 4-15-2.2-15, 36. Similarly, possibly at the pre-discipline stage, the employee can then choose whether to follow any suggested guidance or not, and is at least on notice of the employer's viewpoint.

4. The Civil Service System does not define or call a performance evaluation discipline. I.C. 4-15-2.2-1 et seq., 36. Part of a performance evaluation can include fact file entries or the mechanical assessment process of employee-assessments, all of which are non-discipline.

5. Even if an employee receives a less-than-stellar review[4], any resulting discipline is hypothetical until it actually happens. For instance, an employee receiving a poor evaluation might receive a work improvement plan instead of discipline or simply no discipline at all. It is recognized in this case, that Petitioner was in fact disciplined prior to or around the same time as the review. But such an employee, like Petitioner does here, can then challenge the actual discipline (here the Reprimand) when it happens, avoiding unripe or hypothetical disputes.[5]

6. Moreover, state agency management is entitled, even required by Civil Service statute and SPD regulations (see I.C. 4-15-2.2 and 31 IAC 5 et seq.), to express its opinion over an employee's performance in a review period, and that should not be chilled. Similarly, state employees benefit from the evaluation process where the employer is candid and not unduly fearing litigation over a mere evaluation alone. This finding also cautions classified employers to take a second look and make sure that any actual discipline based off a negative evaluation period is able to sustain just cause review.

7. The State Personnel Department (SPD)'s regulatory guidance and other written documentation accords with this result. SPD is charged with setting forth performance and rating standards, and helping agencies perform the same, under the Civil Service System. See and compare I.C. 4-15-2.2-15, 36; 31 IAC 5-3, 5-12; and

[4] E.g. "needs improvement" or fails to meet expectations.

[5] For example, a negative performance evaluation might specify several defective work areas. But discipline might be more specific and focused on say just one. Even if an employee disagrees with the whole affair, the employee is benefited by only having to face the actual, perhaps narrower, discipline charges. This example holds true in this case. The Reprimand is on narrower grounds than the whole 2012 Performance Evaluation. (See and compare Complaints 1 and 2.)

SPD Performance Evaluation and Discipline Policy Statements (on SPD public website), dated August 1, 2012. The SPD Discipline statement defines a "reprimand" as discipline, but none of the materials define a performance evaluation, fact files or assessment tools as discipline. Id.

8. These findings are consistent with the Civil Service System's legislative intent, and harmonious to its structure. Caselaw in the federal 7th Circuit, as persuasive but not binding authority, supports the result. See Conclusions of Law.

9. A review of the instant pleadings shows the Performance Evaluation in this case is not labeled discipline, nor did it expressly contain a penalty by itself. It provides feedback data to the Petitioner (albeit Petitioner Knick strongly disagrees with it). (See Complaint 2.)

10. I.C. 4-1-6-5 already allows an employee to submit a 200 word written statement to their file opposing any performance evaluation they disagree with, which SPD mentioned at Step II. I.C. 4-1-6-5 is a sufficient remedy for alleged errors on a performance evaluation.

11. On the other hand, the Reprimand in this case is labeled as appealable discipline by Respondent IDHS, and has the penalty effect of discipline. (See Complaint 1.)

12. In sum, characterizing the Performance Evaluation as discipline is inaccurate and distracting. If evaluations were appealable under the Civil Service System, it would likely chill the desire of an agency to provide candid feedback during a performance review period. The loss of candor and its negative impact on overall state employment operations would adversely affect the public. Moreover, the flood gates of litigation would open because state employees would be encouraged to challenge future hypothetical discipline based on a bad review, rather than specific discipline when it actually happens.

## IV. Conclusions of Law

1. SEAC is a creature of statute, charged with fairly and impartially administering Civil Service System appeals. SEAC's jurisdiction over such appeals is divided into classified (just cause claims) and unclassified (at-will claims). Here, Petitioner Knick is a classified employee at all relevant times.

2. When faced 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, 828-929 (Ind. 2011).

3. In this matter, portions of Civil Service Sections 23 and 42 do present a conflict or ambiguity that is resolved by looking at legislative intent, and harmonizing all the statutes together.

