BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

RENE GALVAN Petitioner,	))	**ISSUED**
	) SEAC No. 01-19-011	
vs.	))	JAN 28 2021
INDIANA DEPARTMENT OF CHILD SERVICES Respondent.	)))	STATE EMPLOYEES' APPEALS COMMISSION

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND NON-FINAL ORDER

I. Introduction and Summary

On November 9, 2020, an evidentiary hearing was held in this matter under I.C. § 4-15-2.2-42,[1] before the undersigned Chief Administrative Law Judge ("ALJ"). Petitioner, Mr. Rene Galvan ("Petitioner") appeared by counsel, Mr. Richard Darst. Respondent, Indiana Department of Child Services ("Respondent") appeared by counsel, Ms. Whitney Fritz. Following the hearing, the ALJ gave each party an opportunity to submit Proposed Findings of Fact and Conclusions of Law, which Petitioner and Respondent filed on December 29, 2020.

This case considers Petitioner's termination by Respondent on November 8, 2018, for failure to provide appropriate guidance, support, and direction to those Petitioner supervised to ensure child safety. Petitioner alleges that he was terminated without just cause in contravention of I.C. § 4-15-2.2-42(e) which states a classified employee may only be terminated for just cause, which must be proven by the agency. Petitioner also alleges he was the victim of discrimination and retaliation.

Respondent argues that Petitioner violated Respondent's Child Welfare Policy ("Policy") Sections 4.18, 4.19, and 4.41. Therefore, Respondent contends it had just cause to terminate Petitioner. Respondent also argues it did not act in retaliation or with discrimination in terminating Petitioner.

After having reviewed the arguments, witness testimony, admitted evidence, applicable law, and proposals, and being duly advised, the ALJ issues the following Findings of Fact, Conclusions of Law, and Non-Final Order. Respondent was able to prove that Petitioner's termination was for just cause. Thus, the ALJ finds for Respondent.

[1] Due to the ongoing COVID-19 pandemic, this hearing was held virtually via Microsoft Teams. All parties participated from their respective offices.

II. Findings of Fact

1. At all times relevant to this matter, Petitioner was a Family Case Manager Supervisor ("FCMS"), a classified employee, at Respondent's Madison County Office (Resp't Ex. E).

2. Petitioner was first hired by Respondent as a Family Case Manager ("FCM") in Respondent's Hamilton County Office in December 2012 (Resp't Ex. B).

3. In November 2015, Petitioner transferred to and became a FCMS in Respondent's Madison County Office (Pet'r Test.).

4. In early 2016, Petitioner received his Annual Appraisal covering the 2015 calendar year, which pertained to Petitioner's former role as an FCM, since he spent the vast majority of 2015 in that role. While Petitioner received an overall rating of "meets expectations," Respondent noted that Petitioner struggled with interpersonal relationships and engagement, noting that Petitioner used humor as a means to break office tension, which was not always appreciated (Resp't Ex. F).

5. In October 2016, Petitioner successfully passed his FCMS working test (which is a probationary period of 6-12 months), but in doing so, Respondent noted that Petitioner struggled with certain aspects of teamwork, managing change, and coaching ability (Resp't Ex. E).

6. In mid-2016, Petitioner received an Interim Appraisal for his FCMS role, wherein he received a rating of "meets expectations" (Resp't Ex. G). Respondent noted in the Appraisal that it was sometimes hard to tell when Petitioner was being serious, and that Petitioner had a "directive" personality. *Id.*

7. In February 2017, Petitioner received a rating of "meets expectations" on his 2016 Annual Performance Appraisal (Resp't Ex., H). However, Respondent noted that Petitioner's sometimes joking behavior was off-putting and caused his subordinates not to take Petitioner's decision-making seriously. *Id.*

8. In April 2017, Joanie Crum ("Crum") became the Regional Manager over Madison County (Crum Test.).

9. Crum testified that Respondent's Madison County Office faced serious child welfare issues including multiple child fatalities. *Id.*

10. Crum, therefore, developed a plan to address Madison County's child welfare issues which included safety planning training, PEDS[2] training, and an audit of Madison County by another one of Respondent's Offices. Crum also made relationship building among FCMs and their supervisors a primary focus. This was to ensure accountability and decision making when assessing child safety. *Id.*

11. In July 2017, Crum appointed Christy Tucker-Beebe ("Tucker-Beebe") as the Interim Local Office Director ("LOD") of Madison County. *Id.*

12. In August 2017, Petitioner received an Interim Appraisal, on which he received a rating of "meets expectations," with the caveat that Petitioner's sometimes joking personality was still a concern (Resp't Ex. I).

13. On August 21, 2017, Crum received a complaint from the Director of Respondent's Child Abuse Hotline ("Hotline") regarding an interaction between Petitioner and a hotline employee. The Hotline employee called Petitioner late at night on the Hotline because Petitioner was the designated supervisor on call (Crum Test.).

14. The complaint reported that Petitioner told the Hotline employee her call to Petitioner was ridiculous because the call was not for an emergency, after which Petitioner hung up the phone (Crum Test., Resp't Exs. J, M).

15. Crum addressed the complaint with Petitioner and stated she would listen to the recording of the call. Crum testified that while it was it was not the usual procedure for the Hotline employee to call Petitioner at the time she did, Petitioner should have expressed a more courteous, professional response (Crum Test.).

