BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

KENYA POLK,	)	
Petitioner,	)	
	)	
v.	)	SEAC NO. 06-12-068
	)	
WESTVILLE CORRECTIONAL	)	
FACILITY BY INDIANA	)	
DEPARTMENT OF CORRECTION,	)	
Respondent.	)	

FINAL ORDER
OF THE STATE EMPLOYEES' APPEALS COMMISSION

On November 13, 2013 the assigned Administrative Law Judge (ALJ) issued notice and a copy of "Amended Findings of Fact, Conclusions of Law and Non-Final Order of Administrative Law Judge" granting summary judgment to Respondent Westville Correctional Facility, part of the Indiana Department of Correction ("DOC") (the "ALJ's Order"), which is hereby incorporated by reference as if fully set forth in this document. Petitioner Polk timely filed objections, to which Respondent DOC timely replied.

Thereafter, on April 22, 2014, the Commission held a public oral argument on this matter during its regular meeting. Petitioner Polk appeared by counsel, Mr. Grimes, in person. Respondent appeared by counsel, Mr. Lyttle, in person. Upon public deliberation, motion and 4-0 (unanimous) vote at that meeting, the Commission **UPHELD/AFFIRMED** the ALJ's Order in its entirety except as corrected in Item 1 below.

The Commission specifically determined that the federal, modified *McDonnell Douglas*[1] analysis remains the controlling law as embodied in recent 7th Circuit Court of Appeals cases such as *Adams v. City of Indianapolis*, 742 F.3d 720 (7th Cir. February 2014) contrary to Petitioner's brief, which cites *Hitchcock v. Angel Corps, Inc.*, 718 F.3d 733 (7th Cir. June 2013).

It was further determined that the correction below made no difference to the outcome but corrected the ALJ Order and record as appropriate.[2] The correction is:

[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)
[2] Both parties had noted that Mr. Williams is a "black male" in their briefing.

1.All references to co-worker/officer Mr. Williams being a "white male" are modified to Mr. Williams being a "black male." These corrections include references in the ALJ Order on page 5 (Finding of Fact 15(A) second paragraph, last sentence); page 6 (Finding 15(B)(iii) first sentence); and page 7 (Finding 15(B)(vi) last sentence).

Accordingly, the ALJ's Order, as corrected in Item 1 above, is hereby adopted in its entirety as the Findings of Fact, Conclusions of Law and Final Order of the Commission pursuant to the public Commission decision. Ind. Code § 4-21.5-3. This written copy of the order is thus issued on the Commission's behalf by the undersigned.

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 and must otherwise comply with I.C. 4-21.5-5.

DATED: May 8, 2014

Katherine Noel, Chair
State Employees' Appeals Commission

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employee's Appeals Commission
IGCN, Room N501
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SEAC Commissioners

BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

KENYA POLK, Petitioner,	)	
v.	)	SEAC NO. 06-12-068
WESTVILLE CORRECTIONAL FACILITY BY INDIANA DEPARTMENT OF CORRECTION, Respondent.	)	

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND NON-FINAL ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On January 28, 2013, Respondent Westville Correctional Facility ("WCF"), by counsel, moved for summary judgment. Petitioner Kenya Polk, by counsel, timely responded on March 1, 2013. The case was remanded to the ALJ with respect to re-admitting certain audio visual CD evidence by the Commission on June 28, 2013. The parties' jointly then tendered an audio-visual CD[1] on September 4, 2013, and the 90 day submission window for such evidence is otherwise closed making this amended order ripe. Having duly considered the parties' submissions including the CD, and as further discussed herein, the ALJ determines there are no genuine issues of material fact and Respondent WCF is entitled to judgment as a matter of law. Therefore, Respondent WCF's motion for summary judgment is **GRANTED**.[2]

I. The Summary Judgment Standard

Summary judgment proceedings before SEAC are governed by Indiana Trial Rule 56. I.C. 4-21.5-3-23. Summary judgment is only appropriate when the designated evidence shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Swineheart v. Keri*, 883 N.E.2d 774, 777 (Ind. 2008). All inferences from the designated evidence are drawn in favor of the non-moving party. *Id.* "The burden is on the moving party to

[1] The parties' counsel are thanked for working together to provide a CD of good quality.

