STATE OF INDIANA
BEFORE THE FIRE PREVENTION AND BUILDING SAFETY COMMISSION

IN RE:	)	**CAUSE NO.**
	)	
NEW PRAIRIE SENIOR HIGH SCHOOL	)	**DHS-1501-FPBSC-001**
	)	

NON-FINAL ORDER OF DISMISSAL

On January 22, 2015, the Respondent in this matter filed a motion to dismiss on the grounds that the order from which the Petitioner had appealed had been revoked. The Respondent attached to its motion a copy of the notice of revocation from the Respondent, also dated January 22, 2015. The ALJ therefore **GRANTS** the Respondent's Motion to Dismiss.

Accordingly, the Administrative Law Judge now enters this Non-Final Order of Dismissal. The ultimate authority in this matter is the Indiana Fire Prevention and Building Safety Commission. Indiana Code § 4-21.5-3-29(d) requires any party seeking to preserve an objection to this order for judicial review to file a written objection that

1. identifies the basis of the objection with reasonable particularity; and
2. is filed with the Commission within fifteen days (or any longer period set by statute) after this order is served.

In the absence of an objection from a party or notice from the Commission of its intent to review any issue related to this order, the Commission shall affirm this order in accordance with Indiana Code § 4-21.5-3-29(c). **This order will be considered by the Commission on March 3, 2015, at 9:00 a.m. (EST), in Conference Center Room B, Indiana Government Center South, 302 West Washington Street, Indianapolis, IN 46204.**

Date: January 26, 2015

HON. JUSTIN P. FORKNER
Administrative Law Judge
Indiana Department of Homeland Security
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A copy of the foregoing was served by U.S. Postal Service upon the following parties and attorneys of record:

Greg Dudeck
5327 N. Cougar Road
New Carlisle, IN 46552

and personally served on the following attorney of record:

Pamela M. Walters, Esq.; Staff Attorney
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STATE OF INDIANA
BEFORE THE FIRE PREVENTION AND BUILDING SAFETY COMMISSION

IN RE:	)	**ADMINISTRATIVE CAUSE NO.**
	)	**14-15**
8560 BROADWAY	)	
	)	
	)	

NON-FINAL ORDER OF DISMISSAL

On November 26, 2014, the Respondent in this matter filed a motion to dismiss based on Indiana Rule of Trial Procedure 12(B)(6). After due consideration of the motion and the Petitioner's reply, on January 5, 2015, the ALJ granted the motion in a written order that included findings of fact and conclusions of law. The Petitioner was given ten days from the issuance of that order to amend his petition for administrative review. That time has passed.

Accordingly, the Administrative Law Judge now enters this Non-Final Order of Dismissal. The ultimate authority in this matter is the Indiana Fire Prevention and Building Safety Commission. Indiana Code § 4-21.5-3-29(d) requires any party seeking to preserve an objection to this order for judicial review to file a written objection that

1. identifies the basis of the objection with reasonable particularity; and
2. is filed with the Commission within fifteen days (or any longer period set by statute) after this order is served.

In the absence of an objection from a party or notice from the Commission of its intent to review any issue related to this order, the Commission shall affirm this order in accordance with Indiana Code § 4-21.5-3-29(c). **This order will be considered by the Commission on March 3, 2015, at 9:00 a.m. (EST), in Conference Center Room B, Indiana Government Center South, 302 West Washington Street, Indianapolis, IN 46204.**

Date: January 30, 2015

HON. JUSTIN P. FORKNER
Administrative Law Judge
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A copy of the foregoing was served by U.S. Postal Service upon the following parties and attorneys of record:

Philip Topor; Fire Marshal
Merrillville Fire Department
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and personally served on the following attorney of record:

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STATE OF INDIANA
BEFORE THE FIRE PREVENTION AND BUILDING SAFETY COMMISSION

IN RE:	)	**ADMINISTRATIVE CAUSE NO.**
	)	**14-15**
8560 BROADWAY	)	
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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS

The Respondent in this matter, the Indiana Department of Homeland Security, has filed a motion to dismiss pursuant to Indiana Trial Rule 12(B)(6). For the reasons explained below, the Administrative Law Judge hereby **GRANTS** the Respondent's motion.

Procedural Background

On April 27, 2014, Dr. Arshad Malik applied for a variance from the Indiana Fire Prevention and Building Safety Commission. On August 5, 2014, the Commission approved Dr. Malik's application with certain conditions. On August 15, 2014, the Petitioner in this matter, Fire Marshal Philip Topor, emailed the Respondent to file a petition for administrative review of Dr. Malik's variance. On September 4, 2014, the Commission granted the Fire Marshal Topor's petition and assigned it to the undersigned ALJ.