16. In August 2017, Crum received another complaint from the Director of the Child Advocacy Center ("Center")[3] for which Petitioner was a main point of contact on behalf of Respondent. The director reported that it was difficult to work with Respondent due to Petitioner acting domineering and abrasive in his interactions with the Center (Crum Test., Resp't Ex. J).

17. In August 2017, Crum also received a complaint from a Court Appointed Special Advocate ("CASA") who served as Chair of the Child and Protection Team. Petitioner attended Child and Protection Team meetings on behalf of Respondent; however, the CASA was concerned about Petitioner presenting at a meeting, on behalf of Respondent, that reports of child abuse should not be made for drug-positive infants without the results of a drug screen (Crum Test.).

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[2] PEDS doctors are educated on the medical signs of child abuse and neglect.

[3] The Child Advocacy Center conducts forensic interviews with children.

18. A doctor on the Child and Protection Team also raised this same concern with Respondent's Deputy Director of Field Operations Sarah Sailors ("Sailors"). The doctor reported that Petitioner presented the idea that Respondent did not need to assess infants without a drug screen. *Id.*

19. Crum spoke with Petitioner about these complaints, to which Petitioner stated he understood why such complaints were made but did not intend to be rude. *Id.*

20. Crum also testified that she received a report from another doctor regarding a report of child abuse and/or neglect that the doctor's medical staff tried to make to Respondent. The doctor reported that his medical staff was discouraged from making the report by Petitioner, who told them to call back when they had more information. *Id.*

21. Crum stated that when a call is made regarding child abuse and/or neglect, it is Respondent's practice to refer that person to Respondent's Hotline or take the information and then self-report to the Hotline. It is Respondent's Hotline staff who evaluate whether the report should be assigned to a local office. *Id.*

22. On November 2, 2017, Crum received a report from FCMS Kathryn Heman ("Heman"). Heman was informed by FCM Kala Ragon ("Ragon") that she overheard Petitioner raise his voice and tell an FCM that she was lazy and "pissing [him] off." (Crum Test, Resp't Ex. O).

23. Petitioner did not receive any formal discipline for such reported behavior; however, Petitioner was counseled by Tucker-Beebe. *Id.*

24. At the end of 2017, Heman was promoted to LOD of Madison County (Crum Test.).

25. In early 2018, Petitioner received his 2017 Annual Appraisal. Petitioner received an overall rating of "needs improvement," due to the complaints regarding Petitioner's behavior (Crum Test., Resp't Ex. J). Specifically, Petitioner received a rating of "does not meet expectations" in the areas of employee relations and customer service. *Id.* Petitioner was not put on a Work Improvement Plan ("WIP") as a result of the "needs improvement" rating, though it was an option. *Id.*

26. On February 24, 2018, Heman spoke with a PEDS doctor who was concerned about an infant's injury and the lack of safety planning on the part of Respondent prior to the infant leaving the hospital. Petitioner supervised the case involving the infant (Resp't Ex. P).

27. Petitioner had advised the FCM assigned to the case with the infant that a safety plan was not necessary prior to the infant's release from the hospital because the PEDS doctor did not express concern over the infant's injury; therefore, Petitioner did not see a need for a safety plan (Resp't Ex. P).

28. On March 2, 2018, Heman met with Petitioner to discuss Respondent's lack of safety planning. Heman provided Petitioner with resources to ensure his understanding of the importance of safety staffing and planning (Resp't Ex. P; Pet'r Exs. 26, 27).

29. On March 12, 2018, Petitioner received a Written Counseling[4] for failure to ensure the safety of the infant because Petitioner did not provide the FCM that he supervised with the appropriate support, guidance, or direction (Resp't Ex. P).

30. The Written Counseling advised Petitioner to review Respondent's Child Welfare Manual, to provide consistent communication with FCMs, to ensure all families with assessments will have a safety or communication plan provided to them by the FCM, and to ensure child safety is made Petitioner's utmost priority (Resp't Ex. P).

31. In April 2018, Petitioner received a second Written Counseling for sharing personal information about FCMs with other FCMs (Resp't Ex. R).

32. In June 2018, Rhonda Allen became the Central Assistant Deputy Director of Field Operations for Respondent. Part of Allen's new role was to address child safety issues in Madison County and to improve how the Madison County Office assessed child safety (Allen Test.).

33. On June 29, 2018, Heman discussed Petitioner's performance at regional meetings with Petitioner. Heman counseled Petitioner to accept any feedback given and to not see it as an attack on his performance at the regional meetings. Heman also advised Petitioner to work with, not against, other FCMSs and to not let his personal feelings interfere with his communication (Resp't Ex. S).

34. In May 2018, Petitioner filed a complaint over his 2017 Annual Appraisal with SEAC, which was ultimately dismissed for lack of jurisdiction on June 21, 2018[5] (Pet'r Exs. 25, 33, 35).

35. In August 2018, Petitioner was appointed to the Family Case Manager Supervisor Advisory Committee ("Committee") by Sailors (Pet'r Ex. 1, Allen Test., Crum Test.).

36. Crum and Allen testified that Petitioner was appointed to the Advisory Committee with the hope that he would learn from others on the Committee (Allen Test., Crum Test.).