[2] The main change to this opinion from the original is in Paragraph 15 of the Findings of Fact. That section has been completely replaced herein. This Introduction and Conclusions of Law were amended to conform. Brackets note amended sections.

prove the nonexistence of material fact; if there is any doubt, the motion should be resolved in favor of the party opposing the motion." *Oelling v. Rao (M.D.) et al*, 593 N.E.2d 189, 190 (Ind. 1992).

II. Employment At-Will, Title VII Discrimination and Retaliation

In this Indiana Civil Service System case, Petitioner Polk is a former unclassified state employee for Respondent WCF. An unclassified state employee is at-will, and serves at the appointing authority's pleasure. However, a termination of an unclassified, at-will state employee must not violate public policy. I.C. 4-15-2.2-1 et seq., 42 (Civil Service System). Petitioner Polk challenges her termination from state employment as the product of race or sex discrimination and retaliation, including her filing of prior EEOC[3] charges. Prohibited discrimination or retaliation, if found, is a violation of federal and state law, and public policy.

Indiana follows the employment at-will doctrine which allows an employer or an employee to terminate the employment at any time for a "good reason, bad reason, or no reason at all." *Meyers v. Meyers Construction*, 861 N. E.2d 704, 705 (Ind. 2007). However, there are three recognized exceptions to the at-will doctrine, one of which is "a public policy exception . . . if clear statutory expression of a right or duty is contravened." *Ogden v. Robertson*, 962 N.E.2d 134, 145 (Ind. App. 2012). Whether public policy was violated is the specific issue in the instant matter. I.C. 4-15-2.2-42.

Title VII, 42 U.S.C. § 2000e (the Civil Rights Act of 1964, as amended), makes it unlawful under federal law for an employer to discriminate by terminating an employee because of that person's race or sex, among other grounds. Indiana law contains similar, state law based, public policy prohibitions. I.C. 22-9-1 (Indiana Civil Rights Act); See also, I.C. 4-15-2.2-1 et seq., 12, and 42. Indiana civil rights laws look to federal law for guidance. *Filter Specialists, Inc. v. Dawn Brooks et al.*, 906 N.E.2d 835, 839-842 (Ind. 2009). At the summary judgment stage, Indiana courts use the modified *McDonnell Douglas*[4] analysis in race based discrimination cases. *Filter Specialists, supra.*

The application of the Title VII analysis is often referred to as the modified *McDonnell Douglas* burden shifting framework. See *Pantoja v. American NTN Bear. Manuf. Corp.*, 495 F.3d 840, 845 (7th Cir 2007). Under this analysis, a petitioner may prove discrimination either through direct or indirect evidence. *Coleman v. Donahoe*, 667 F. 3d 835, 845 (7th Cir. 2012). A petitioner can present either a single motive or mixed motive theory of discrimination. *Id.* To establish a *prima facie* case of discrimination using the indirect method, a petitioner must offer

[3] Equal Employment Opportunity Commission, a federal agency that enforces Title VII and other anti-discrimination laws. The Indiana Civil Rights Commission is the parallel state agency.
[4] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

evidence that: (1) she is a member of a protected class, (2) her job performance met the employer's legitimate expectations, (3) she suffered an adverse employment action, and (4) another similarly situated individual who was not in a protected class was treated more favorably than the petitioner. *Id.* Once a petitioner establishes a *prima facie* case of discrimination, the burden then shifts to the employer to show a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* Once the employer has presented this reason the burden shifts back to the petitioner "who must present evidence that the stated reason is a 'pretext,' which in turn permits an inference of unlawful discrimination." *Id.*

Under Title VII, "[u]nlawful retaliation occurs when an employer takes an adverse employment action against an employee for opposing impermissible discrimination." *Williams v. Lovchik*, 830 F. Supp. 2d 604, 620 (S.D. Ind. 2011). A petitioner asserting a claim of retaliation under Title VII can prove her case with either direct or indirect methods of proof. *Id.* In order to prove retaliation by the direct method, the petitioner must present evidence, direct or circumstantial, demonstrating that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action by the employer; and (3) a causal connection exists between the two. *Id.* Filing an EEOC Charge of Discrimination is considered a statutorily protected activity. *Id.* [Amended] The United States Supreme Court recently held that, unlike discrimination under Title VII, a retaliation claim must establish but-for causation. *University of Texas Southwestern Medical Center v. Nassar*, 2013 WL 3155234 (S. Ct. June 2013).