A telephonic prehearing conference was held in this matter on Wednesday, October 1, 2014. A subsequent telephonic status conference was held on October 29, 2014, during which the Respondent indicated its intent to file a dispositive motion to terminate this proceeding. The ALJ therefore issued an order setting a deadline of November 26, 2014, for the parties to file any dispositive motions and, pursuant to Indiana Trial Rules 12 and 56, providing that an adverse party would have twenty days to respond to a motion to dismiss or motion for judgment on the pleadings, and thirty days to respond to a motion for summary judgment. Additional briefing would only be permitted with leave from the ALJ.

On November 26, 2014, the Respondent filed a motion to dismiss with supporting memorandum and proposed order. The Petitioner timely filed a response.[1]

Standard of Review

"A motion to dismiss under Ind. Trial Rule 12(B)(6) tests the legal sufficiency of the claim, not the facts which support it." Collard v. Enyeart, 718 N.E.2d 1156, 1158 (Ind. Ct. App. 1999), trans. denied. In reviewing such a motion to dismiss, the ALJ takes as true all allegations upon the face of the complaint and may only dismiss if the Petitioner is not entitled to recover "under any set of facts admissible under the allegations of the complaint." Huffman v. Ind. Office of Envtl. Adjudication, 811 N.E.2d 806, 814 (Ind. 2004) (quoting Huffman v. Ind. Dep't of Envtl. Mgmt., 788 N.E.2d 505, 510 (Ind. Ct. App. 2003)). The pleadings are viewed "in a light most favorable to the nonmoving party" and "every reasonable inference" must be drawn in favor of that party. Id.

Findings of Fact

The ALJ hereby issues the following findings of fact, based solely on the pleadings in this matter.[2]

1. On April 27, 2014, Dr. Arshad P. Malik filed an application for variance with the Commission. The application related to a building owned by Dr. Malik and located at 8560 Broadway, Merrillville, IN 46410.

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[1] The Petitioner's response was emailed to the ALJ. This is permissible for a response to a motion to dismiss under the Indiana Administrative Orders and Procedures Act. See Ind. Code § 4-21.5-3-1(b)(3). It is *not*, however, a permissible means by which to serve a petition for administrative review under AOPA. See Ind. Code § 4-21.5-3-1(b)(2). Nevertheless, the Respondent treated the Petitioner's email as a petition for administrative review and set it on the Commission's agenda. The Commission granted the petition and assigned it to the undersigned for resolution, and the Respondent does not now challenge the petition as being improperly served.

Additionally, it was not immediately clear if the Petitioner filed his response solely with the ALJ, sent an identical email to the Respondent, or served the Respondent with a hard-copy of the response. The ALJ forwarded the Petitioner's response to counsel for the Respondent, without any substantive comment, to ensure all parties were served with all filings.

[2] The "pleadings," such as they are in an administrative appeal, are considered here to be the Dr. Malik's application for variance, the Commission's order granting Dr. Malik's request, the Petitioner's email requesting administrative review of that order, counsel for the Respondent's subsequent email, and the Commission's letter granting the Petitioner's petition for review.

2. The application sought a variance from Section 901.6 of the 2008 Indiana Fire Code, which addresses the inspection, testing, and maintenance of fire detection, alarm, and extinguishing systems.[3] The application attested that the sprinkler system did not hold air pressure and would not function, and complying with Section 901.6's requirements would result in an undue financial hardship.

3. The Commission granted Dr. Malik's application for a variance at its August 5, 2014, meeting, and notified Dr. Malik of this result in an order sent on August 6, 2014. The order was addressed and sent only to Dr. Malik.

4. The order noted that the variance was granted with the conditions that "[s]igns are to be posted on the sprinkler risers and the fire department connection stating that the sprinkler system is nonfunctioning and the responding fire department shall be notified."

5. The Petitioner is the Fire Marshal for the City of Merrillville, Indiana.

6. On August 15, 2014, the Petitioner sent an email to Ms. Mara Snyder, then-counsel for the Indiana Department of Homeland Security, stating "Mara, I was told that Dr. Malik got a variance for keeping his sprinkler system out of service and leaving it in place. I would like to file an appeal because I don't agree with leaving it in place. Thank you."