37. On August 29, 2018, Petitioner received a counseling from Crum for an unprofessional tone Petitioner used in an email to Petitioner's supervisors (Resp't Ex. T).

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[4] The ALJ notes that a counseling is not considered formal discipline, but may serve as notice that failure to correct the performance or repetition of the misconduct may result in disciplinary action. https://www.in.gov/spd/files/discrandp.pdf

[5] The ALJ dismissed Petitioner's SEAC complaint for lack of jurisdiction because Petitioner's complaint concerned the counselings he received. As noted, counselings are not formal discipline under the civil service statute; therefore, SEAC did not have jurisdiction to further consider Petitioner's complaint.

38. In mid-2018, Petitioner received an Interim Appraisal for 2018, wherein he received a "meets expectations" rating. Respondent noted improvement in the areas where Petitioner previously received a "does not meet expectations" in his 2017 Appraisal (Resp't Ex. K).

39. On October 1, 2018, Petitioner received a Written Reprimand for failing to ensure the safety of a child when Petitioner advised an FCM to unsubstantiate an allegation of domestic violence, which, upon review by Respondent, was reversed, which led to the removal of the child from the home (Resp't Ex. U).

40. On October 25, 2018 FCM Kristin Nigg ("Nigg"), who at the time was supervised by Petitioner[6], was conducting a placement for a child. FCM Fadrica Wimsatt ("Wimsatt") was asked to accompany Nigg because Nigg was not yet comfortable placing the child on her own (Pet'r Test., Wimsatt Test.).

41. Wimsatt testified that Nigg expressed difficultly with and concern over the safety plan for the child's placement; therefore, Wimsatt advised Nigg to contact Petitioner. Nigg called Petitioner in the presence of Wimsatt and placed the call on speaker phone (Wimsatt Test.).

42. Wimsatt testified that the call between Nigg and Petitioner was different than other calls Wimsatt had observed between an FCM in the field and their supervisor. Wimsatt testified that Petitioner's call with Nigg was shorter than normal and Petitioner did not ask any follow-up questions regarding the safety plan (Wimsatt Test.).

43. On October 29, 2018, Nigg was at the hospital to assess a report of child abuse and/or neglect regarding a drug-exposed infant (Resp't Ex. W). Nigg was again accompanied by another more experienced FCM, FCM Elise Wilson ("Wilson"). *Id.* When Nigg had questions regarding how to proceed with her assessment, Nigg was advised by Wilson to contact Petitioner. *Id.*

44. Nigg called Petitioner from outside the hospital room and reported that Petitioner accused her of speaking to him in front of the family. Nigg stated that when she attempted to clarify with Petitioner that she was in fact outside the hospital room, Petitioner was dismissive (Resp't Ex. W).

45. Petitioner stated that he answered Nigg's questions, but heard people speaking in the background of the call, so he asked Nigg to not speak with him around the family. *Id.* Petitioner then told Nigg that he would request another county to finish the assessment and ended the call (Pet'r Test.).

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[6] Nigg's usual supervisor went on maternity leave around October 2018; therefore, Petitioner was temporality assigned as Nigg's supervisor.

46. On October 30, 2018, Petitioner was out of the office attending a Family Case Manager Supervisor Advisory Committee ("FCMS Committee") meeting (Pet'r Test.). Petitioner testified that he attempted to contact Nigg by telephone in order to follow up with her concerns on October 25 and 29, 2018, but she did not answer. *Id.* Petitioner was then notified on that same day by Heman that he no longer supervised Nigg. *Id.*

47. In November 2018, Heman resigned her position with Respondent. Ashley Krumbach ("Krumbach") who was the LOD for Respondent's Marion County East Office was appointed as the Interim LOD for Madison County (Crum Test., Allen Test.).

48. On November 8, 2018, Petitioner participated in a pre-deprivation meeting along with Crum and Krumbach regarding Petitioner's dismissive behavior and lack of guidance and direction to Nigg (Resp't Ex. AA).

49. During the meeting, Petitioner stated he provided assistance to Nigg on October 25, 2018 by answering her questions when she called and by assigning another FCM to accompany Nigg (Pet'r Test.).

50. Petitioner also stated he provided assistance to Nigg on October 29, 2018, as he attempted to answer Nigg's questions on the phone but had believed that Nigg was in the room with the family (Pet'r Test.).

51. After a review of Petitioner's performance history, written counselings, written reprimand from October 2018, and the gravity of the child safety issues related to Petitioner's performance issues, Petitioner was terminated on November 8, 2018, for failure to provide appropriate guidance, support, and direction to Nigg in order to ensure child safety (Crum Test., Allen Test., Resp't Ex. A).

III. Conclusions of Law

1. SEAC is a creature of statute, charged with fairly and impartially administering Civil Service System appeals. I.C. § 4-15-2.2 *et seq*. SEAC's jurisdiction over such appeals is divided into classified (just cause claims) and unclassified (at-will claims). I.C. §§ 4-15-2.2-23, 24. Petitioner was a classified employee at all relevant times.