III. Findings of Fact

The following facts are taken from the designated evidence, as construed in the light most favorable to non-movant Petitioner Polk:

1. Petitioner Polk, an African-American female, was at all relevant times an unclassified, at-will employee as a correctional officer for Respondent WCF. She is a member of two protected classes given her race and gender. (Pet. Compl., p. 4-5)

2. On March 19, 2012 Petitioner Polk's employment was terminated by Respondent WCF for "inattentiveness as well as failure to report staff misconduct." (Pet. Compl., p. 2)

3. On April 11, 2012, *after* the termination, Petitioner Polk filed an EEOC charge stating that she was the "recipient of continuous and ongoing harassment, being denied terms and conditions of employment afforded to white male and female co-workers in similar situations" and for filing "previous complaints with the EEOC." (Pet. Compl. p. 5)

4. Petitioner Polk was previously disciplined up to termination by Respondent WCF several times between July 9, 2008 and April 9, 2009. (Resp. Exs. D-G). These disciplinary

actions were part of a previous case before SEAC and ended in a settlement between the parties and Petitioner Polk's reinstatement of employment. (Resp. Ex. H)[5]

5. On February 26, 2012 Petitioner Polk was working as the Pod Control Officer in D Unit which is a maximum security segregation unit of the correctional facility. (Resp. Ex. K, p. 1)

6. On February 26, 2012 an offender (SB) in D Unit committed suicide by hanging himself in his cell. (Resp. Ex. K, p. 1)

7. When interviewed by Investigator Whelan on March 1, 2012, Petitioner Polk stated that she did not remember if her co-workers on February 26, 2012, Officers Greenwood and Williams, had taken a formal count of the offenders in D Pod on the morning of February 26, 2012. (Resp. Ex. K, p. 3)

8. Under Indiana Department of Correction ("IDOC") Post Orders, the "duties and responsibility of staff assigned to manage a pod" include "observe and report all irregularities that relate to the security of the facility." (Resp. Ex. B, p. 1)

9. According to the IDOC Rules and Regulations, Pod Control Officers "must be in direct visual and verbal contact with floor officers at all times." (Resp. Ex. B, p. 6)

10. Respondent's advanced legitimate, non-discriminatory reason for the discharge of Petitioner Polk is a failure to abide by these employer policies, and alleged failure to assist the offender count or follow reporting procedure. Respondent asserts Polk's race and gender had nothing to do with WCF's employer decision. (Resp. Designation and Brief.)

11. Petitioner Polk asserts that she was "in direct visual and verbal contact with Greenwood and Williams at all times on the date of the [suicide incident] while performing [her] Pod Control Officer responsibilities and completed the shift." (Pet. Decl. Polk ¶ 15)

12. Petitioner Polk asserts that "at no time did [she] fail to report" any irregularities or corrupt or unethical practices "by fellow staff or perform all of [her] duties while on the unit." (Pet. Decl. Polk ¶ 16-17)

[5] The ALJ will focus solely on the discipline issues in the instant matter. Prior older settlements are not determinations on the merits.

13. Petitioner Polk's affidavit correspondingly takes the view, and it is taken as true, that as the Pod Control Officer, Petitioner Polk did not have primary responsibility for the formal count of offenders. (Pet. Decl. Polk ¶ 11)

14. Although Petitioner Polk has asserted that she did not fail in her employment duties, she has presented no evidence that the termination of employment had an unlawful motive or was a pretext for discrimination or retaliation. Respondent, meanwhile, has presented affirmative evidence of a legitimate, non-discriminatory reason for the termination.

