BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

TROY SMITH Petitioner,	) SEAC No. 06-18-045	
vs.	)	
LOGANSPORT JUVENILE CORRECTIONAL FACILITY BY INDIANA DEPARTMENT OF CORRECTION Respondent.	)	

ISSUED
MAR 27 2019
STATE EMPLOYEES' APPEALS COMMISSION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction and Summary

On December 7, 2018, Respondent Logansport Juvenile Correctional Facility, a part of the Indiana Department of Correction, ("Respondent"), by counsel, filed a Motion for Summary Judgment regarding Petitioner's Complaint ("Motion"). Petitioner Troy Smith ("Petitioner"), pro se, timely replied to the Motion on February 14, 2019. Thereafter, on March 1, 2019, Respondent filed a response in support of its Motion.

This case considers Petitioner's Demotion on April 8, 2018, from Deputy Warden to a Correctional Officer, for mishandling two (2) separate use of force incidents. The controlling pleadings for purposes of this decision is the Complaint originally received on June 25, 2018, Respondent's Motion, Petitioner's reply to Respondent's Motion and Respondent's surreply.

After review of the pertinent pleadings noted above, the ALJ finds Respondent's Motion meritorious and hereby **Grants** it. Petitioner's Complaint, with its factual allegations accepted as true, fails to allege a violation of a law, rule, or public policy exception to Indiana's at-will employment law, and this case must therefore be dismissed under I.C. § 4-15-2.2-42. The following additional findings of fact, conclusions of law, and final order of dismissal for lack of jurisdiction are entered.[1]

[1] Commission proceedings are governed by the Administrative Orders and Procedures Act (AOPA), I.C. 4-21.5 et seq. *See* I.C. § 4-15-1.5-6(1). Accordingly the Commission has delegated to its Administrative Law Judges pursuant to I.C. § 4-21.5-3-28 of the AOPA, the authority to issue final orders in this class of proceedings.

II. Summary Judgment Standard

Summary Judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Simon Prop. Grp., L.P. v. Acton Enterprises, Inc.*, 827 N.E.2d 1235, 1238 (Ind. Ct. App. 2005). A party seeking summary judgment bears the burden to make a prima facie case showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. *Id. See also Am. Mgmt., Inc. v. MIF Realty L.P.,* 666 N.E.2d 424, 428 (Ind. Ct. App. 1996). Once the moving party satisfies this burden through evidence designated to the trial court pursuant to T.R. 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. *Simon Prop. Grp., L.P.*, 827 N.E.2d at 1238*; Am. Mgmt., Inc*, 666 N.E.2d at 428.

The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. *Simon Prop. Grp., L.P.* at 1238; *Shambaugh & Son, Inc. v. Carlisle,* 763 N.E.2d 459, 461 (Ind. 2002). "A fact is material if its resolution would affect the outcome of the case, and an issue is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth or if the undisputed material facts support conflicting reasonable inferences." *Celebration Worship Ctr., Inc. v. Tucker*, 35 N.E.3d 251, 253 (Ind. 2015).

III. Findings of Fact

1. At all times relevant to this matter, Petitioner was Deputy Warden, an unclassified, at-will employee.

2. Starting in November, 2017, Petitioner was responsible for holding disciplinary review meetings with staff (Resp't Motion Ex. D, F, N).

3. Prior to November, 2017, Human Resources ("HR") participated in such meetings (Resp't Motion Ex. F).

4. On January 10, 2018, Correctional Officer ("CO") Andrew Boonstra ("Boonstra") received a Written Reprimand in Lieu of a Two Shift Suspension for using unjustified physical force on a student (Resp't Motion Ex. H).

5. On February 21, 2018, Boonstra utilized force on another student in Respondent's facility (Resp't Motion Exs. O, Q).

6. On February 26, 2018, Boonstra utilized force on a different student (Resp't Motion Exs. P, R-1, R-2).

7. Boonstra's utilization of force on both students were found to be unjustified by Respondent's staff, including Petitioner (Resp't Motion Exs. P, Q, L, J).

8. Petitioner was directed by then-Warden Lori Harshbarger ("Harshbarger") to discuss with HR staff the appropriate level of discipline for Boonstra (Resp't Motion Ex. D).[2]

9. On March 12, 2018, Petitioner held an administrative review meeting with Boonstra to address both use of force incidents (Pet'r Compl.).

10. On March 14, 2018, HR staff member Joan Ebert ("Ebert"), told Petitioner that she was required to review all disciplinary decisions prior to Petitioner issuing discipline to a staff member (Resp't Motion Ex. E).

11. On March 16, 2018, Petitioner issued a two (2)-shift suspension to Boonstra for the use of force incidents in February, 2018 (Pet'r Compl.).