2. This is a classified (just cause) case under the Civil Service System. A state agency may only take material adverse employment actions against a classified state employee for just cause. I.C. § 4-15-2.2-23. In a disciplinary case involving a classified employee the state agency has the initial and ultimate burden of proving by a preponderance of the credible evidence that there was just cause for imposing the adverse employment action. Ind. Code § 4-15-2.2-42(g); *see also* Non-Final and Final Orders in *Miller v. FSSA*, SEAC No. 05-12-060 (2012); Non-Final and Final Orders in *Cole v. DWD*, SEAC No. 02-12-019 (2013); Non-Final and Final Orders in *Johnson v. DWD*, SEAC No. 05-13-034 (2014). Therefore, if the Respondent fails to establish just cause, the challenged adverse employment action is invalid.

3. To establish just cause, the Respondent may refer to the Petitioner's work performance or service rating. I.C. § 4-15-2.2-36(e). An agency's service ratings and employee performance standards "must be specific, measurable, achievable, relevant to the strategic objective of the employee's state agency or state institution, and time sensitive." *Id.* Therefore, in determining whether just cause was established, SEAC may consider Petitioner's performance as compared to the Respondent's employee performance standards. I.C. § 4-15-2.2-12, 36 and 42.

4. Additionally, the inquiry focuses on the reasonableness of the employer agency's workplace expectations. Employer expectations must be reasonably well communicated and consistently applied to similarly situated employees. *See Miller, Cole and Johnson, supra*. The reasonable expectations of the Respondent may include its communicated employee performance standards and expected outcomes. *Id.* The just cause standard requires the Respondent to act with reasonableness, not perfection. *See Ghosh v. Ind. State Ethics Com'n*, 930 N.E.2d 23 (Ind. 2010); *Tacket v. Delco Remy*, 959 F.2d 650 (7th Cir. 1992) (just cause standards in other contexts in Indiana similarly looks to the reasonable expectations of the employer).

5. If an agency establishes just cause, "the [C]ommission shall defer to the appointing authority's choice as to the discipline imposed" I.C. § 4-15-2.2-42(g). The ALJ is not authorized to substitute his own judgment after the agency proves it had just cause to impose the adverse employment action.

6. Petitioner argues that he was discriminated against due to his race, that other employees of Respondent received more favorable treatment. and that he was retaliated against for complaining about such discrimination.

7. The ALJ will first address Petitioner's argument that he was discriminated against via disparate treatment.

8. Allegations of discrimination are handled under Title VII of the Federal Civil Rights Act of 1964, as amended. *See also*, the Indiana Civil Rights Act (Ind. Code § 22-9), which prohibits racially based employment discrimination under state law. The Title VII discrimination analysis is often referred to as the modified McDonnell Douglas burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

9. There are three steps to this analysis. First the petitioner-employee "has the initial burden of establishing a prima facie case of discrimination." *Ind. Civil Rights Comm'n v. S. Ind. Gas & Elec. Co.,* 648 N.E.2d 647 (Ind. Ct. App. 1995). This includes showing that he belongs to a protected class, his job performance met the employer's legitimate expectations, he suffered an adverse employment action, and another similarly situated individual who was not in the protected class was treated more favorably. *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012); *McDonnell Douglas*, 411 U.S. 792.

10. Second, if the petitioner-employee establishes a prima facie case of discrimination, the burden shifts to the respondent-agency to show a legitimate, nondiscriminatory reason for the adverse employment action(s). *Id.*.

11. Third, once the respondent-agency shows such reason, the burden shifts back to the petitioner-employee to "present evidence that the stated reason was just a 'pretext' which in turn permits an inference of unlawful discrimination." *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012) (citing *McDonnell Douglas*, 411 U.S. at 804).

12. When analyzing claims of discrimination under *McDonnell Douglas*, 7th Circuit courts are directed to look at the evidence as a whole. *Ortiz v. Werner Enters., Inc.,* 834 F.3d 760, 764 (7th Cir. 2016). In *Ortiz* the Court stated:

> Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself or whether just the "direct" evidence does so, or the "indirect" evidence. Evidence is evidence. Relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled "direct" or "indirect." *Id.*

13. In order to show discrimination via disparate treatment, Petitioner must present evidence that, considered as a whole, would allow a reasonable juror (here, the ALJ) to conclude that the plaintiff was discriminated against due to a protected characteristic." *Knapp v. Evgeros, Inc.*, 205 F. Supp. 3d 946, 956 (N.D. Ill. 2016).

14. First, Petitioner must show he is a member of a protected class. Petitioner identifies as Hispanic and therefore meets this element.

15. Next, Petitioner must show that his job performance was meeting Respondent's legitimate expectations.

16. Respondent argues that as an FCMS, Petitioner was reasonably expected to provide the appropriate guidance, support, and direction to Nigg regarding her concerns for child safety on October 25 and 29, 2018.

17. Respondent also argues that Petitioner failed to comply with Respondent's Child Welfare Policy ("Policy") Section 4.18, entitled "Initial Safety Assessment", Section 4.19, entitled "Family Support-Community Services Plan", and Section 4.41 entitled "Safety Staffing Plan",[7] when Petitioner failed to provide guidance to Nigg.

18. Section 4.18 of Respondent's Policy states that Respondent is to complete an initial Safety Assessment within (24) hours of the initiation of every assessment (Resp't Ex. DD, Crum Test.).