15. [Amended] Following remand, Respondent WCF and Petitioner Polk jointly tendered an audio-visual CD with extra copies, on September 4, 2013. The CD is hereby admitted as evidence and has been fully considered. The CD contains three separate audio-visual interviews of Petitioner Kenya Polk, and two then DOC co-workers: Birle Williams and Chilisa Greenwood. All facts, and reasonable inferences therefrom, in the CD must be construed in the non-movant's favor, here Petitioner Polk.

A. General Remarks on Interviews

The DOC Internal Affairs investigator, Mr. Whelan, who appears to be a sworn/police officer, conducted the three interviews and did so in a reasonably professional manner. Whelan told each interviewee, including Petitioner Polk, that the interviews were being video-taped and read them a statement of explanation of the interview process. He gave them a written copy of same. Each interviewee signed, including Petitioner Polk. Whelan indicated to the employee-interviewees that they were being investigated for potential violations of DOC policy/post-orders.

Specifically, Whelan told them that the investigation was regarding what was called the 'Signal 3000' (an offender's death), and in particular the lack of a formal offender count. Whelan further indicated to Petitioner Polk and the other interviewees that they had to participate in the interview truthfully or face discipline. However, Whelan specified that the interviews did not constitute discipline per se, nor constitute a pre-deprivation process. Whelan's manner was not unduly overbearing, intimidating or unconscionable. Petitioner Polk appeared reasonably comfortable and often laughed, told stories or back and forth conversed with Whelan. Whelan's most pointed questions were directed not to Petitioner Polk, but charge officer Williams, a white male.

In sum, the general character of the interviews does not support a public policy claim for race discrimination or retaliation even construing the facts in the light most favorable to Petitioner.

B. Additional Facts Found from CD Interviews

i. Greenwood, a black or darker skin female, was working in D Pod on the morning in question when the offender committed suicide. She acknowledged to Whelan, directly or indirectly, that no formal count had been taken that morning. For instance, Greenwood indicated that formal counts were sometimes rare due to the busy pace. Greenwood pointed out that she was not the officer-in-charge, which was Williams. Whelan noted to Greenwood (and the others) that the offender could have taken his life in some manner if so determined, but indicated the importance of formal counts. Whelan stated that Greenwood performed well after the incident. The interview was not heated.

ii. Petitioner Polk, a black female, stated she was not going to lie and did not know or remember if a formal count was taken that morning. Petitioner did not see Williams or Greenwood conduct the count directly. At a different point in the interview, Petitioner Polk indicated that given the movements of co-workers Greenwood and Williams, she had believed that they had done the offender count. For instance, she indicated that she thought Williams had been making rounds while Petitioner Polk and Greenwood were in the control pod. She mentioned that she had been in the bathroom initially when the incident happened, but had responded and asked what was occurring. Petitioner Polk laughed and conversed with Whelan. The interview was not heated.

iii. Whelan asked the most pointed questions to Williams, a white male. Williams had not just been in the pod, but the officer in charge. Williams was more evasive about the nature of the offender count, but directly or indirectly agreed no formal count had been taken due to the press of business in the pod.

iv. In sum, the interviews – taken as best construed for Petitioner Polk – is primarily cumulative to and shows what the other designated evidence does. Petitioner Polk had some responsibility for her work and duties on D Pod, but did not have primary responsibility for the formal count in question because Williams was the officer in charge. The three workers did not do a formal count, although Petitioner did not know that at the time. Respondent DOC's formal offender count policy was not abided by Petitioner Polk or her co-workers, but again Petitioner Polk did not know that at the time.

v. The CD does not reveal any racially invidious motive against Petitioner Polk's employment status by DOC. There is no evidence that the state's proffered termination reasons were a pretext. DOC might have been incorrect about the exact details or extent of Petitioner's Polk's responsibility (versus that exact measure of Greenwood's or Williams' responsibility) for the formal count when it made the employment decision, but the decision was not tainted by racial discrimination, retaliation or pre-textual.

vi. At the time of discharge, DOC was correct in general terms that a formal count had not been taken properly. All three workers Greenwood, Polk and Williams had some duty, whether more or less, for the formal count. The interview process treated Petitioner Polk, a black female, at least as well as it treated her co-workers, Greenwood (a black or darker skin female) and Williams (a white male).