4. In the Civil Service System, the General Assembly decided that a "classified employee is entitled to appeal a dismissal, demotion, or suspension as provided in section 42 of this chapter." I.C. 4-15-2.2-23(b). I.C. 4-15-2.2-42(g) is then broader, referring to all classified discipline.[6]

5. Petitioner argues that Section 42(a) could then be read in isolation far more broadly, allowing an employee to challenge any application of law, policy or rule by the state. Section 42(a) states: "An employee in the state civil service system may file a complaint concerning the application of a rule, law or policy to the complainant…" I.C. 4-15-2.2-42(a).

6. While Petitioner's argument requires hard consideration, this ALJ ultimately considers the best, most harmonious, statutory construction of the Civil Service System to be: the General Assembly intended SEAC to only hear classified discipline cases (where a concrete discipline action or alleged material harm has happened to a petitioner employee), not classified cases involving unripe pre-discipline claims or claims over evaluations. I.C. 4-15-2.2-15, 21, 23, 36, 42.

7. Section 23's listing of specific discipline types are indicative of that legislative intent when coupled with Section 42(a and g). *Id*. This impression is reinforced by the language of Sections 15 and 36, and SPD guidance, which cast performance evaluations in a guidance mode, rather than in a discipline mode. See Findings of Fact.

8. Furthermore, while not binding on Indiana law, the federal Seventh Circuit has consistently held that a negative performance evaluation alone does not constitute an adverse employment action. See *Grube v. Lau Industries, Inc.*, 257 F.3d 723, 729 (7th Cir. 2001); *Smart v. Ball State Univ.*, 89 F.3d 437, 442 (7th Cir. 1996).

9. This decision today is also consistent with SEAC's previous unclassified (at-will) precedents. See *King v CIF/DOC*, SEAC 10-13-090, Notice of Proposed Dismissal issued on October 24, 2013 (SEAC does not adjudicate pre- or non-discipline in unclassified cases.); *Slonaker v FSSA*, SEAC 10-13-088, Notice of Proposed Dismissal issued October 21, 2013 (Section 1 holds that a letter of counseling alone is not discipline and therefore not actionable by an unclassified employee. In *Slonaker*, SEAC construed the applicable Civil Service statutes together, I.C. 4-15-2.2-22, 24 and 42(a and f), to show that the right of an unclassified Civil Service appeal is linked

[6] Respondent is correct that Section 23 leaves out "reprimands", but Section 42(g) includes reprimands because it covers all classified "discipline". SPD presently defines a reprimand as discipline. The picture is clearest and more logical when discipline (a reprimand, suspension, demotion, demotion-transfer or discharge) is contrasted from non-discipline (evaluations, appraisals, work profiles, mere counseling or a transfer with no material change).

to materially adverse discipline by the state Respondent agency.); And see dicta in Final and Non-Final Orders in *Veale v. Ind. Dept. of Transportation*, SEAC No. 04-13-029 (performance evaluations are only "lesser employment actions".)

10. Uncoupled from other material adverse or discipline action, a performance evaluation, fact entry or assessment alone is not discipline. I.C. 4-1-6-5 already allows an employee to submit a 200 word written statement to their file opposing any performance evaluation they disagree with. I.C. 4-1-6-5 is a sufficient remedy for alleged errors on a performance evaluation. The Civil Service System should be read in harmony with I.C. 4-1-6-5 and not displace it.

11. SEAC should dismiss Petitioner Knick's Performance Evaluation claim only. Classified state employees, as here for Petitioner Knick, can, however, appeal specific discipline that might follow a negative performance evaluation under the Civil Service System. The Reprimand is exactly such discipline. Petitioner's Knick's Reprimand claim shall proceed to the merits.

12. To the extent a conclusion of law stated herein is a finding of fact or the reverse, it shall be so deemed and remain effective.

## V. Partial Order of Dismissal

A state performance evaluation or appraisal process is not discipline and does not fall under the Civil Service System's classified appeal coverage. Thus, this order dismisses Claim B of the Petitioner's consolidated Complaint, the 2012 Performance Evaluation claim. This order does not diminish Petitioner's claim relating to the Reprimand and does not impact either party's right to present evidence on the background or circumstances leading to the Reprimand. The evidentiary hearing on the Reprimand remains set for February 7, 2014. The parties and by their respective counsel are ordered to appear for this hearing. So ordered.

DATED: January 14, 2014

Hon. Aaron R. Raff
Chief Administrative Law Judge
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