19. Respondent argues that Petitioner violated Section 4.18 because Nigg was unable to complete an initial safety assessment on October 29, 2018, due to Petitioner's lack of assistance.

20. Petitioner argues that he overheard people in the background when Nigg called; therefore, Petitioner believed Nigg was speaking in front of the child's family. However, Petitioner states he instructed Nigg on how to proceed with the assessment and that he told Nigg he would contact Respondent's Office in another county to complete the assessment (Pet'r Test., Resp't Ex. 1).

21. To the contrary, in an email from Nigg to Heman, Nigg states that despite her attempts to convince Petitioner about her whereabouts during the call, Petitioner was nevertheless dismissive and adamant that she was speaking in front of the family (Resp't Ex. W).

22. Ultimately, Petitioner's position is that because Nigg had another FCM accompany her and because Petitioner stated he would have another county conduct the assessment; Petitioner provided adequate guidance.

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[7] Section 4.41 of Respondent's Policy was not a finalized policy at the time of Petitioner's dismissal. However, Petitioner testified that Section 4.41 had been an implemented practice utilized by Respondent since 2016 and that an email had been sent to all FCMSs with the details of this practice (Resp't Ex. FF). Upon review of the email, what was expected of Petitioner is identical to what is detailed in the draft version of Section 4.41. Therefore, the ALJ concludes that Petitioner was aware of and expected to adhere to this policy.

23. While Nigg did not complete the initial safety assessment, Petitioner, as Nigg's supervisor is not without responsibility to ensure those he supervises take the necessary steps to complete an initial safety assessment.

24. Under responsibilities for the job description of an FCMS, it states, "[An FCMS] [p]rioritizes work within the department and ensures that deadlines are met. This includes assessment of the risk to the child . . ." (Resp't Ex. KK). The responsibilities also state, "[An FCMS] [e]stablishes and/or communicates and interprets policy and objectives to staff." *Id.*

25. Petitioner attempts to mitigate his failure to ensure that Nigg understood how to properly complete her assessment by simply stating that Nigg was speaking to him in front of the child's family, but does not explain why it was improper for Nigg to do so or why that meant Petitioner could not at that point provide direction to her.

26. Furthermore, even though Petitioner was Nigg's interim supervisor, Petitioner, at the time, was Nigg's supervisor for all intents and purposes. Therefore, it was Petitioner's responsibility to ensure that he could effectively communicate and interpret policy to Nigg and that her deadlines were met.

27. Thus, the ALJ finds, as did Respondent, that Petitioner violated Section 4.18 of its Policy.

28. Section 4.19 of Respondent's Policy states that Respondent, during an assessment, will assist the child's family with the development of a safety plan whenever a decision has been made that the child is conditionally safe, or whenever an assessment finding of "substantiated" is reached, but Respondent will not take further intervention. There is no deadline for the completion of a safety plan; however, Respondent's Policy states that one should be created as quickly as necessary to ensure the safety of a child (Resp't Ex. EE).

29. Respondent contends that while Nigg was able to complete a safety plan with the family on October 25, 2018, Petitioner did not respond to Nigg's request for help in the appropriate manner in order to ensure she completed the safety plan satisfactorily, nor did Petitioner follow up with Nigg regarding her concerns about the safety plan.

30. Petitioner argues that when Nigg called, Petitioner instructed her to do a safety plan. Petitioner states that Nigg had no other questions regarding the safety plan and asked Wimsatt whether she had any additional questions (Pet'r Test).

31. Wimsatt testified that when Nigg encountered difficulty in completing the safety plan, she advised Nigg to contact her supervisor. Wimsatt also testified that she was present for the phone call Nigg made to Petitioner. Wimsatt described Petitioner's tone as quick and "to the point" and stated that he did not ask any follow up questions. Wimsatt also stated that she had not been an FCM for that long and that she still relied upon her supervisor's advice (Resp't Ex. X, Wimsatt Test.).

32. In addition, Wimsatt stated that Petitioner told Nigg they could discuss her concerns the following day and then hung up the phone (Resp't Ex. Y). Wimsatt also stated that Nigg did not feel supported by Petitioner (Resp't Ex. X).

33. The ALJ finds that even if Petitioner did to an extent answer Nigg's questions, he did so in a manner that was perceived by both Nigg and Wimsatt as unhelpful and dismissive.

34. Given the nature of the child safety concerns that Madison County faced, the ALJ finds the way in which Petitioner handled Nigg's request for help troubling. Crum and Allen both testified that safety planning was an integral part of their efforts to protect children.

35. Moreover, once shown the safety plan that Nigg completed, Petitioner described the safety plan as "not good" but sufficient (Pet'r Test). Thus, the ALJ concludes that Petitioner did not provide the appropriate guidance to Nigg in order to confirm she was able to complete a "good" safety plan so as to ensure the safety of the child.

36. Even if Petitioner told Nigg they would address the safety plan the following day, Respondent's Policy makes clear that a safety plan is to be created as quickly as necessary to protect the safety of the child. It is reasonable to conclude that Nigg understood such, as she completed the safety plan on that same day with the family. However, Nigg's safety plan was clearly lacking given Petitioner's failure to properly supervise Nigg. Petitioner, as Nigg's supervisor, bore the responsibility of assisting Nigg in order to ensure there was an adequate safety plan in place for the family as soon as possible.