16. No genuine issue(s) of material fact require an evidentiary hearing. Respondent, as discussed below, is entitled to judgment as a matter of law under Ind. T.R. 56.

IV. Conclusions of Law & Analysis

1. Indiana follows the at will employment doctrine. Under this doctrine, "an employee may be dismissed, demoted, disciplined, or transferred for any reason that does not contravene public policy." I.C. 4-15-2.2-24(b). There are public policy exceptions to the at-will doctrine (See *Meyers* and I.C. 4-15-2.2-42) but in this case Respondent WCF has shown that Petitioner Polk's employment was terminated for the non-discriminatory reason of unsatisfactory work performance.

2. Under the modified Title VII *McDonnell Douglas* analysis, the initial burden is on Petitioner Polk to show a *prima facie* case of discrimination through either direct or indirect evidence. See *Coleman* at 845. Here, Petitioner Polk fails to establish a *prima facie* case of discrimination and has not therefore shown a public policy exception to the at-will employment doctrine.

[Amended] Similarly, for a retaliation claim to survive summary judgment, a Petitioner must show at least a question of material fact of but-for causation of "[u]nlawful retaliation occurs when an employer takes an adverse employment action against an employee for opposing impermissible discrimination." *Williams v. Lovchik*, 830 F. Supp. 2d 604, 620 (S.D. Ind. 2011); See further, *University of Texas Southwestern Medical Center v. Nassar*, 2013 WL 3155234 (S. Ct. June 2013).

3. Although Petitioner Polk has asserted that she did not fail in her employment duties, she has presented no evidence that the termination of employment had an unlawful motive or was a pretext for discrimination. Respondent WCF, meanwhile, has presented affirmative evidence of a legitimate, non-discriminatory reason for the termination.

4. Petitioner Polk has failed to designate evidence that she was treated differently than similarly situated employees or put forth any causation evidence of unlawful employer intent.

5. Petitioner Polk has alleged that she filed prior EEOC charges but has not designated those as evidence or made more than a conclusory accusation of a connection between those complaints and an adverse employment action by Respondent WCF. Petitioner Polk does not show any question of material fact that the supervisor in charge of her termination considered her filing previous EEOC charges when making the decision to terminate her employment.

6. Although Petitioner Polk has not designated the prior EEOC charges as evidence, it appears from the Complaint that one was filed in 2010. However, the gap between 2010 and 2012 is too attenuated in time to, by itself, show an inference of retaliation. This case does not involve designated evidence that Petitioner Polk filed an EEOC charge, gave Respondent WCF notice and then was disciplined immediately on the heels of the notice within a few days. (See Pet. Compl. p. 5) Petitioner has shown no evidence of causation.

7. Assuming arguendo that Petitioner Polk has successfully shown the bare minimum elements of a *prima facie* case of discrimination or retaliation, Respondent WCF has adequately shown, through designated evidence, a legitimate, non-discriminatory reason for the employment termination: believed unsatisfactory work performance.[6]

8. The burden thus shifts back to Petitioner to show that this asserted employer reason is merely a pretext for unlawful discrimination. Petitioner has not provided designated evidence that her termination by Respondent WCF was a pretext for unlawful discrimination or retaliation for filing a prior EEOC charge. Mere complaint references to older charges in 2010 (without more) or the April, 2012 charge, which occurred *after* the termination are insufficient. See *Coleman, supra.* [Amended] The necessary causal connection can be severed if the time lapse between the statutorily protected activity and

[6] Indiana T.R. 56 requires Respondent to affirmatively show its entitlement to relief, which it does. The ALJ's analysis thus proceeds to the legitimate reason and pretext inquiry under the *McDonnell Douglas* analysis.

the adverse employment action is too remote. See *Everroad v. Scott Truck Systems, Inc.*, 604 F.3d 471, 481 (7th Cir. 2010); *Haywood v. Lucent Techs., Inc.*, 323 F.3d 524, 532 (7th Cir. 2003) (holding a one year time lapse to be too remote).

