IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILIP J. KERRIGAN,	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	**NO. 04-CV-1189**
ELAINE CHAO, SECRETARY OF	:	
LABOR, UNITED STATES	:	
DEPARTMENT OF LABOR,	:	
Defendant.	:	

Diamond, J.

MEMORANDUM

Plaintiff Philip Kerrigan has brought this action *pro se*, alleging that the Secretary of Labor violated his Due Process and Equal Protection rights, and his rights under the Federal Employees Compensation Act, when the Labor Department terminated his disability benefits. The Secretary has moved to Dismiss; Plaintiff has moved for Summary Judgment. I deny the Plaintiff's Motion, grant the Secretary's Motion, and Dismiss the Complaint.

STANDARD OF REVIEW

Although the Secretary has moved to dismiss pursuant to Fed. Rule Civ. P. 12(b)(1) -- for want of jurisdiction -- the Secretary also argues that the Plaintiff has failed to state viable causes of action. (See, e.g., Secretary's Brief at 18). Accordingly, I will review the Secretary's Motion under Rule 12(b)(1) and Rule 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(1) can challenge a complaint on its face -- a "facial attack" -- or it can challenge the existence of subject matter jurisdiction -- a "factual attack." Krumins v. Atkinson, No. 95-5737, 1996 WL 432477, at

*1 (E.D. Pa. July 22, 1996) (quoting Mortenson v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). The Third Circuit has directed that:

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Mortenson, 549 F.2d at 891. The plaintiff has the burden of persuading the Court that it has jurisdiction. Gould Elecs. Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000).

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. LaFate v. Hosp. Billing & Collections Serv. Ltd., No. 03-985, 2004 U.S. Dist. LEXIS 17592, *2 (E.D. Pa. Sept. 1, 2004) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). In considering a Rule 12(b)(6) motion, the Court is required to accept all well-pleaded allegations in the complaint as true, and view these allegations in the light most favorable to the non-moving party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989) (citations omitted); Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 77 (3d Cir. 2003). Dismissal is warranted only if the plaintiff cannot obtain relief under any set of facts that could be established. Ramadan v. Chase Manhattan Corp., 229 F.3d 194, 195 (3d Cir. 2000) (citing Alexander v. Whitman, 114 F.3d 1392, 1397-98 (3d. Cir. 1997)). In reviewing the propriety of administrative proceedings -- like those at issue here -- the Court may consider at the Rule 12(b)(6) stage the record of administrative actions, opinions, and decisions on which a Plaintiff bases his complaint. Pension Benefit Guar. Corp. v. White Consol Indus., 998 F.2d 1192, 1196-1197 (3d Cir. 1993); Tlush v. Mfrs. Res. Ctr., 315 F. Supp. 2d 650, 654 (E.D. Pa. 2002).

Courts are obligated liberally to construe *pro se* pleadings to ensure that *pro se* litigants are afforded proper deference. Castro v. Chesney, No. 97-4983, 1998 U.S. Dist. LEXIS 17278, *26 (E.D. Pa. Nov. 3, 1998) (citing Haines v. Kerner, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972); Lancaster County Office of Aging v. Schoener, No. 02-7248, 2003 U.S. Dist. LEXIS 1342, *3, n2. (E.D. Pa. Jan. 13, 2003) (citations omitted); see also United States ex rel. Turner v. Rundle, 438 F.2d 839, 845 (3d Cir. 1971) (*pro se* petitions may be inartfully drawn and should be read "with a measure of tolerance") (citations omitted). "[P]ro se plaintiffs . . . are entitled to even greater deference when the sufficiency of their pleadings are [sic] called into question." Boone v. Chesney, No. 94-3293, 1994 U.S. Dist. LEXIS 12339, at *1 (E.D. Pa. Sept. 2, 1994) (citing Haines; Hughes v. Rowe, 449 U.S. 5, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980)). A court may dismiss a *pro se* complaint under Rule 12(b)(6) only when it "appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McDowell v. Del. State Police, 88 F.3d 188, 189 (3d Cir. 1996) (quoting Haines, at 520). "On the other hand, a judge may not become a surrogate attorney for the party, even one who is proceeding *pro se*." Taylor v. Diznoff, 633 F. Supp. 640, 641 (W.D. Pa. 1986) (quoting Mazur v. Pa. Dept. of Transp., 507 F. Supp. 3, 5 (E.D. Pa. 1980), aff'd 649 F.2d 860 (3d Cir. 1981).