37. Petitioner's argument is limited to the fact that, again, because he had a more experienced FCM accompany Nigg, Petitioner provided adequate assistance.

38. However, Wimsatt testified that Nigg asked her to come along when meeting with the family, not Petitioner (Wimsatt Test.). Wimsatt also testified that at that point, she had only been an FCM for less than (2) years. *Id.* Additionally, Allen testified that it can take several years for an FCM to feel comfortable and really understand their job (Allen Test.).

39. Moreover, Wimsatt specifically told Nigg to call Petitioner since an FCM was supposed to do this when they were unsure of how to proceed (Wimsatt Test.).

40. The ALJ thus finds Petitioner's argument unpersuasive. Wimsatt, as a fellow FCM, did not act in lieu of Petitioner as a supervisor. It was Petitioner's responsibility to guide or assist FCMs in the field if they had questions on how to interpret Respondent's Policy. As Allen testified, an FCMS is a critical role in terms of child safety because FCMSs must have discussions with FCMs in the field in order to guide them on how to best proceed (Allen Test.).

41. Furthermore, Petitioner provides no reason as to why Nigg's safety plan was not good but sufficient in light of the fact that Petitioner states he answered all of her questions. In addition, Petitioner provides no reason as to why Nigg or Wimsatt may have felt that he was dismissive on the phone.

42. Thus, the ALJ finds that Petitioner did not prioritize Nigg's request for help to the extent he should have in light of the child safety concerns Madison County faced. As a result, Nigg did not complete an adequate safety plan. Therefore, the ALJ concludes that Petitioner violated Section 4.19 of Respondent's Policy.

43. Section 4.41 of Respondent's Policy states that Respondent shall conduct a daily safety staffing for each open assessment or assessments with safety concerns that had not yet been resolved (Resp't Ex. Q).

44. Respondent contends that Petitioner failed to follow up with Nigg after the October 25 and 29, 2018 incidents and therefore failed to complete the required safety staffing with Nigg.

45. More specifically, Respondent argues that Nigg approached Petitioner on October 26, 2018 in order to discuss the October 25, 2018 safety plan at which time Petitioner told Nigg she was too stressed due to the assessment (Resp't Ex. W). Furthermore, Respondent argues that Petitioner failed to follow up with Nigg regarding her concerns surrounding the October 29, 2018 assessment.

46. Petitioner argues that Nigg did not have a copy of the October 25, 2018 safety plan nor any of the required paperwork with her in order to discuss the safety plan with Petitioner on October 26, 2018.

47. Respondent, on the other hand, contends that Petitioner did not need a copy of the safety plan in order to provide the appropriate support and guidance to Nigg when she approached Petitioner on October 26, 2018 with her concerns regarding the previous day.

48. Respondent's Policy does not identify how a safety staffing is to be conducted or whether Respondent requires FCMs to provide their supervisors with any required paperwork. While the ALJ understands that Petitioner may have expected those he supervised to have such paperwork, the ALJ finds that Petitioner could have consulted with Nigg regardless of whether she possessed a copy of the safety plan.

49. The ALJ also recognizes that it would be easier to facilitate such a conversation if Nigg had the safety plan with her, but the ALJ agrees with Respondent that solely because Nigg did not possess the safety plan does not mean Petitioner could not have a conversation with Nigg to address her concerns.

50. Therefore, the ALJ finds that Petitioner had the opportunity to complete the required daily safety staffing with Nigg as it pertained to the October 25, 2018 safety plan.

51. Petitioner further argues that he was unable to follow up with Nigg regarding the October 29, 2018 assessment because Petitioner was out of the office on October 30, 2018 for an FCMS Advisory Council meeting. Petitioner states he made several attempts to contact Nigg by phone in order to conduct a safety staffing with her, but she did not answer. Petitioner was then informed by Heman that he would no longer supervise Nigg (Pet'r Test, Pet'r Ex. 1).

52. Thus, the ALJ finds that Petitioner violated Section 4.41 of Respondent's Policy when he failed to complete the required safety staffing with Nigg on October 26, 2018.

53. As detailed above, Petitioner failed to adhere to Respondent's Policy and thus failed to meet Respondent's workplace expectations.

54. Third, Petitioner must demonstrate that another similarly situated individual, who is not in Petitioner's protected class, was treated more favorably.

55. A "similarly-situated analysis calls for a flexible, common-sense examination of all relevant factors." *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012). "Similarly situated employees 'must be directly comparable to the [Petitioner] in all material respects,' but they need not be identical in every conceivable way." *Id.* at 846 (citation omitted). Typically, a Petitioner must show the comparators: "(1) dealt with the same supervisor; (2) were subject to the same standards; and (3) engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Id.* at 847.

56. Petitioner argues that Nigg, FCM Spencer Osborn ("Osborn"), FCM Emil Moore ("Moore"), and FCM Stephanie Hinshaw ("Hinshaw") were treated more favorably than Petitioner (Pet'r Test.). More specifically, Petitioner argues that Nigg, who is a white female, was not disciplined for failing to provide Petitioner with her October 25, 2018 safety plan.