9. Petitioner's designated evidence asserts that (a) she was not responsible for the offender's suicide; and (b) that as the Pod Control Officer, Petitioner Polk was not primarily or directly responsible for the offender count. Both are taken as true under the Ind. T.R. 56 standard. However, SEAC need not decide who may or may not be responsible for the offender's suicide. Assuming Respondent WCF was wrong as to some or all of the facts surrounding what occurred in D Pod on February 26, 2012, as to Petitioner's precise duties, and who exactly was responsible for the suicide or official count, Petitioner has not put forth any designated evidence to show a pretextual, discriminatory or retaliatory motive for her termination of employment. Respondent WCF's employer belief that Petitioner did not follow policy or perform her duties, correct or incorrect, is a lawful termination reason.

10. Respondent WCF has demonstrated that Petitioner Polk cannot satisfy the public policy exception to the employment at will doctrine as an unclassified employee.

11. [Amended]. The joint submission CD does not change the legal outcome. The CD interviews do not show a prima facie case of discrimination or retaliation, nor rebut the state's action as pre-textual.

12. Prior sections reciting contentions or certain general legal standards are hereby incorporated by reference, as needed. To the extent a given finding of fact is deemed to be a conclusion of law, or a conclusion of law is deemed to be a finding of fact it shall be given such effect.

V. Non-Final Order Granting Motion for Summary Judgment

Summary judgment is entered in favor of Respondent WCF. There are no genuine questions of material fact to require an evidentiary hearing. Respondent WCF is entitled to judgment as a matter of law against all claims of the Complaint. Respondent WCF has satisfied the movant's burden under Ind. T.R. 56. Petitioner Polk has not rebutted this burden. Petitioner's Complaint is denied. All case management deadlines are vacated. Respondent WCF's termination of Petitioner Polk's state employment is upheld.

DATED: November 13, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge

State Employee's Appeals Commission
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v.	)	SEAC NO. 06-12-068
WESTVILLE CORRECTIONAL FACILITY BY INDIANA DEPARTMENT OF CORRECTION, Respondent.	)	

NOTICE OF FILING OF AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER OF ADMINISTRATIVE LAW JUDGE

The attached "Amended Findings of Fact, Conclusions of Law and Non-Final Order of Administrative Law Judge" granting summary judgment to Respondent WCF has been entered as required by I.C. 4-21.5-3-23 and 29. To preserve an objection to the document, either the Petitioner or the Respondent must submit a written objection that:

1. Identifies the basis of the objection with reasonable particularity.
2. Is filed at the following address, with service to the other party, by **December 2, 2013**:

State Employees' Appeals Commission
Indiana Government Center North
100 N. Senate Avenue, Room N501
Indianapolis, IN 46204-2200

Since the Commission has designated the Administrative Law Judge as the "trier of fact" for this cause, objections will not include items of evidence. If evidence is included with the objections it will be returned to the filing party. The objections may include a brief addressing the applicable law being relied upon by the party.

If objections are filed within the time specified, the State Employees' Appeals Commission (SEAC) will hear the objections at a regularly scheduled meeting. Prior to that meeting any motions filed regarding the objections will be dealt with by the Administrative Law Judge.

During the time specified above any member of the SEAC may express the desire to review any specific issue addressed in the "Findings of Fact and Conclusions of Law" pursuant to I.C. 4-21.5-3-29(e). If such a review is ordered, it will be conducted at a regular scheduled meeting of the SEAC, and each party will be notified.

A party may move to strike any objections believed to be untimely. The Administrative Law Judge shall act upon a motion to strike. If the Administrative Law Judge grants the motion, the attached document will become final absent any desire to review an issue expressed by a member as discussed above. If the Administrative Law Judge denies the motion to strike, the findings and non-final order shall be reviewed by to the SEAC as outlined above.

DATED: November 13, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
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