THE COMPLAINT, THE INSTANT MOTIONS, AND THE RECORD IN THIS CASE

The confusing nature of Plaintiff's pleadings and allegations has encumbered the evaluation of both sides' Motions. For instance, Plaintiff's Complaint is two pages long and includes only the barest allegations of governmental misconduct. Plaintiff has appended to his Complaint a "Declaration," numerous documents from his administrative proceedings, and a

supporting "Memorandum." Plaintiff has also filed a "Response" to the Secretary's Motion to Dismiss, to which he has also appended numerous administrative proceeding documents.

I have combined all the allegations in these pleadings and filings so that, together, they constitute Plaintiff's Complaint for purposes of evaluating the Secretary's Motion to Dismiss. I have also considered the documents that Plaintiff has appended to those "Complaint" papers, both because they are the documents on which Plaintiff bases his Complaint, and because they constitute part of his administrative record. Weinberg v. J.S. Cornell & Son, Inc., No. 01-5706, 2004 U.S. Dist. LEXIS 19052, *3-4 (E.D. Pa. Sept. 21, 2004) (citing Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994)).

In moving to dismiss, the Secretary has also provided me with extensive documentation from Plaintiff's administrative proceedings. Under Rule 12(b)(6), I may consider these documents without converting the Secretary's Motion into one for Summary Judgment. In re Rockefeller Ctr. Props. Sec. Litig., 184 F.3d 280, 292-293 (3d Cir. 1999) (a court may consider documents integral to or relied on in the complaint, letter decisions of government agencies, and published reports of administrative bodies, without converting a motion to dismiss into a motion for summary judgment); Pension Benefit Guar. Corp., 998 F.2d at 1196-1197; Rogan v. Giant Eagle, Inc., 113 F. Supp. 2d 777, 781-782 (W.D. Pa. 2000); Mitchell v. Cellone, 291 F. Supp. 2d 368, 371 (W.D. Pa. 2003); In re Wellbutrin/Zyban Antitrust Litig., 281 F. Supp. 2d 751, 755 (E.D. Pa. July 25, 2003).

Finally, Plaintiff's "Motion for Summary Judgment" is little more than a restatement of why he believes his benefits were improperly terminated. Accordingly, I will consider the allegations in Plaintiff's Summary Judgment Motion and the documents he appended to his

"Motion" as part of his "Complaint" in this Court.

PROCEDURAL HISTORY

On March 3, 1986, Plaintiff, a carpenter with the United States Navy, injured his back while working at the Public Works Center in San Diego, California. (Plaintiff's Brief, Exhibit C at 1). Plaintiff missed several weeks of work as a result of the injury. In April 1986, Plaintiff sought workers' compensation benefits pursuant to FECA, claiming that he injured his back in the course of his federal employment. 5 U.S.C. § 8101 *et seq.*; (Plaintiff's Brief, Exhibit C at 2). The Office of Workers' Compensation Programs accepted Plaintiff's claim for a herniated disc in January 1987. (Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Declaration at 2). Plaintiff was paid retroactive compensation for wages lost from April 23, 1986 through May 25, 1986, and July 4, 1986 through May 19, 2002. (Secretary's Brief, Attachment A at 3; Attachment D at 1-2).

In July 1986, Plaintiff received psychological counseling for an emotional condition purportedly caused by his back injury. Plaintiff's claim for psychiatric treatment was initially denied by the OWCP, but, following an appeal to the Office Hearing Representative, the claim was remanded to the OWCP for further development. (Secretary's Brief, Attachment A at 5-7, 14). Following a review of Plaintiff's medical history, Dr. Bruce Smoller, a physician specializing in neurology and psychology, concluded that Plaintiff suffered a work-related emotional condition that was resolved in January 1987. Based on Dr. Smoller's opinion, the OWCP issued a *de novo* decision that Plaintiff suffered a temporary psychiatric problem in 1986. The OWCP agreed to compensate Plaintiff for approximately six months of psychiatric treatment; Plaintiff was required either to submit the related medical bills or appeal through

customary administrative procedures. It is unclear from the record what actions Plaintiff has taken, if any.