57. Petitioner further argues that he instructed Hinshaw to complete a safety plan while conducting an assessment which Hinshaw forgot to do (Pet'r Test., Pet'r Ex. 1). Thereafter, Petitioner states he instructed Moore to complete the safety plan. However, Petitioner argues he received a counseling because no safety plan was completed.[8] Thus, Petitioner's argument is that because Petitioner was the one counseled for the lack of safety planning, Hinshaw and Moore were treated more favorably.

58. Petitioner also argues Osborn was not terminated despite multiple violations of Respondent's Policy including putting a child at risk due to poor documentation and dishonesty (Pet'r Ex. 82).

59. However, while Nigg, Osborn, Hinshaw, and Moore were all FCMs at the time of Petitioner's termination, none shared the same supervisor as Petitioner nor were they subject to the same standards as an FCMS. Therefore, they are not directly comparable to Petitioner.

60. Petitioner next points to a chart naming (24) individuals, which includes those stated above, as comparators whom Petitioner argues received more favorable treatment (Pet'r Ex. 82). Of these individuals, (5) are FCMs, (18) are FCMSs, and for (1) individual Petitioner did not provide their job title. *Id.*

61. In addition to the FCMs named above, Petitioner also includes FCM Shelby Baker ("Baker") in his chart. Petitioner argues Baker failed to follow direction from Petitioner. Petitioner also states that Baker received a written counseling for workplace harassment related to remarks she made about religion. *Id.*

62. However, Baker, as an FCM, also fails to be directly comparable to Petitioner for the same explanation given above. Furthermore, Baker received discipline related to workplace harassment. Thus, Petitioner fails to show how Baker engaged in similar conduct to that of Petitioner.

[8] This situation pertains to the counseling that Petitioner received when a PEDS doctor spoke with Heman on February 24, 2018 regarding his concerns that there was a lack of safety planning given an infant's injuries. Heman addressed this issue with Petitioner and provided Petitioner with resources on safety planning (*See supra,* Findings of Fact nos.26, 27, 28).

63. The individual that Petitioner did not provide a job title for also fails to be comparable to Petitioner. Without knowing the capacity in which this individual was employed with Respondent, the ALJ is not able to reasonably conclude if they were subject to the same standards as Petitioner. As well, Petitioner alleges that this individual received discipline for failure to comply with a request to verify eligibility of dependents; therefore, they did not engage in conduct similar to Petitioner (Pet'r Ex. 82).

64. The (18) FCMSs also fail to be similarly situated to Petitioner. For instance, Petitioner did not include who supervised these FCMSs. Furthermore, multiple FCMSs worked out of a different county or department than Petitioner (Pet'r Ex. 54). For example, Petitioner lists FCMS Sandra Brown ("Brown") as a comparator but Brown worked for Respondent's Collaborative Care department at the time she was disciplined (Pet'r Exs. 54, 82).

65. Also, Petitioner provides no evidence as to how the offices or departments that each FCMS worked for operated. Thus, the ALJ cannot conclude, nor is the ALJ in a position to assume, whether or not these FCMSs were subject to the same standards as Petitioner who worked for Respondent's Madison County office.

66. Additionally, the vast majority of the FCMSs named in Petitioner's chart did not engage in conduct similar to that of Petitioner. For example, Petitioner identifies Karen Frame ("Frame") as a FCMS who was given a written reprimand for failing to submit case plans to court on time.

67. Furthermore, for those FCMSs who Petitioner claims received discipline for failure to ensure child safety and failure to comply with Respondent's Policy, no detail is provided as to what conduct they engaged in to violate Respondent's Policy. Petitioner only lists in the chart that they received discipline for failure to ensure child safety. Therefore, the ALJ is unable to conclude how these individuals engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them.

68. Thus, Petitioner failed to demonstrate that another similarly situated individual, who is not in Petitioner's protected class, was treated more favorably.

69. Therefore, the ALJ finds that Petitioner's argument that he was subject to discrimination via disparate treatment fails.

70. The ALJ will next turn to Petitioner's argument that he was subject to retaliation.

71. Petitioner argues he was retaliated against for filing an appeal with SEAC in May 2018 and for complaining to Crum and Heman that Petitioner felt he was discriminated against due to his race.

72. Specifically, Petitioner argues he was given his first written reprimand shortly after he complained to Heman and Crum and that Petitioner received his first written counseling shortly after he filed a complaint with SEAC (Pet'r Test.).

73. To prevail on a Title VII retaliation claim, Petitioner must show that a reasonable jury (here, the ALJ) could find that Petitioner engaged in a protected activity, that he suffered an adverse employment action, and that the adverse action was motivated by a protected activity. *Smith v. Ill. DOT*, 936 F.3d 554 (7th Cir. 2019).

74. Petitioner is able to show that he suffered an adverse an employment action. In this case, Petitioner was terminated.

75. Next, Petitioner is able to show he engaged in protected activity when he filed an appeal with SEAC. However, Petitioner fails to show that he made complaints to Heman and Crum.

76. Petitioner testified that he told Crum and Heman he felt targeted due to his race but did not provide any detail as to when he spoke with them (Pet'r Test.).

77. Crum testified that Petitioner never spoke with her about feeling targeted. Crum also testified that Heman never reported to her that Petitioner complained of being targeted (Crum Test.).

