BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

WILLIAM ROSS Petitioner, vs. INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT Respondent.	))))))))	SEAC No. 07-18-053

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. Introduction and Summary

On October 1, 2018, Respondent Indiana Department of Workforce Development, ("Respondent"), by counsel, filed a Motion to Dismiss regarding Petitioner's Complaint ("Motion"). Petitioner William Ross ("Petitioner"), pro se, timely replied to the Motion on November 16, 2018. Thereafter, on December 6, 2018, Respondent filed a response in support of its Motion.

This case considers Petitioner's termination on May 9, 2018, for failing to meet the standards required of him as a Disabled Veteran Outreach Specialist. The controlling pleadings are Petitioner's Complaint filed on July 24, 2018, Petitioner's amended Complaint filed August 28, 2018, Respondent's Motion, Petitioner's reply to Respondent's Motion and Respondent's surreply.

Under I.C. § 4-15-2.2-42(g), Respondent must prove that it had just cause to terminate Petitioner's employment. After review of the pertinent pleadings noted above, the ALJ finds that Respondent had just cause to terminate Petitioner. He thus finds Respondent's Motion meritorious and hereby **Grants** it. Petitioner's Complaint must therefore 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.

I. Motion to Dismiss Standard

"An Ind. Trial Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim, not the facts supporting it." *Bedree v. DeGroote*, 799 N.E.2d 1167 (Ind. Ct. App. 2003). When deciding, the ALJ "views the complaint in the light most favorable to the non-moving party, drawing every reasonable inference in favor of this party." *Id.* A "grant of the motion to dismiss is proper if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. Furthermore, in determining whether any facts will support the claim, the [ALJ] looks only to the complaint and may not resort to any other evidence in the record." *Id.*

II. Findings of Fact

1. Petitioner was first hired by Respondent in February, 2017 (Pet'r Compl.).

2. At all times, Petitioner was a classified Disabled Veteran Outreach Specialist (Pet'r Compl).

3. On November 21, 2017, Petitioner signed a probation agreement with the Hancock County Superior Court, as a result of a prior drug offense (Pet'r Reply[1]).

4. In February, 2018, Petitioner was arrested (Resp't Motion).

5. On March 6, 2018, formal charges were filed against Petitioner as a result of the February, 2018 arrest (Resp't Motion).

6. On March 29, 2018, a predeprivation meeting was held with Petitioner regarding the February, 2018 arrest (Resp't Motion).

7. On April 4, 2018, Respondent determined that Petitioner, as a result of the February, 2018 arrest, should receive a three (3) day suspension (Resp't Motion).

8. On April 20, 2018, Petitioner was again arrested, since the Hancock County prosecutor determined that Petitioner's February, 2018 arrest violated the terms of his probation agreement (Resp't Motion).

9. On April 20, 2018, Petitioner was sentenced to temporary detention at the Hancock County Jail (Resp't Motion).

10. Between April 20, 2018 and May 1, 2018, Petitioner missed work, due to his incarceration (Pet'r Reply).

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[1] Petitioner did not label the exhibits in his Reply; thus, the ALJ will not use pinpoint citations.

11. In the interim, Respondent, believing that Petitioner was an unclassified employee, terminated him. However, upon discovering its mistake just prior to Petitioner's release, Respondent reinstated Petitioner and awarded him back pay and full benefits[2] (Pet'r Reply).

12. On May 1, 2018, Petitioner was released from detention to a work release program, after which Petitioner returned to work on May 3, 2018 (Pet'r Reply).

13. On May 4, 2018, Respondent held a predeprivation meeting with Petitioner regarding his arrest on April 20, 2018 (Resp't Motion).

14. After deliberation, Respondent terminated Petitioner on May 9, 2018, for violation of the State's leave policy.

III. 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 a classified employee at all relevant times.

2. At the outset, Petitioner claims that his due process rights were violated when he was initially terminated while incarcerated.

3. However, as explained above, Respondent realized this mistake, reversed Petitioner's termination and made him whole by paying him back wages for the time of the mistake. Thereafter, Petitioner was properly given a predeprivation conference under the State's Discipline Policy. *See https://www.in.gov/spd/files/discpol.pdf.* Thus, this argument fails.

4. Petitioner next argues that Respondent did not adhere to what he calls the State's "Personnel Policy" ("Policy").

5. While such Policy does not exist, the ALJ believes Petitioner refers to the State's Arrests and Convictions Policy ("Arrest Policy") when he asserts that his dismissal was in contravention of public policy.

[2] Additionally, at the prehearing conference, Respondent's counsel further explained the confusion and reaffirmed that upon discovering the mistake, it reversed Petitioner's termination and paid him back wages until Petitioner returned to work on May 3, 2018.

6. Under the State's Arrest Policy, an employee may be carried on Unauthorized Leave ("UL") for time spent in jail and may be subject to disciplinary action. *See https://www.in.gov/spd/files/acrandp.pdf.*

7. Additionally, "[f]ive (5) consecutive UL days may be cause for dismissal for employees in the classified service." *See Id.*

8. Finally, neither personal nor vacation leave may be taken to cover periods of incarceration, unless the vacation leave was scheduled for a purpose unrelated to the incarceration prior to the employee being incarcerated. *Id.*

9. It was undisputed that Petitioner, while in jail, missed work from April 20, 2018 through May 1, 2018.[3] (Pet'r Compl).