In 1992, Plaintiff began receiving back treatment from Dr. James Webber, a family practitioner. Plaintiff applied to the OWCP seeking payment for Dr. Webber's continuing treatment. The OWCP denied this request in February 1995 because Dr. Webber was not an appropriate specialist for Plaintiff's back injuries. On appeal, the Office Hearing Representative affirmed the OWCP decision, stating that Dr. Webber did not specialize in disc injuries. (Secretary's Brief, Attachment A at 11). Plaintiff appealed this ruling to the Employees Compensation Appeals Board, which affirmed. (Secretary's Brief, Attachment B at 1). Plaintiff filed a Petition for Reconsideration which the ECAB denied on April 15, 1999. (Secretary's Brief, Attachment C at 2). On March 21, 2002, OWCP issued a final decision denying Plaintiff's request for a lump sum payment of his disability benefits. The decision included an explanation of Plaintiff's rights to further administrative review.

Following the ECAB decision, the OWCP referred Plaintiff to Anthony W. Salem, a Board-certified orthopedic surgeon, for examination. Dr. Salem concluded that Plaintiff could resume full-time work with restrictions. OWCP then referred Plaintiff for vocational rehabilitation to commence on December 18, 2001. Plaintiff refused to participate in the vocational rehabilitation. By letter dated January 30, 2002, OWCP informed Plaintiff that a failure to cooperate with the vocational counselor could result in a reduction or termination of his benefits. (Secretary's Reply Brief, Attachment A at 1). In response, Plaintiff claimed that the OWCP claims examiner failed adequately to notify him of the vocational rehabilitation and based his conclusion on a false medical opinion. Plaintiff also asserted his disagreement with the

Statement of Accepted Facts provided to Dr. Salem.

On May 19, 2002, OWCP terminated Plaintiff's compensation benefits because of his refusal to participate in vocational rehabilitation. (Secretary's Reply Brief, Attachment B at 1). At Plaintiff's request, the Office Hearing Representative reviewed the OWCP decision. On August 20, 2002, the OHR ruled that termination was proper because of Plaintiff's failure to show good cause for refusing to participate in vocational rehabilitation. Plaintiff unsuccessfully sought a second hearing before the Branch of Hearings and Review. Plaintiff was informed that he could submit evidence to OWCP as a request for reconsideration.

Plaintiff appealed these rulings to the ECAB. On September 16, 2003, ECAB affirmed the OWCP's termination of Plaintiff's benefits, again citing Plaintiff's failure to demonstrate "good cause" for refusing to participate in vocational rehabilitation. (Secretary's Brief, Attachment D at 2-3). ECAB also held that the OHR properly denied Plaintiff's request for a second hearing. (Secretary's Brief, Attachment D at 4).

Plaintiff filed the instant Complaint in March 2004, alleging that the 2002 termination of benefits violated his Due Process and Equal Protection rights and his rights under FECA. He accuses the Secretary of retaliation, perjury, forgery, misrepresentation, concealment of material facts, abuse of process, abuse of discretion, psychiatric abuse, and malfeasance. Plaintiff not only relies on the administrative proceedings just described, he also refers the Court to his efforts to persuade the government to initiate a criminal investigation of these proceedings.

On May 4, 2001, Plaintiff informed the Department of Defense Office of Inspector General of alleged abuse, fraud, and illegality committed by the Labor Department. (Plaintiff's Declaration under FECA at 9). On September 19, 2001, Plaintiff was notified that the case had

been transferred to the Labor Department. (Plaintiff's Declaration under FECA at 10). The Office of Inspector General for the Department of Labor requested, and Plaintiff claims to have provided, additional information regarding the allegations. (Plaintiff's Declaration under FECA at 10). On February 6, 2002, the Inspector General's Office concluded there was "no impropriety" in the Department's actions. (Plaintiff's Declaration under FECA at 10). On October 9, 2002, Plaintiff, purportedly acting on instructions from the United States Attorney's Office, submitted documents pertaining to the same alleged improprieties to the Philadelphia Office of the Federal Bureau of Investigation. (Plaintiff's Declaration under FECA at 12). Plaintiff has not alleged whether the FBI conducted any further investigation.