78. Petitioner has put forth no other evidence that he made such a complaint to Crum or Heman. Therefore, the ALJ finds that Petitioner has failed to show he engaged in protected activity as it pertains to any complaints made to Heman and Crum.

79. Finally, when looking at the evidence as a whole, Petitioner has failed to show how his termination was motivated by his appeal to SEAC in May 2018.

80. Petitioner's main contention is that he did not receive a written counseling until after he filed a complaint with SEAC (Pet'r Test.).

81. Petitioner is correct that he did not receive a written counseling until after he appealed to SEAC; however, Respondent has put forth overwhelming evidence that it had a non-retaliatory reason for issuing Petitioner a written counseling in addition to terminating Petitioner.

82. Respondent issued the written counseling to Petitioner for failure to ensure the safety of an infant when Petitioner did not provide an FCM appropriate support (Resp't Ex. P). Moreover, Respondent terminated Petitioner on the same basis.

83. Petitioner, on the other hand, proffers nothing more than an argument as to timing to support a causal connection between his written counseling and appeal to SEAC. Furthermore, Petitioner fails to provide any detail as to how Respondent's decision to terminate him was motivated by his SEAC appeal. Therefore, the ALJ cannot reasonably find that Petitioner's termination was motivated by his 2018 appeal to SEAC.

84. The ALJ will finally turn to whether Respondent had just cause to terminate Petitioner.

85. Given that the State's Discipline Policy provides for progressive discipline for classified employees, Respondent must show that the incidents described above constituted just cause such that termination was Respondent's only option when less formal discipline was available.

86. While the majority of Petitioner's annual performance appraisals indicated that Petitioner, despite some weaknesses, was a good supervisor overall, Petitioner's 2017 performance appraisal demonstrated that Petitioner struggled to meet expectations with respect to employee relations and customer service.

87. In addition, prior to receiving more formal discipline, Petitioner was spoken to on many occasions by Heman, Crum, and Tucker-Beebe regarding Petitioner's lack of safety planning and Petitioner's abrasive and dismissive demeanor.

88. Petitioner then received a written counseling for failing to ensure the safety of a child because Petitioner did not provide an FCM proper support and guidance. While counselings are not considered formal discipline, they do acknowledge that continued misconduct may result in more formal discipline.[9] Thus, Petitioner was aware that he must improve upon such behavior.

89. After Respondent issued Petitioner a written counseling, Petitioner received a written reprimand for failing to ensure the safety of a child when Petitioner advised an FCM to unsubstantiate an allegation of domestic violence. At this point, Petitioner was advised to review Respondent's Policy, specifically Chapter 4, which included Sections 4.18, 4.19 and 4.41.

90. Thereafter, Petitioner was terminated following the incidents with Nigg.

91. Respondent argues that during Petitioner's pre-deprivation meeting, Petitioner continued to deny any wrongdoing and further denied any misunderstanding of Respondent's Policy (Crum Test., Resp't Ex. AA).

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[9] https://www.in.gov/spd/files/discrandp.pdf.

92. Senior Human Resources Business Partner Bradley Morris ("Morris") testified that work improvement plans are generally intended to address issues of inability (Morris Test.). Morris also testified that formal discipline is generally intended to address issues of unwillingness. *Id.*

93. Thus, Respondent argues it decided not to address Petitioner's behavior with a Work Improvement Plan due to Petitioner's unwillingness to improve upon such behavior as described above.

94. Allen also testified that because of the child safety concerns in Madison County, Respondent felt it could not leave Petitioner in a role to judge or make decisions on child safety (Allen Test.). Therefore, after review of Petitioner's performance history, the written counseling, the written reprimand, and the gravity of the child safety issues related to Petitioner's performance issues, Respondent made the decision to terminate Petitioner.

95. As the State's Discipline Policy states, employee disciplinary actions are to be corrective and progressive in nature.[10] Respondent clearly attempted to address Petitioner's behavior and lack of guidance to those he supervised first with verbal counselings followed by a written counseling, and thereafter a written reprimand.

96. The ALJ finds that based upon the complaints made to Respondent, in addition to the October 25, 2018, phone call with Nigg and Wimsatt, Petitioner demonstrated a pattern of abrasive, dismissive behavior in how he spoke with other employees of Respondent in addition to those in the community.

97. Moreover, Petitioner was counseled on and received a written reprimand specifically for failure to ensure the safety of a child due to an inability to provide proper guidance or direction to an FCM. Petitioner thereafter exhibited the same behavior in response to Nigg's requests for assistance and again failed to ensure the safety of a child.

98. Thus, the ALJ finds that Respondent had just cause to terminate Petitioner.

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.

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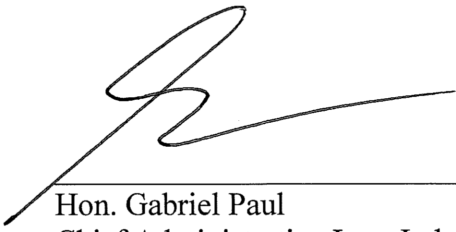
[10] https://www.in.gov/spd/files/discrandp.pdf

IV. Non-Final Order

Judgment for Respondent. Petitioner's termination is hereby UPHELD. The Parties shall bear their own fees and expenses. So Ordered.



DATED: January 28, 2021

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