10. Therefore, under the Arrest Policy, assuming Petitioner only worked during the week, Petitioner missed seven (7) work days between April 20, 2018 and May 1, 2018.

11. There was no evidence presented that Petitioner had previously scheduled vacation leave before his incarceration; thus the ALJ finds that Petitioner was in violation of the Arrest Policy when he accrued more than five (5) days of UL while incarcerated.

12. Therefore, Respondent was within its rights to terminate Petitioner based upon his violation of the Arrest Policy.

13. Petitioner next attempts to raise a claim under 42 U.S.C. § 1983, alleging Respondent violated his Civil Rights.

14. Petitioner does not allege this violation in either his original or amended Complaints, instead raising it for the first time in his Reply to Respondent's Motion.

15. Since a Motion to Dismiss under Ind. T.R. 12(b)(6) looks only to the Complaint, the ALJ cannot consider any facts or claims raised outside of it. *See First Nat'l Bank and Trust v. Indianapolis Pub. Hous. Agency*, 864 N.E.2d 340, 350 (Ind. Ct. App. 2007).

16. Therefore, the ALJ finds that Petitioner cannot now raise a claim regarding Respondent's alleged violation of 42 U.S.C. § 1983 and will not consider it for purposes of this ruling.

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[3] Since Petitioner did not return to work until May 3, 2018, it does not appear as if Respondent considered May 2, 2018, to be a date Petitioner accrued UL.

17. Petitioner next claims that Respondent violated the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution, which prohibits someone from being prosecuted twice for the same offense.

18. However, as Respondent correctly notes in its Motion, the Double Jeopardy Clause more appropriately applies to the criminal, and not civil context. *See United States v. Ursery*, 518 U.S. 267 (1996); *see also One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) *per curiam*.

19. Even if the ALJ were to find that the Double Jeopardy Clause applied, here, Respondent was not in violation of its provisions.

20. It was undisputed that Petitioner's arrests in February, and April, 2018 were two (2) separate matters and were handled as such by Respondent.

21. As to the former arrest, Petitioner received a three (3) day suspension. Petitioner was subsequently terminated for the latter.

22. If Petitioner wished to appeal his suspension, he could have followed the same procedure he did in filing the instant matter. However, there was no evidence submitted showing that Petitioner appealed his suspension. Therefore, Petitioner cannot now seek to have it overturned by virtue of arguing that his termination was in violation of the Double Jeopardy Clause.

23. Therefore, Petitioner's claim that Respondent violated the Double Jeopardy Clause of the Fifth Amendment fails.

24. Petitioner finally claims that Respondent violated the Americans with Disability Act ("ADA") when it terminated him because Respondent knew that Petitioner was a drug addict and failed to accommodate him as a result.

25. The ADA makes it unlawful for an employer to "discriminate against a qualified individual on the basis of disability in regard to . . . terms, conditions, and privileges of employment." *Turner v. The Saloon, Ltd.*, 595 F.3d 679 (7th Cir. 2010). To survive Respondent's Motion, Petitioner "must first show that he is 'disabled' within the meaning of the Act." *Id*

26. The ADA defines "disability" as:

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment. *Id*

27. If someone is found to be disabled within the meaning of the ADA, "the ADA requires employers to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer." *Cloe v. City of Indianapolis*, 712 F.3d 1171 (7th Cir. 2013).

28. "In order to establish a prima facie case of failure to accommodate under the ADA, a plaintiff must show that: (1) [h]e is a qualified individual with a disability; (2) the employer was aware of [his] disability; and (3) the employer failed to reasonably accommodate the disability." *Id.*

29. "The ADA's reasonable accommodation requirement applies only to known disabilities. Thus, a plaintiff must normally request an accommodation before liability under the ADA attaches." *Id.*

30. In the instant case, while it can be argued that Petitioner was a qualified individual with a disability, Petitioner's Complaint does not show that Respondent was either aware of Petitioner's disability, or that Respondent failed to accommodate Petitioner because of it.

31. More importantly, however, is the fact that Petitioner's Complaint does not show that he asked for an accommodation at any point in time.

32. Additionally, Petitioner's Complaint does not show that he ever submitted the probation agreement he signed in 2017, to Respondent, which theoretically could have alerted Respondent to the fact that Petitioner suffered from a drug addiction.

33. Therefore, based on the Complaint, the ALJ finds that Petitioner was not disabled under the ADA such that Respondent was required to accommodate him. This argument therefore fails as well.

34. 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. The ALJ finds that Respondent had just cause to terminate Petitioner when it did so based solely on the fact that Petitioner had accrued an amount of UL in excess of the five (5) days allowed under the Arrest Policy. Thus, Respondent's Motion must be granted.

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

IV. Final Order of Dismissal

Respondent's Motion to Dismiss under Ind. T.R. 12(b)(6) 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: December 21, 2018

Hon. Gabriel Paul
Chief Administrative Law Judge
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