DISCUSSION

Construing the collection of documents I deem to be Plaintiff's Complaint as liberally as I reasonably can, I believe that Plaintiff seeks to make the following claims:

1. Under FECA, the Secretary improperly denied his claim for benefits.

2. That in denying his claim, the Secretary violated his Due Process and Equal Protection protections rights under the Fifth Amendment to the Constitution, and those rights provided by 42 U.S.C. § 1983.

The Secretary has moved to dismiss.

Federal Employees Compensation Act

The Labor Department terminated Plaintiff's benefits because he refused to participate in vocational rehabilitation. (Secretary's Brief, Attachment D at 2). Plaintiff claims that this decision was incorrect under FECA. (Plaintiff's Memorandum of Points at 17). The Secretary

correctly notes that the statute itself provides that this Court does not have jurisdiction to review a claim for a denial of benefits under FECA:

> The action of the Secretary or his designee in allowing or denying a payment under this subchapter is -- (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128(b); see also Miller v. Bolger, 802 F.2d 660, 662 (3d Cir. 1986) ("after an administrative review procedure, the Secretary's decision is final, and 'not subject to review by another official of the United States or by a court by mandamus or otherwise'" (quoting 5 U.S.C. § 8128(b))). Accordingly, I dismiss for want of jurisdiction Plaintiff's claim that the Secretary improperly terminated his FECA benefits.

Due Process

A limited exception to 5 U.S.C. § 8128(b) has been recognized for consideration of "substantial, cognizable constitutional claims." Freeman v. Herman, No. 98-2649, 1998 U.S. Dist. LEXIS 18645, *11 (E.D. Pa. Nov. 24, 1998); Garner v. United States DOL, 221 F.3d 822 (5th Cir. Miss. 2000); Carson v. United States DOL, No. 04-1171, 2004 U.S. Dist. LEXIS 16621, *4 (E.D. La. Aug. 19, 2004); Ramirez v. Dir. Office of Workers' Comp. Programs, No. 02-188, 2003 U.S. Dist. LEXIS 24326, *10 (W.D. Tx. Sep. 16, 2003). Judicial review is permitted where the challenge is to the manner in which the claim was decided, rather than the substantive merits of the case. See Ramirez, at *10.

Plaintiff argues that the Secretary's 2002 termination of his FECA benefits violated his Due Process rights. The Secretary contends that Plaintiff's Due Process claim is actually a

restatement of his claim that his denial of benefits violated FECA. Accordingly, the Secretary contends that this Court is without jurisdiction to hear the claim. Fed. R. Civ. P. 12(b)(1); (Secretary's Brief at 9-10). I agree that Plaintiff has sought to recast his FECA challenge as a Due Process violation and thus evade § 8128(b)'s jurisdictional bar. To reach this conclusion, however, I must first determine that the Due Process claim is facially inadequate. Accordingly, I must evaluate the claim under Rule 12(b)(6).

"Claims of entitlement to federal disability payments are secured through laws passed by Congress, 5 U.S.C. §§ 8101 - 8193, and therefore, entitlement to the benefits cannot be taken away without due process." Raditch v. United States, 929 F.2d 478, 480 (9th Cir. 1991); see Ramirez, at *13 (disability benefits procured under FECA are valid property interests subject to Due Process protections).

Due Process is a flexible concept and the procedural protection required depends upon the circumstances of the case. Wehner v. Levi, 562 F.2d 1276, 1278 (D.C. Cir. 1977) (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). Due Process has been interpreted to require "at least notice and an opportunity to be respond in some manner, whether in writing or at an oral hearing, before termination of that [property] interest." Raditch, 929 F.2d at 480 (citing Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 546, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985)).