7. On August 17, 2014, Ms. Snyder forwarded the Petitioner's email to an IDHS employee responsible for providing staff support to the Commission, with instructions to "[p]lease print out this e-mail as a timely appeal for the Sept. agenda."

8. On September 4, 2014, the Commission met at a regularly scheduled meeting and granted the Petitioner's petition for review. The Commission notified the Petitioner of this decision by letter sent on September 8, 2014.

9. Dr. Malik did not appeal the Commission's order granting his variance and has not been made a party to this action in any capacity, nor was he notified by the Commission that it had granted the Petitioner's petition for administrative review and assigned this matter to an administrative law judge.

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[3] See 2008 Ind. Fire Code § 901.6 (adopted by 675 Ind. Admin. Code 22-2.4-1).

Conclusions of Law

Applying the law set forth in this decision to the factual findings supported by the evidence, the ALJ hereby reaches the following conclusions of law with respect to the issues presented:

1. The Indiana Code creates the Commission and requires it to adopt statewide building and fire safety laws. Ind. Code §§ 22-12-2-1, 22-13-2-2. The Commission is also authorized by statute to "grant a variance to a rule that it has adopted." Ind. Code § 22-13-2-11(a). Such orders granting variances are subject to administrative review under the Indiana Administrative Orders and Procedures Act. Ind. Code §§ 22-12-7-1, -2; see also Ind. Code § 4-21.5-3-5(a)(3), -7(a); 675 Ind. Admin. Code 12-5-6(j).

   This action arises out of an order issued by the Commission and granting, with conditions, a variance. It is therefore subject to the provisions of AOPA.

2. A motion to dismiss pursuant to Trial Rule 12(B)(6) seeks to dismiss an action for "[f]ailure to state a claim upon which relief can be granted." The Petitioner here sought administrative review of an agency action. In the most generic and broadest sense, this is most certainly "a claim upon which relief can be granted."

   But the substance of the Respondent's motion more specifically argues that the Petitioner is not qualified to pursue this administrative appeal—in a way, that he lacks standing. Thus, the ALJ concludes that Trial Rule 12(B)(6) still provides the proper framework for consideration of the Respondent's motion. See Schulz v. State, 731 N.E.2d 1041, 1043 (Ind. Ct. App. 2000) ("An allegation that a party lacks standing is properly filed under Ind. Trial Rule 12(B)(6).").

3. The aim of the standing doctrine, in courts of law, "is to insure that the party before the court has a substantive right to enforce the claim that is being made in the litigation." Id. at 1044. "It is a key component of Indiana's constitutional scheme of separation of powers" and "is a prudential limitation on the ability of individuals to seek redress in our courts and may be raised at any point during the litigation either by the parties or the court sua sponte."[4] Id.

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[4] This statement aside, the better practice would be for this issue to be raised with some obedience to Trial Rule 12(B)'s requirements. "A motion making any of these defenses shall be made before pleading if a further pleading is permitted or within twenty [20] days after service of the prior pleading if none is required." Trial Rule 12(B). This timeline does not correlate identically to the process for filing of a petition for administrative review, given that the petition must be granted as timely before a party may file dispositive motions. But certainly within twenty days of that latter occurrence a party could reasonably assert this defense.

But while the concept of standing is analogous to the Respondent's claim here—and permits its motion under the rubric of Trial Rule 12(B)(6)—the standards for this judicial doctrine do not directly apply in this case. Huffman, 811 N.E.2d at 809.

4. Instead, in an administrative proceeding the General Assembly "may dictate access to administrative review on terms the same as or more or less generous than access to file a lawsuit." Id. And the General Assembly has done just this through the relevant AOPA provision, which states to qualify for review of an administrative order, a person's petition for review must do the following:

> State[] facts demonstrating that:
> (A) the petitioner is a person to whom the order is specifically directed;
> (B) the petitioner is aggrieved or adversely affected by the order; or
> (C) the petitioner is entitled to review under any law.

Ind. Code § 4-21.5-3-7(a)(1).

In short, to qualify for administrative review of the Commission's order granting Dr. Malik's variance and survive the Respondent's Trial Rule 12(B)(6) challenge, the Petitioner's complaint—his petition for administrative review—must satisfy at least one of these three requirements.

5. The Respondent argues that the Petitioner is not the person to whom the Commission's order was specifically directed, and that the Petitioner's pleadings fail to demonstrate facts that he is aggrieved or adversely affected by the approval of the variance application or that he is entitled to review under any law. The ALJ agrees.

