BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

CLYDE OUTLAW Petitioner, vs. INDIANA DEPARTMENT OF CHILD SERVICES Respondent.	))) SEAC No. 04-20-028)))))	ISSUED MAY 26 2022 STATE EMPLOYEES' APPEALS COMMISSION

FINAL ORDER
OF THE STATE EMPLOYEES' APPEALS COMMISSION

On January 14, 2022, the assigned Administrative Law Judge (ALJ)[1] issued notice and a copy of his "Findings of Fact, Conclusions of Law and Non-Final Order" in this matter, granting judgment to Respondent Indiana Department of Child Services ("Respondent") ("ALJ's Order") that Respondent had just cause to terminate Petitioner. Petitioner timely filed objections ("Petitioner's Objections"), to which Respondent replied.

Thereafter, on May 12, 2022, the Commission held an in-person[2] meeting and oral arguments on this matter were heard during its regular meeting. Three (3) Commissioners[3] were in attendance which constituted a quorum per I.C.§ 4-15-1.5-5. Petitioner appeared by counsel, Mr. Shaw Friedman. Respondent appeared by counsel, Ms. Whitney Fritz.

Upon deliberation, motion and 3-0 (unanimous) vote at that meeting, the Commission overrules in part and sustains in part Petitioner's Objections, as follows:

1. With respect to Petitioner's Objection No. 5 to the effect that the State Personnel Department Arrests and Convictions Policy (the "Arrests and Convictions Policy") is unconstitutional, the Commission overrules the objection on grounds that the contention was raised for the first time in Petitioner's Objections and not presented to

[1] The ALJ for the hearing and Findings of Fact, Conclusions of Law and Non-Final Order was Gabriel Paul. The undersigned ALJ assumed jurisdiction of the case after the issuance of the Non-Final Order.
[2] Petitioner's counsel appeared telephonically per consent of the Commission and Order by the ALJ due to counsel's remote location and other previously scheduled matters.
[3] Commissioners Sullivan, Wilkinson, and Trathen were in attendance.

the ALJ. The Commission observes that although administrative law judges and administrative adjudicative bodies have taken the position that they lack authority to determine constitutional claims, *see, e.g., Elgin v. Dep't of Treasury*, 567 U.S. 1, 7 (2012), it is not aware of this issue having been confronted as a matter of Indiana administrative law.

2. With respect to Petitioner's Objections Nos. 8 and 9 to the effect that the affidavit of Petitioner's witness Fionna Fox was improperly excluded, Petitioner's Objections are sustained to the following extent. The record reflects that the proffered Fox affidavit was excluded on grounds that its admission would have violated Ind. Code § 22-4-17-9 and § 22-4-17-12(h).

   However, § 9 provides in relevant part, "Any testimony or evidence submitted in due course before the department, the review board, an administrative law judge, or any duly authorized representative of any of them, shall be deemed a communication presumptively privileged with respect to any civil action except actions to enforce the provisions of this article." The proffered Fox affidavit was not "testimony or evidence submitted . . ." within the meaning of and therefore not covered by this provision. Even where proffered evidence in a SEAC processing would be subject to § 9, the Commission notes that the privilege provided by the statute is presumptive, not absolute.

   And § 12(h) provides in relevant part, "Any finding of fact, judgment, conclusion, or final order made by a person with the authority to make findings of fact or law in an action or proceeding under this article is not conclusive or binding and shall not be used as evidence in a separate or subsequent action or proceeding between an individual and the individual's present or prior employer in an action or proceeding brought before an arbitrator, a court, or a judge of this state or the United States regardless of whether the prior action was between the same or related parties or involved the same facts." The proffered Fox affidavit did not comprise or contain "[a]ny finding of fact, judgment, conclusion, or final order . . ." within the meaning of and therefore not covered by this provision.

The Commission notes that the Fox affidavit may well have been subject to hearsay objection, but no hearsay objection was made, and, in any event, hearsay would have been admissible to the extent provided in Ind. Code § 4-21.5-3-26(a).

3. With respect to Petitioner's Objection No. 6 to the effect that Petitioner did not violate the Arrests and Convictions Policy by entering into a deferred prosecution agreement, Petitioner's Objection is sustained to the following extent.