Here, the Secretary afforded the Plaintiff ample process. Plaintiff was given both notice and the opportunity to submit evidence before the reduction of his benefits, including the opportunity to show good cause for his failure to accept vocational rehabilitation counseling. After the reduction in benefits, Plaintiff requested and received hearings before the OHR and the

ECAB. The OWCP warned Plaintiff that his refusal to participate in vocational rehabilitation could result in a termination of his benefits. (Secretary's Reply Brief, Attachment A at 1). It was only after Plaintiff ignored this warning that the Labor Department terminated his benefits. (Secretary's Brief, Attachment D at 2). These procedural safeguards were certainly sufficient to ensure both fairness and reliability of the Secretary's actions. See, e.g., Carson, at *4 (Plaintiff was afforded Due Process when, after she received notice, the OWCP conducted a review of medical documentation rather than hold an evidentiary hearing).

As part of his Due Process claim, Plaintiff also makes scatter-shot allegations against the Secretary, accusing her of malfeasance for having destroyed, lost, and forged documents; presented perjured testimony; and concealed adverse facts. These are, presumably, the same allegations made unsuccessfully to two Inspectors General and the FBI.

Plaintiff's only specific allegation is that the CA-1 accident report, witness statement, and CA-17 status report of May 28, 1986 were lost. (Pl. Declaration at 1; Pl. Reply to Motion to Dismiss at 5). In raising this allegation at the administrative level, Plaintiff failed to produce any evidence of government malfeasance. More significant, Plaintiff fails to allege -- and, has never shown --what information is or may be contained in those documents, or how he has been prejudiced by the absence of the documents. See Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994) (party must show, at the very least, prejudice, in addition to other factors to receive relief for loss or destruction of evidence); Kalumetals, Inc. v. Hitachi Magnetics Corp., 21 F. Supp. 2d 510, 520 (W.D. Pa. 1998).

Plaintiff does not otherwise specify here -- nor did he specify during his administrative proceedings -- exactly what other evidence was forged, destroyed, perjured, or concealed. It is

clear, however, that Plaintiff had more than ample opportunity to raise these claims at the administrative level. The record is replete with references to Plaintiff's allegations of government malfeasance, including numerous letters from Plaintiff to administrative representatives in the Department of Labor and even an attempt by Plaintiff to involve his Congressman in the proceedings. (Affidavit of Philip Kerrigan, 10/09/02; Letter to Robert Barnes, 9/07/02; Letter to Employees' Compensation Board, 3/18/03; Letter to Congressman Chaka Fattah, 04/26/02). Further, Plaintiff repeatedly raised these allegations before administrative fact-finders; they were repeatedly rejected as grounds for reinstatement of his benefits following his refusal to participate in vocational rehabilitation. (Decision of Hearing Representative, 09/16/02, at 2; Decision of ECAB, 9/16/02, at 3; Letter from William J. Staarman, District Director, to Philip Kerrigan 10/15/03). Accordingly, because Plaintiff had numerous opportunities to challenge the allegedly false evidence, Due Process requirements were satisfied. See, e.g., Smith v. Mensinger, 293 F.3d 641, 654 (3d Cir. 2002) (as long as procedural requirements are satisfied, "mere allegations of falsified evidence . . . without more, are not enough to state a due process claim").

The vehemence of Plaintiff's allegations is not a substitute for a legally viable cause of action. Here, Plaintiff essentially pleads that only a corrupt and illegal administrative process could result in his 2002 termination of benefits. The Secretary correctly argues that this is merely a restatement of Plaintiff's contention that he was improperly denied FECA benefits.

Similarly, Plaintiff contends his denial of FECA benefits was wrongful and made "in retaliation for plaintiff's reporting of [a] six month international investigation by Naval Criminal Investigative Service as an act of fraud to [the] Department of Defense." (Plaintiff's Declaration

at 11). Again, Plaintiff may not circumvent this Court's jurisdictional limits "by collaterally attacking a denial of FECA benefits as retaliatory." Nicastro v. Runyon, 60 F. Supp. 2d 181, 186 (S.D. N.Y. 1999).

