BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

JASON WILLIAMS Petitioner,	)	
	) SEAC No. 09-19-048	ISSUED
vs.	)	
	)	NOV 01 2019
INDIANA DEPARTMENT OF TRANSPORTATION Respondent.	)	STATE EMPLOYEES' APPEALS COMMISSION

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. Introduction and Summary

On September 18, 2019, the Indiana Department of Transportation ("Respondent") by counsel, filed a Motion to Dismiss Petitioner's Complaint ("Motion"). Petitioner Jason Williams, ("Petitioner"), pro se, submitted a response to Respondent's Motion on October 17, 2019. The ALJ has duly considered the parties' filings, arguments and the pleadings, and this matter is ripe for ruling.[1]

This case considers Petitioner's termination for violation of the State's Non-Tobacco Use Agreement ("NTUA"). Petitioner bases his challenge on the fact that his failure to revoke the agreement for 2019 was an honest mistake.

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.

[1] Commission proceedings are additionally 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 AOPA, the authority to issue final orders in this class of proceedings.

I. 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) (citation omitted). 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).

II. Findings of Fact

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

1. Petitioner was hired by Respondent in 2004 (Pet'r Compl.).

2. Under the NTUA Petitioner received a bi-weekly deduction in his insurance premium in exchange for not using tobacco products. Petitioner understood that by doing so, he subjected himself to random testing for tobacco at any time during the year (Pet'r Compl.).

3. An employee can revoke the NTUA at any point if he starts smoking again and has not been selected for testing (Pet'r Compl.).

4. Petitioner identifies as a smoker, but had tried to quit on several occasions in the past (Pet'r Compl.). Once Petitioner realized he was unable to quit smoking, he always revoked his NTUA in early January with no issues (Pet'r Compl.).

5. During Petitioner's Open Enrollment ("OE") for 2019 in the fall of 2018, he accepted the NTUA (Pet'r Compl.).

6. On December 31, 2018, Petitioner went into Respondent's PeopleSoft system in order to revoke his NTUA for the 2019 plan year (Pet'r. Compl.).

7. When Petitioner attempted to opt out of his NTUA for 2019, he received an error message indicating that the revocation was premature (Pet'r Compl.).

8. The message also stated that Petitioner should log back into the system on or after January 1, 2019 in order to properly revoke the agreement (Pet'r Compl.).

9. Since January 1, 2019 was a state holiday, Petitioner was not at work and therefore did not revoke his agreement (Pet'r Compl.).

10. On June 27, 2019, Petitioner was selected for a random tobacco test, in order to ensure that he was not using tobacco (Pet'r Compl.).

11. Petitioner then realized he had forgotten to revoke his NTUA and told the tester that he was a smoker (Pet'r Compl.).

12. Petitioner was told to take the test anyway, in order to prove his good character (Pet'r Compl.).

13. Petitioner tested positive for tobacco and thereafter, following a meeting on July 16, 2019, was terminated for violation of the NTUA.

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 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. As a preliminary matter, the ALJ notes that per his request of the Parties, documents were provided to the ALJ that were not originally included in the Complaint. While the ALJ's consideration of such documents (as described below) could cause him to convert Respondent's motion to one under Ind. T.R. 56, such is not the case here.

6. "A motion under . . . Rule 12(b)(6) can be based only on the complaint itself, documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice." *Geiniosky v. City of Chicago*, 675 F.3d 743 (7th Cir. 2012).

7. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *In re: FedEx Ground Package Sys.*, 2010 U.S. Dist. LEXIS 30303 (N.D. Ind. March 29, 2010) (citing Fed. R. Evid. 201(b)); *See* Ind. R. Evid. 201.

8. For the ALJ to take judicial notice, the adjudicative facts cannot be disputed. *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995).

9. In the present matter, the documents requested by the ALJ consisted of Petitioner's pay stubs from January, 2019 through June, 2019, as well as screenshots from Petitioner's elections made during his OE period in 2018. These documents fall under the second category listed above, since Respondent has vouched for their authenticity such that its determination of the same cannot be questioned. Therefore, the ALJ takes judicial notice of the documents named above and now turns to the matter at hand.

10. Petitioner freely admits that he smokes and also freely admits that he violated the NTUA (Pet'r Compl.). However, he argues that by trying to revoke the NTUA on December 31, 2018, he exercised good faith and simply forgot to go back and revoke his agreement between January 1, 2019 and the date he was selected to test on June 27, 2019. Petitioner also argues that he relied on the representations of the Indiana State Personnel Department ("SPD") when he took the test. The ALJ will address each argument in turn.

11. The NTUA, as described above, provides for a reduction an employee's insurance premium, in exchange for a written promise from the employee to remain tobacco free. https://www.in.gov/spd/2857.htm.

12. The NTUA also states in clear terms that, "[i]f you accept the Non-Tobacco Use Agreement during [OE] and later use tobacco, your employment will be terminated." *Id.*

13. The NTUA provides one, and only one, safe harbor, or exception to this mandate. "The only exception to the job loss penalty is if you revoke the agreement by logging in to PeopleSoft and completing the self-service process to change your agreement." *Id.* If the safe harbor is executed before an employee is selected to test, the employee will not be terminated, but must repay the State an amount equal to the premium reduction received to date. *Id.*

14. Most importantly for Petitioner's purposes, are the NTUA's final instructions: "[t]he Non-Tobacco Use Incentive does not carry over from year to year. If you want to participate in 2019, you must access your [OE] event within PeopleSoft and accept the agreement."