   The Arrests and Convictions Policy provides in relevant part, "A judgment on a verdict or a plea of guilty or nolo contendere, and/or a finding of guilt substantiated by the evidence which results in the payment of fines, forfeiture of collateral or bond, restitution, deferred adjudication or sentencing, probation, confinement, suspended sentence, pre-trial diversion agreement, or any other penalty imposed by a court of law or agreed upon by the accused for a crime."

   The record reflects that the Petitioner entered into the equivalent of a "pre-trial diversion agreement" in *State v. Clyde Nathen Outlaw*, No. 64D04-1907-CM-006218 (Porter Sup. Ct. 4), on Nov. 19, 2019. However, under the language of the Arrests and Convictions Policy, for a pre-trial diversion agreement to constitute grounds for discipline, it must "substantiate[ ]" a "judgment on a verdict or a plea of guilty or nolo contendere, and/or a finding of guilt substantiated by the evidence." In Petitioner's case, neither the Court's order nor the pre-trial diversion agreement itself contained any finding or admission of guilt. As such, Petitioner's entering into the pre-trial diversion agreement did not constitute cause for discipline under the Arrests and Convictions Policy.

4. With respect to Petitioner's Objection No. 4 to the effect that Petitioner did not violate the "Personal Conduct" section of Respondent's Code of Conduct (Respondent's Code"), Petitioner's Objection is sustained to the following extent.

   Respondent's Code provides in relevant part, "Employees who engage in unprofessional or criminal conduct or other serious misconduct off-duty may be subject to disciplinary action by DCS. If such conduct is determined to be harmful to the DCS image, to be inconsistent with the agency's expectations of its staff members, to impact and/or disrupt business operations, bring the agency into disrepute or to

jeopardize the agency's or employee's standing within the community, the staff member may be subject to disciplinary action, up to and including dismissal."

This is a classified (just cause) case under the Civil Service System. A state agency may only terminate or take material adverse employment actions against a classified state employee for just cause. Ind. Code § 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.

Respondent was arrested and charged with Domestic Battery in *State v. Clyde Nathen Outlaw, supra.* The Commission agrees with Respondent that, whether or not any judgment of conviction is ever entered or admission of guilt is ever made, committing an act or acts of Domestic Battery could well constitute "unprofessional or criminal conduct or other serious misconduct" that would be just cause for dismissal under the foregoing policies and standards. However, Respondent in such a circumstance has the burden of proving by a preponderance of the evidence that such an act or acts of Domestic Battery in fact occurred.

The ALJ found that "Petitioner was involved in a domestic situation which ultimately led to his arrest," ALJ's Order Concl. of Law. No. 13, and apparently that this violated Respondent's Code, *see id.* No. 18. The Commission finds that a finding of "involve[ment] in a domestic situation" without more is not sufficient cause for dismissal under Respondent's Code. As discussed in Paragraph 3, *supra*, there was never any finding of guilt entered or admission of guilt made in Petitioner's case, which has now been dismissed. The facts concerning any guilt on Petitioner's part set forth in the ALJ's Order Denying Respondent's Motion for Summary Judgment and Petitioner's Cross Motion for Summary Judgment ("Summ'y Jgt. Order") dated

December 8, 2020, are highly equivocal in this regard. *See* Summ'y Jgt. Order Findings of Fact Nos. 5 through 14. And the Fox affidavit discussed in Paragraph 2, *supra*, suggests an alternative explanation for Petitioner's dismissal. As such, the Commission finds that Respondent did not establish by a preponderance of the evidence that Petitioner committed an act or acts of Domestic Battery and, therefore, did not establish a violation of Respondent's Code.

5. With respect to Petitioner's Objections Nos. 1, 2, 3, and 7, the Commission finds them to be moot or otherwise unnecessary to resolve in light of the foregoing.

The Commission reverses the conclusion of the ALJ that Respondent had just cause to terminate Petitioner.

The Parties shall bear their fees and expenses. This order is issued on the Commission's behalf by the undersigned.

This Order constitutes the Final Order of the Commission under I.C. § 4-15-2.2-42(h). The Commission is the ultimate authority, and the action is its Final Order and determination in this matter. A person who wishes to seek judicial review must file a petition with an appropriate court within thirty (30) days of the date of this Order and must otherwise comply with I.C. § 4-21.5-5.

DATED: ***May 26, 2022***

Hon. Erin M. McQueen
Chief Administrative Law Judge
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