

**BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION**

IN THE MATTER OF:

TERRIE A. CLOUD)	
Petitioner,)	
)	
v.)	SEAC NO. 02-13-016
)	
FAMILY AND SOCIAL SERVICES)	
ADMINISTRATION OF INDIANA)	
Respondent.)	

**FINAL ORDER OF DISMISSAL
FOR LACK OF ADMINISTRATIVE EXHAUSTION**

You are hereby notified that the Administrative Law Judge (the “ALJ”), acting on behalf of the State Employees’ Appeals Commission (“SEAC”), now enters a final order of dismissal as to the Complaint of Petitioner Terrie A. Cloud because SEAC lacks statutory jurisdiction. The jurisdictional issues are set forth in the ALJ’s March 7, 2013 “Notice of Prehearing Conference and Scheduling Order and Notice of Jurisdictional Issues with Leave to Amend,” entered previously (the “Notice”). The Notice is incorporated by reference herein. Petitioner Cloud, pro se, timely filed her “Notice of Jurisdictional Issues with Leave to Amend – Petitioner Response” on April 8, 2013 (the “Jurisdictional Response”).¹ Respondent Family and Social Services Administration of Indiana (“FSSA”), by counsel, timely filed Respondent’s Motion to Dismiss on May 7, 2013. Finally, Petitioner Cloud timely filed her response to Respondent’s Motion to Dismiss on May 13, 2013. The matter is now ripe for ruling. The following findings of fact, conclusions of law and final order are made.

I. Jurisdictional Facts

1. This is an unclassified Civil Service case. Petitioner Cloud alleges that her January 8, 2013 employment reprimand and suspension arose as the product of racial discrimination, racial harassment or hostile work environment.

2. Petitioner Cloud timely submitted her Step I Civil Service Complaint to FSSA on February 7, 2013.

¹ The ALJ also considers the Response an effective amendment to Petitioner Cloud’s Complaint.

3. Petitioner Cloud received on or about February 19, 2013 a letter from SPD that was dated February 13, 2013. This SPD letter is discussed below.
4. Respondent FSSA timely denied the Step I Complaint by formal letter on February 19, 2013.
5. Petitioner Cloud then filed her appeal directly to SEAC at Step III on February 27, 2013.
6. Respondent FSSA asserts that Petitioner Cloud skipped Step II in the Civil Service System Complaint Procedure and, therefore, SEAC is required to dismiss the appeal. To be precise, Petitioner skipped both components of the Step II. She did not file a Step II complaint with the Director of the SPD, and SPD's Director never had the opportunity to respond to a Step II filing. See, I.C. 4-15-2.2-42(e), discussed below.
7. Petitioner Cloud contends in the alternative that (1) an earlier letter of February 13, 2013 by SPD (the "SPD Letter") satisfied Step II; or (2) that an email exchange on February 19, 2013 between Petitioner and Joyce Crull of the State Personnel Department (the "SPD Email") fulfills Step II; or (3) that Petitioner was misled by the SPD Email communication and should be allowed to proceed with her appeal.
8. The February 13, 2013 SPD Letter cannot be the Step II response because it pre-dates the February 19, 2013 FSSA Step I response. The SPD Letter also does not declare itself to be a Step II response.
9. Instead, the SPD Letter refers to the state employer investigating Petitioner Cloud's racial discrimination, harassment or hostile work environment claim. The SPD Letter states in part: "[p]ursuant to the complaint, an investigation into allegations of discrimination was conducted". This language is best understood on this record as in the nature of an employer civil rights investigation promptly undertaken by SPD as generally recommended by the federal Equal Employment Opportunity Commission (EEOC). In other words, from the dates and context, the word "complaint" in the SPD Letter refers to a civil rights investigation by an employer after any complaint or claim by an employee of harassment or discrimination, not the Civil Service Complaint process. See EEOC Compliance Manual, Section 15, IX (Proactive Prevention) at <http://www.eeoc.gov/laws.compliance.cfm>. Federal and state civil rights laws strongly encourage, if not require, the state to promptly investigate civil rights related complaints as an employer and not wait for litigation, such as before SEAC.