6. It is axiomatic that the Petitioner is not the person to whom the Commission's order was specifically directed—the order is addressed only to Dr. Malik, was mailed only to Dr. Malik, and relates only to a variance application filed by Dr. Malik. In other words, the order was specifically direct to Dr. Malik and no-one else. Thus, the Petitioner does not meet the requirement of Indiana Code § 4-21.5-3-7(a)(1)(A).

7. As for subsection (a)(1)(B), to be "aggrieved or adversely affected" sufficient to qualify for administrative review under AOPA, "a person must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it a pecuniary, property, or personal interest." Huffman, 811 N.E.2d at 810; Ind. Assoc. of Beverage Retailers, Inc. v. Ind. Alcohol & Tobacco Comm'n, 836 N.E.2d 255, 259 (Ind. 2005). This is different than the standard

for AOPA's predecessor—the Administrative Adjudication Act—which "allowed 'all interested persons or parties' the ability to seek administrative review of agency action." Huffman, 811 N.E.2d at 810.

The current AOPA standard is therefore narrower than the prior AAA standard. Rather than simply being an "interested person" in the matter, to qualify for administrative review a petitioner must have suffered, or be likely to suffer, a distinct injury to either a pecuniary, property, or personal interest.

8. The variance and conditions underlying this matter permitted Dr. Malik to keep his sprinkler system out of service, but required him to leave the system in place with signs on the visible portions noting that the system was out of service. In his petition for administrative review, the Petitioner stated that "I would like to file an appeal because I don't agree with leaving it in place."

   The Petitioner expressed disagreement with the Commission's order, but as the Indiana Supreme Court in Huffman stated, "[t]he concept of 'aggrieved' is more than a feeling of concern or disagreement with a policy; rather, it is a personalized harm." Id. at 812. The Petitioner's initial pleading is therefore insufficient to satisfy the requirement of Indiana Code § 4-21.5-3-7(a)(1)(B).

9. In his response to the Respondent's motion to dismiss, the Petitioner elaborated on why he disagreed with the variance.[5] He articulated the following points:

   a. Leaving a broken sprinkler system in place "creates a false sense of safety" and is also a violation of a different provision of the Indiana Fire Code that prohibits any device that has the physical appearance of life safety or fire protection equipment but does not perform those functions.

   b. Requiring a sign that the sprinkler system is out of service on the exterior of the building will result in him receiving "continuous phone calls and complaints because the public will see the system is out of service which looks bad." Additionally, he asserts that the sign will lead other business owners in Merrillville to ask him why they are required to maintain their sprinkler systems but Dr. Malik is not.

   c. The Indiana Fire Code requires fire detection, alarm, and extinguishing systems to be maintained in an operative condition, and replaced or repaired when not functioning. The variance violates this section.

[5] The Petitioner presented the same concerns during the telephonic prehearing conference in this matter, when asked by the ALJ to clarify the nature of his petition.

d. This variance "will continue to be an on going issue in the years ahead as new inspectors come about and as they see a system in place that is non functioning." There might not be an issue while Dr. Malik owns the building, but "when he moves on records will get lost, moved or forgotten which will make this become an issue again."

10. These statements might be construed as presenting matters outside the pleadings. Under Trial Rule 12, if these matters were not excluded then the Respondent's motion would be treated as a motion for summary judgment and additional evidence could be presented.[6]

11. But it is not necessary to decide whether to exclude the statements as additional evidence or permit them and allow the Respondent to reply and present its own designated evidence. Because even if those statements were admitted—and even viewing them in a light most favorable to the Petitioner and drawing every reasonable inference from them—they still would not rise to satisfy the standard of being "aggrieved or adversely affected" as that phrase is defined.

12. The concerns that leaving the broken system in place would create a false sense of safety, look bad to the public, cause confusion amongst other business owners, or undermine the validity of enforcing fire safety laws in Merrillville, are likely legitimate. But there is nothing within AOPA that allows a public official's generalized concerns or interest—even those of a local fire marshal charged with enforcing fire safety laws—to supplant the requirement of being aggrieved or personally affected.

    At most these are examples of the doctrine of "public standing," whereby "persons with no personal stake in a matter [may] bring suit when certain public rights are at issue." Huffman, 811 N.E.2d at 812, 812 n.5. But the public standing doctrine does not apply within AOPA: "[t]he language of AOPA does not allow for administrative review based on a generalized concern as a member of the public. The statute says 'aggrieved or adversely affected' and this contemplates some sort of personalized harm." Id.