The relief Plaintiff requests further confirms that what Plaintiff seeks here is not additional "process." Plaintiff asks me to reinstate his benefits, enjoin the Secretary from interfering with those benefits, and award Plaintiff compensatory and special damages. (Plaintiff's Memorandum of Points at 19; Plaintiff's Response Brief at 18). Yet, these remedies are not available for an alleged Due Process violation. See Raditch, 929 F.2d at 481 ("[a] violation of procedural rights requires only a procedural correction, not the reinstatement of a substantive right to which the claimant may not be entitled to on the merits"); Casper v. Herman, 1998 U.S. Dist LEXIS 1845, *12 (E.D. Pa. Feb. 10, 1998) (holding that "any relief at best would be an order allowing Plaintiff an administrative appeal"); Ramirez, at *13. This is undoubtedly why the Secretary believes Plaintiff's "Due Process" complaint has nothing to do with Due Process, but, rather, is simply a claim for FECA benefits -- a claim I am without jurisdiction to hear. 5 U.S.C. § 8128(b).

There is nothing in the administrative record suggesting that Plaintiff was not allowed to litigate fully his governmental malfeasance claims. Nor is there any evidence in the record to support those claims or to show that he suffered any prejudice because of governmental unfairness. In these circumstances, it is apparent that the procedural protections Plaintiff claims he was afforded before the Secretary terminated his benefits were certainly adequate. See, e.g., Carson, at *4. Accordingly, I dismiss Plaintiff's Due Process claim.

Equal Protection

Plaintiff also asserts that the Secretary's denial of his benefits claim violated his Equal Protection rights. Once again, the Secretary argues that this is simply a restatement of his claim for benefits.

Plaintiff argues that the ECAB did not properly follow its own decision in In the Matter of Ernest Dillon, No. 90-78, 41 ECAB 653 (1990) (holding that it is improper for the OWCP to advise an evaluating physician that he may not consider the location of the injured individual's assignment in assessing his ability to return to work). Thus, Plaintiff argues that his Equal Protection rights were violated because the ECAB treated him differently than it treated Ernest Dillon. This is not an Equal Protection claim at all, but, rather, a claim that the Secretary improperly terminated Plaintiff's FECA benefits.

To make out an Equal Protection claim, Plaintiff must allege that he is part of a class -- even a "class of one" -- that "has been intentionally treated differently from others similarly situated, and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000). Thus, Plaintiff's allegation -- that the ECAB erroneously failed to follow one of it own holdings -- does not raise an Equal Protection claim. If it did, this might improperly transform virtually any contention that a court or agency erroneously failed to follow an earlier decision into a claim of unconstitutional discrimination. Accordingly, I dismiss Plaintiff's Equal Protection claim.

Finally, Plaintiff asserts pursuant to 42 U.S.C. § 1983 a "denial of civil rights under the color of law." (Plaintiff's Memorandum of Points at 16). Yet, § 1983 prohibits a deprivation of a constitutional right under color of state or territorial law. 42 U.S.C. § 1983 (2004). As Plaintiff makes claims here against only federal employees acting pursuant to federal law, he has not articulated a cognizable § 1983 claim. See Soeken v. Herman, 35 F. Supp. 2d 99, 102 (D.C. 1999). Accordingly, I dismiss Plaintiff's § 1983 claim.

The Secretary's Motion to Dismiss is **GRANTED**.

Plaintiff's Motion for Summary Judgment is **DENIED**.

An appropriate Order follows.

_____ _____

Date **Paul S. Diamond, J.**

IN THE UNITED STATES DISTRICT COURT
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PHILIP J. KERRIGAN,	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	
	:	**NO. 04-CV-1189**
ELAINE CHAO, SECRETARY OF	**:**	
LABOR, UNITED STATES	**:**	
DEPARTMENT OF LABOR,	**:**	
Defendant.	**:**	

Order

AND NOW, this 26th day of October, 2004, upon consideration of the Secretary's Motion to Dismiss and Plaintiff's response, it is **ORDERED** that the Secretary's Motion is **GRANTED**. Upon consideration of the Plaintiff's Motion for Summary Judgment and the Secretary's response, it is **ORDERED** that the Plaintiff's Motion is **DENIED**.

The Complaint is **DISMISSED WITH PREJUDICE**.

The Clerk of Court shall close this matter for statistical purposes.

BY THE COURT:

_____

Paul S. Diamond, J.