10. The same day² that Petitioner Cloud received FSSA's Step I denial, Petitioner exchanged emails with Joyce Crull of SPD.³ Again, the context was the employer's civil rights investigation, but Petitioner charges confusion. Petitioner relies on the SPD Email to dispense with Step II.
11. In that email exchange Petitioner Cloud asked Ms. Crull several questions. Ms. Crull replied in the SPD Email that: "Your allegations of a hostile work environment have been investigated...Therefore, as the investigation is closed, further correspondence is unnecessary." Petitioner responded that afternoon by email: "Is this the end of the complaint process as far as SPD is concerned?" SPD did not respond to that afternoon inquiry. (Petitioner's Response to Respondent's Motion to Dismiss, Exhibit 2).
12. However, Respondent FSSA's Step I denial dated that same day of February 19, 2013 was a formal letter to Petitioner and very specific and accurate in stating:

If you [Petitioner Cloud] are not satisfied with this decision, you have fifteen (15) calendar days to submit your complaint to step 2, the State Personnel Director: State Personnel Department, 402 West Washington Street, Room W161, Indianapolis, Indiana 46204; ATTN: Civil Service Employee Complaint; or Fax to 317.232.3089.
13. The SPD Email was a continuation and part of the employer's separate civil rights investigation launched when Petitioner Cloud complained of racial discrimination, harassment or hostile work environment. This investigation started before the Step I denial. Neither the SPD Letter nor the SPD Email purported to be Step II responses to Petitioner's Civil Service complaint. Nor did Petitioner file a Step II Complaint with SPD.
14. The ALJ agrees with Petitioner Cloud that these SPD email communications regarding her civil rights investigation, occurring somewhat concurrently with Petitioner's Civil Service employee complaint, could cause confusion as to Step II status. The confusion was increased because Ms. Crull did not respond to the last February 19, 2013 email by Petitioner Cloud or clarify more expressly that Petitioner could pursue Step II of the Civil Service process. That said, FSSA's Step I denial letter told Petitioner in a crystal clear writing that she could mail a Step II to the State Personnel Director, who is not Ms. Crull. Petitioner's own email communications showed that Petitioner herself was unsure if Step II was complete or yet to come. Petitioner thus reasonably should have filed a Step II to cover that procedural base.

² February 19, 2013

³ Ms. Crull is a Program Director for Employee Relations at SPD. Ms. Crull is not the overall State Personnel Director for SPD as referred to in I.C. 4-15-2.2, who is Director Anita Samuel.

15. To further summarize, there were two procedural trains running at the same time for Petitioner Cloud. These procedural trains were the Civil Service Complaint process under I.C. 4-15-2.2-42 and the separate employer civil rights investigation urged by the federal EEOC and civil rights laws.
16. Translated from plain language into legal doctrines, Petitioner asserts two separate legal arguments: administrative exhaustion excuse by estoppel or futility. The ALJ explores both in turn. However, these doctrines do not offer Petitioner Cloud relief under this record.

II. Conclusions of Law: Civil Service Complaint Steps & Standards

1. The ALJ first reviews the overall step system, and then discuss Step II specifically. The Civil Service Complaint process contains three (3) steps. To have standing before SEAC, a petitioner employee must first timely exhaust Step I with the Appointing Authority (Respondent FSSA) and then timely exhaust Step II with the Indiana State Personnel Department (“SPD”). Timely exhaustion requires a petitioner to file a written complaint at Step I within thirty (30) days of reasonable discovery of the complained employment action. If the Appointing Authority denies Step I, a petitioner may proceed to Step II within fifteen (15) days. If the SPD’s Step II response is unsatisfactory to a petitioner, that petitioner may proceed to Step III within fifteen (15) days after receiving notice of the Step II response. Each step involves a filing to a separate state agency. In sum, Step III (SEAC) is the final of three steps in the complaint sequence under the Civil Service System, and each step must be timely undertaken before SEAC obtains jurisdiction. I.C. 4-15-2.2-42(e).
2. In particular, the Step II mechanic is provided and detailed by statute: “Step II: if the appointing authority [FSSA] or the appointing authority’s designated representative does not find in favor of the complainant, the complainant may submit the complaint to the director [a defined term referring to SPD’s overall director] not later than fifteen (15) calendar days after the date of the appointing authority’s finding. The director or the director’s designee shall review the complaint and issue a decision not later than thirty (30) calendar days after the date the complaint is submitted to the director.” I.C. 4-15-2.2-42(e).
3. A review of this statutory provision shows that the ordinary process is that a Step II Complaint Step has two subparts. The first subpart is a petitioner employee timely filing the Step II complaint after a Step I denial with the SPD Director. FSSA’s Step I denial letter detailed that process and gave reasonable notice or instructions for Petitioner Cloud to do that. The second part is the SPD Director’s authorized response, which is to take place after a review and within thirty days. In this case, Petitioner relies on an email exchange with a subordinate of the SPD Director on the same day as the Step I denial to discharge Step II. However, Petitioner did not file a separate Step II complaint addressed to the SPD Director.

Subpart one of Step II is missing. Even if subpart one is excused, subpart two of Step II is incomplete as well. The emails by Ms. Crull do not purport to satisfy Step II on behalf of the SPD Director. The same-day timing involved does not suggest an SPD response at Step II. There was no time for the SPD Director to review, and the normal time frame for a response is up to thirty days long.