15. Since the NTUA does not carry over from year to year, it must be renewed during OE each year.

16. Petitioner was aware of this requirement, since he included evidence in his Complaint that he had successfully revoked the agreement in January of previous years.

17. Petitioner believed that his revocation on December 31, 2018 was successful. However, upon attempting to do so, the evidence Petitioner submitted also included a warning from the PeopleSoft system that stated, "[y]ou have a future [NTUA] on file. You will need to return to this page on or after 1/1/19 to submit an additional revocation request." (Pet'r Compl.)

18. While the ALJ finds that the above warning could have been written in a more definite way, he nevertheless finds that as stated, it put Petitioner on notice that his attempt at revocation on December 31, 2018 was not valid.

19. Petitioner was enrolled in the State's "CDHP 1" plan for 2019, according to his pay stubs. The SPD's insurance rate premium chart shows the 2019 bi-weekly rate for such plan with the NTUA is $33.84, which matches the amount shown on Petitioner's pay stubs. (SEAC Ex. B; https://www.in.gov/spd/2853.htm).

20. Moreover, Petitioner's screen shots from his 2018 OE show that he selected the NTUA as of January 1, 2019 (SEAC Exs. A, C). Therefore, it is undisputed that Petitioner both selected the NTUA and received the corresponding benefit starting on January 1, 2019.[2]

21. The ALJ agrees with Petitioner that he simply committed an honest mistake; however, he nevertheless finds that Petitioner could have logged back into the system the next day—January 1, 2019—while the thought of revocation was still top of mind. Even though January 1, 2019 was a state holiday, the PeopleSoft system was accessible to Petitioner from any computer with an internet connection, so Petitioner could have revoked the NTUA via his home, or any other computer. Thereafter, Petitioner had nearly six (6) months to revoke his agreement before he was selected to test.

22. Petitioner had successfully completed this task in previous years (albeit in January of each year), so the ALJ is unsure as to why Petitioner believed his revocation was accepted on December 31, 2018, especially considering that Petitioner received a warning from the system when attempting to do so.

23. Since the NTUA does not provide a safe harbor for such "honest mistakes", the ALJ is unable to infer that Petitioner's actions were such that termination was not warranted.

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[2] The ALJ is aware of a provision found in each state employee's OE enrollment screen which states that if an employee has not completed his NTUA as of January 1 of each year, he will revert to being considered a smoker and will not receive the premium reduction (and thus, won't be subject to a random tobacco screen (SEAC Ex. C). While not stated, the ALJ interprets this provision as applying to those employees who did not accept the NTUA during OE. Otherwise, those employees who previously selected the NTUA during OE would have to go back into PeopleSoft each year on January 1 to accept the agreement again, which is a result the ALJ finds the State does not wish to happen.

24. Therefore, the ALJ finds that, regardless of Petitioner's intent, his attempted revocation of the NTUA on December 31, 2018 was not valid; therefore, Respondent assumed that Petitioner accepted the terms of the NTUA such that when he tested positive for tobacco on June 27, 2019, it followed the NTUA when terminating him.

25. Petitioner finally makes a fleeting reference in his Complaint about certain things said to him by both Respondent and a representative of the Indiana State Personnel Department ("SPD") before he took the test. While not specifically stated, the ALJ construes Petitioner's references to such statements to constitute a claim that he detrimentally relied upon them when he took the test.

26. To succeed upon this theory, Petitioner must allege and prove that (1) Respondent made an unambiguous promise to Petitioner, (2) Petitioner relied on such promise, (3) Petitioner's reliance was expected and foreseeable by Respondents, and (4) Petitioner relied on the promise to its detriment. *Pearson v. Voith Paper Rolls, Inc.*, 656 F.3d 504 (7th Cir. 2011).

27. In this case, Petitioner's Complaint does not demonstrate that Petitioner clears the first hurdle. Petitioner merely states that he was told that taking the test could only help him, after which Petitioner surmised his good character would convince Respondent not to terminate him (Pet'r Compl.).

28. Petitioner knew the penalty for violating the policy and freely admitted to Respondent before the test that he smoked and therefore was going to test positive.

29. Therefore, the ALJ finds that an unambiguous promise was not made to Petitioner such that he can pursue this theory.

30. While the ALJ finds that legally, this case must be dismissed, he finds it necessary to address Petitioner's statements regarding his character. From his Complaint, the ALJ surmises that Petitioner, outside of this transgression, has been a good employee. Petitioner also states that he knows of other employees who were allowed to keep their jobs for far worse offenses. The ALJ recognizes the value of making sure Respondent's employees adhere to the terms of the NTUA and understands that providing for exceptions could lead Respondent down a slippery slope; however, in this case, the ALJ harkens back to a statement SPD counsel made during a similar proceeding, wherein he stated that in certain extreme cases, exceptions to the NTUA could be made. *See* Final Order of Dismissal, *Rafert v. Department of Workforce Development*, SEAC No. 02-19-021 (March 6, 2019).

31. Given the facts at issue, the ALJ posits that this is an extreme circumstance as contemplated above and urges Respondent (and SPD if necessary) to reconsider its decision to terminate Petitioner's employment. Petitioner is cautioned however, that the ALJ has no authority to compel Respondent to do so, given this decision and merely asks Respondent to reconsider as a professional courtesy.

32. The ALJ finds that Petitioner has failed to state a claim upon which relief can be granted and which are incapable of supporting relief under any set of circumstances under Ind. T.R. 12 (B)(6). *McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999). Therefore, dismissal is appropriate.

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.

IV. 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: November 1, 2019

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Chief Administrative Law Judge
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