    And as discussed below, even a Fire Marshal presenting these concerns—rather than simply a general member of the public—does not have any broader right to qualification under AOPA.

13. Likewise, the Petitioner's concern that the records might, or will, get lost, moved, or forgotten when Dr. Malik leaves the building—thereby causing confusion with new inspectors—is also probably legitimate. But even

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[6] If, in a motion to dismiss for failure to state a claim, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Ind. Trial Rule 12(B). "In such case, all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Id.; see also Huffman, 811 N.E.2d at 814.

assuming these were personal harms to the Petitioner, a person who is aggrieved or adversely affected "must *have suffered* or *be likely to suffer in the immediate future*" those harms. Id. at 810 (emphasis added).

There is no evidence that Dr. Malik is going to move from the facility in the immediate future, or that new inspectors are arriving soon, or that the records related to this variance are in immediate jeopardy.[7] In short, this concern is still speculative and too far removed from the immediate future to constitute a basis for qualification under Indiana Code § 4-21.5-3-7(a)(1)(B).

14. The Petitioner's stated concern that the variance violates other sections of the fire safety code likewise cannot be evidence to support this provision. For one thing, as a general matter the Commission is allowed by statute to issue variances from the fire and building safety codes—that is the point of the variance in the first place.

    As to the specific claims, the Petitioner first argues that the variance creates a violation of Section 901.6 of the Indiana Fire Code. But on its face, the variance states that it is a variance *from* Section 901.6. Thus, however broad Section 901.6's scope actually is, the Commission saw fit to exclude Dr. Malik's facility from those requirements. This is within its power.

    With respect to the Petitioner's claim that the variance creates a violation of Section 901.4.4 of the fire safety code, this may be correct. But that does not necessarily mean that a variance from Section 901.6 is invalid—nor does it constitute grounds for the Petitioner to seek administrative review of the issuance of that variance.[8]

15. This leaves the Petitioner's concern that the effect of this variance will be that he will field numerous phone calls, questions, and complaints from the public and local business owners. And once again, this might very well be the likely outcome.

    But responding to public inquiry must be part and parcel of service as a public official. Cf. Ind. Code § 5-14-1.5-1 ("this state and its political subdivisions exist only to aid in the conduct of the business of the people of this state"). No matter how time-consuming it might be or burdensome it might feel to the official at times, this responsibility cannot be used as proof of an injury to a pecuniary, property, or personal interest.

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[7] Even assuming that poor record-keeping and a failure to pass along information somehow constitute a cognizable injury under AOPA.

[8] Certainly, however, as Fire Marshal the Petitioner is statutorily empowered to issue an inspection order with respect to any violation of Section 901.4.4 that might exist. See Ind. Code §§ 36-8-17-6, -8, -9.

16. Finally, neither the Petitioner's petition for review nor his response to the Respondent's motion to dismiss present any arguments or evidence to show that the Petitioner is entitled to administrative review under any other law. Certainly none of the statutes governing local fire inspections or officials grant such a right. See Ind. Code 36-8-17. Not even the State Fire Marshal has such an entitlement. See Ind. Code 22-14-2.

17. The ALJ therefore concludes that the Petitioner is not the person to whom the order is specifically directed, the Petitioner is not aggrieved or affected by the order, and the Petitioner is not entitled to administrative review under any other law. Accordingly, the Petitioner does not meet the statutory requirements to seek administrative review of the Commission's August 5, 2014 order.

18. But because the Respondent's motion was invoked Trial Rule 12(B)'s framework, this conclusion does not necessarily terminate the proceeding. Trial Rule 12(B) provides that "[w]hen a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule the pleading may be amended once as of right pursuant to Rule 15(A) within ten [10] days after service of notice of the court's order sustaining the motion." The Petitioner will therefore be given the opportunity to amend his petition for administrative review to comply with the requirements of Indiana Code § 4-21.5-3-7(a)(1).

Decision and Order

The Respondent's motion to dismiss is **GRANTED**. The Petitioner has ten days from the service of this order to file with the ALJ a petition for administrative review that complies with Indiana Code § 4-21.5-3-7(a)(1); see also Ind. Code § 4-21.5-3-2(e). As an amended petition, this need not be filed by U.S. Mail; email is sufficient. But a copy *must* be served on the Respondent.

If no amendment is filed within that time, a non-final order of dismissal will be issued to be considered by the Indiana Fire Prevention and Building Safety Commission as the ultimate authority in this proceeding.

Date: January 5, 2015

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