4. Petitioner Cloud's position was unclassified. Her state employment was therefore at-will at the time of the reprimand and suspension. I.C. 4-15-2.2-1, -22, and -24. The State Employees' Appeals Commission, created by the General Assembly, is solely authorized "[t]o hear or investigate those appeals from state employees as is set forth in IC 4-15-2.2-42. . ." I.C. 4-15-1.5-6; see *Indiana Bell Tel. Co., Inc. v. Indiana Util. Reg. Comm'n*, 715 N.E.2d 351, 354 (Ind. 1999). For an at-will state employee to invoke the statutory jurisdiction of SEAC, he or she must satisfy the administrative exhaustion requirements as set forth by the General Assembly in the "Complaint Procedure." I.C. 4-15-2.2-42.
5. There is a strong preference in Indiana for satisfying the requirements of administrative exhaustion before statutory jurisdiction can be invoked. *Koehlinger v. State Lottery Com'n of Indiana*, 933 N.E.2d 534, 538 (Ind. Ct. App. 2010). Furthermore, a decision is deemed void if SEAC "fails to stay within its jurisdiction and to abide by the statutory and legal principles that guide it." *Indiana Gas Co., Inc. v. Indiana Finance Authority*, 977 N.E.2d 981, 996 (Ind. Ct. App. 2012).

III. Conclusions of Law as to the SPD Email, Futility and Estoppel Doctrines

1. In Indiana, administrative agencies may not acquire jurisdiction by means of estoppel. *Howell v. Indiana-American Water Co., Inc.*, 668 N.E.2d 1272, 1275-1276 (Ind. Ct. App. 1996). Therefore, Petitioner Cloud may not assert that she reasonably relied upon the SPD Email as fulfilling her Step 2 Civil Service complaint. Moreover, Petitioner's email chain with Ms. Crull shows that Petitioner herself was entertaining doubt about whether Step II still needed to be exhausted. Petitioner should have reasonably filed at Step II in light of the Step I denial's instructions, despite any confusion caused by Ms. Crull's email. Estoppel against the government agency is unavailable in this context.
2. To prevail upon a futility claim, Petitioner Cloud must show that SPD "was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances." *Indiana State Bldg. and Constr. Trades Council v. Warsaw Cmty. School Corp.*, 493 N.E.2d 800, 806 (Ind. Ct. App. 1986). However, the futility exception to the administrative exhaustion requirement is not established lightly. *City of East Chicago v. Copeland*, 839 N.E.2d 737, 743 (Ind. Ct. App. 2005). There is no sufficient showing in the record that SPD was powerless to effect a remedy or that a remedy would be fruitless. In

fact, the statutory structure and SPD's statutory powers at Step II show that SPD's Director could offer a remedy. See, I.C. 4-15-2.2 generally, and Section 42 specifically.

3. Petitioner received the FSSA Step I denial by letter on the same day that she received the SPD Email. To repeat, under this jurisdictional inquiry, it is highly significant that FSSA's Step I denial correctly states:

If you are not satisfied with this decision, you have fifteen (15) calendar days to submit your complaint to step 2, the State Personnel Director: State Personnel Department, 402 West Washington Street, Room W161, Indianapolis, Indiana 46204; ATTN: Civil Service Employee Complaint; or Fax to 317.232.3089.

4. The fact that Petitioner Cloud was directed to submit her civil service employee complaint (by mail/fax) to Step II on the same day that she received the SPD Email cannot be overlooked. An ambiguous email is simply not enough to excuse administrative exhaustion in light of the clear letter. Petitioner cannot reasonably rely on such email communication to assume fulfillment of Step II. With a strong preference for fulfilling administrative exhaustion and against applying the futility exception, it was not futile for Petitioner Cloud to file a Step II directed towards SPD's Director. Administrative exhaustion is not excused.
5. Prior sections reciting contentions or certain general legal standards are hereby incorporated by reference, as needed. To the extent a given finding of fact is deemed to be 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

According to SEAC's statutory authority, "if a procedural or jurisdictional requirement is not met, the commission shall dismiss the appeal." I.C. 4-15-2.2-42(e). Petitioner's suspension and reprimand Complaint, and this action, is hereby **DISMISSED** with prejudice.⁴

This is the Final Order on behalf of the Commission in this matter. 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 I.C. 4-21.5-5.



DATED: May 29, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
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A copy of the foregoing was sent to the following:

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⁴ The ALJ notes that Petitioner Cloud asserts for the first time in Petitioner's Response to Respondent's Motion to Dismiss that she has since been terminated from state employment. The termination is not part of the instant Complaint. Nothing in this order shall be construed to effect Petitioner's right to timely appeal a termination through the Civil Service employee complaint procedure, starting at Step 1.

Additional copy to:

Joy Grow
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