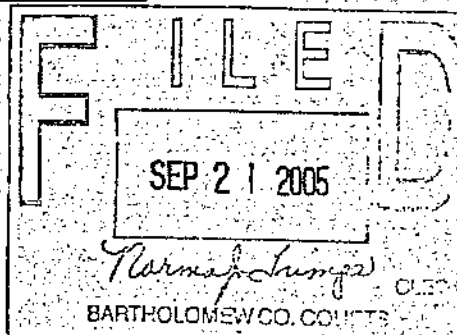


IN THE
BARTHOLOMEW CIRCUIT COURT
STATE OF INDIANA
CAUSE NO. [REDACTED]

MALCOMB D. ENGLAND,)
Plaintiff,)
)
vs.)
PUBLIC EMPLOYEES')
RETIREMENT FUND and)
STATE OF INDIANA,)
Defendants.)



**ORDER GRANTING MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER JURISDICTION**

Before a Court can review the merits of a case, the Court must have jurisdiction to hear the case. Defendants filed a Motion to Dismiss alleging that this Court does not have subject matter jurisdiction. In Plaintiff's response, Plaintiff first argues that Defendant is not controlled by the *Administrative Orders and Procedures Act* (AOPA). However, AOPA applies to the administrative review of every agency action except those specifically excluded under I.C. 4-21.5-2-5(11). The Administrative Code governs PERF. See 35 IAC 1.2 *et seq.*

Plaintiff's response next focuses on his assertion that he [REDACTED] was unaware of the appeal process and that Defendants did not inform him of his right to appeal. Plaintiff states: "It is the general rule of administrative law that notice of one's right to appeal an administrative ruling, and notice of one's right to have a hearing if one is dissatisfied with a decision (a hearing presumably before an administrative law judge), is given in writing to the aggrieved person. While notification of appeal rights may be a worthy goal, Plaintiff has not cited any statute or case law to persuade this Court that

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PERF was required to give such a notification. Unlike criminal law, in civil law there is no general duty for Courts to notify aggrieved parties of their right to appeal.

Plaintiff finally argues that even if AOPA applies, an exception to the general rule of "exhaustion of administrative remedies" is that a plaintiff's compliance with the administrative procedure would be futile. Plaintiff cites the case of *New Trend Beauty School, Inc. vs. Ind. State Board of Beauty Culturist Examiners* 518 N.E.2d 1101, 1104 (Ind.Ct.App.1988). While the Court in *New Trend* does indeed indicate that futility is one of three potential exceptions, the Court of Appeals found that New Trend Beauty School did not meet the threshold requirement.

"[The question of bias] is best preserved by initial action before the Board in the form of appropriate objections and/or motions for disqualification. ... Such procedure will give the Board "the opportunity to correct or prevent an error as a result of bias," without judicial interference." *New Trend*, p. 1105.

Plaintiff is only surmising that a timely appeal before the appropriate administrative body would *have* been futile. In *New Trend* the trial court found that it did not have jurisdiction to hear the case because New Trend had not exhausted its administrative remedies. The Court of Appeals upheld this decision. The facts of the case in *New Trend* are much more compelling than are the facts in the case at bar.

Finally Plaintiff states in his brief, "It appears that if an "agency" fails to "provide the remedies of notice and hearing," then the agency's "defense" of "failure to exhaust administrative remedies" is not even applicable or available to it as a defense. Plaintiff cites the case of *Porter Memorial Hospital v. Malak, M.D.* 484 N.E.2d 54, 60 (Ind.Ct.App.1985). This is not an administrative agency case. This explains why Plaintiff placed the word *agency* in quotation marks in his brief. The *Porter Hospital* case deals with an entity that failed to follow its by-laws. The Court of Appeals ruled in

that case that the aggrieved party was entitled to judicial review. The underlying facts in the *Porter Hospital* case make it clear that that case does not apply to the case at bar.

The law is well settled that if a party fails to exhaust their administrative remedies, then they are not entitled to judicial review. As late as August 4, 2005, the Indiana Court of Appeals raised the issue of failure to exhaust administrative remedies *sua sponte* and reversed a trial court judgment. *City of Marion v. Howard* 832 N.E.2d 528 (Ind.Ct.App.2005).

In this case, Plaintiff has failed to exhaust his administrative remedies. Therefore, regardless of the merits of the case, this Court does not have subject matter jurisdiction to hear the case.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss is GRANTED and this case is DISMISSED with prejudice.

All of which is ORDERED this 21st day of September, 2005.



Stephen R. Heimann
Bartholomew Circuit Judge

CC:

C. Richard Marshall

Patricia Huber Strachan
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204