12. Petitioner did not consult with Ebert or any other HR staff regarding his decision prior to issuing the discipline to Boonstra (Resp't Motion Exs. I, F, K).

13. Thereafter, Respondent's executive staff members became aware of and reviewed the video footage of the Boonstra incidents (Resp't Motion Exs. C, D).

14. After review, Petitioner's decision to suspend Boonstra was reversed and Boonstra was instead dismissed from his employment because of the two unjustified use of force incidents in February, 2018 (Resp't Ex. C).

15. Additionally, Harshbarger received a Written Reprimand for the manner in which the incidents were handled (Resp't Ex. C).

16. Petitioner was demoted on April 8, 2018, for his conduct and judgment while handling the discipline of Boonstra (Resp't Motion Exs. B, C).

IV. Conclusions of Law

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

[2] As of June 25, 2018, Harshbarger holds the position of Program Director (Resp't Motion Ex. D).

2. The general at-will employment law is well settled: An employee in the unclassified service is an employee at will and serves at the pleasure of the employee's appointing authority." Ind. Code § 4-15-2.2-24(a). "An employee in the unclassified service may be dismissed, demoted, disciplined, or transferred for any reason that does not contravene public policy." I.C. § 4-15-2.2.-24(b).

3. Recognized exceptions to the at-will doctrine based on public policy have traditionally only been found where an employee was terminated or disciplined for exercising a statutory right or refusing illegal conduct that would lead to personal criminal liability. Put another way, the courts ask whether the termination in question was illegal in light of applicable statutory law. A merely foolish or arbitrary choice by an employer to terminate or discipline does not invoke an exception. *Baker v. Tremco Inc.,* 917 N.E.2d 650, 653-655 (Ind. 2009); *Meyers v. Meyers Construction,* 861 N.E.2d 704, 706-707 (Ind. 2007); *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997); *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

4. "Indiana generally follows the employment at will doctrine, which permits both the employer and the employee to terminate the employment at any time for a 'good reason, bad reason, or no reason at all.'" *Meyers,* 861 N.E.2d at 706 (Ind. 2007) (quoting *Montgomery v. Bd. of Trustees of Purdue Univ.*, 849 N.E.2d 1120, 1128 (Ind. 2006); *Cantrell v. Morris*, 849 N.E.2d 488, 494 (Ind. 2006); *Sample v. Kinser Ins. Agency*, 700 N.E.2d 802, 805 (Ind. Ct. App. 1998), *trans. not sought*. Correspondingly, a claim that a termination was arbitrary or unfair does not state an at-will exception allowing SEAC jurisdiction. Nor does such an assertion state a claim for which relief can be granted in an unclassified—at-will—Civil Service System case. *Meyers,* 861 N.E.2d at 704; I.C. § 4-15-2.2-42. A viable public policy exception must be present for the Complaint to survive.

5. Petitioner contends that Respondent inconsistently applied its policies or all together failed to adhere to said policies concerning discipline involving use of force incidents and also claims that he was not required to contact the Indiana Department of Child Services ("DCS") as a result of the actions in question, which Respondent claims Petitioner was responsible for doing when he found out about the incidents described above (Resp't Motion).

6. Petitioner also suggests that he received inconsistent discipline as compared to others involved in the incidents involving Boonstra's use of force. The ALJ will first discuss this allegation.

7. "Disparate treatment claims require proof of intentionally discriminatory treatment of a protected class." *Villas West II of Willowridge Homeowners Ass'n v. McGlothin*, 885 N.E.2d 1280, 1285 (Ind. 2008). Such claims are also analyzed under Title VII of the Federal Civil Rights Act of 1964, as amended. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016). In order to show a *prima facie* case of discrimination, the Petitioner must present evidence that (1) he was in a protected group, (2) he was performing to his employer's legitimate expectations, (3) he was given discipline, and (4) he was treated less favorably than similarly situated individuals. *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009).

8. Petitioner fails to meet the first requirement of being in a protected class as he offers no evidence that he was in a protected class at the time of his demotion.

9. Even if Petitioner were in a protected class, there is also no evidence that Petitioner was otherwise performing to his employer's legitimate expectations; in fact, the evidence shows the opposite—that Petitioner was not performing to his employer's expectations when he failed to consult with HR about Boonstra's discipline.

10. Petitioner identifies four (4) other individuals—Harshbarger, then-Captain Charlie Blackburn ("Blackburn"), then-Correctional Lieutenant Jeff Hershberger ("Hershberger"), and Director of Operations Cecil Davis ("Davis")—who were aware of Boonstra's use of force incidents, but were not disciplined for their handling of the situation, as Petitioner was.[3] However, the individuals in question received different or no discipline as compared to Petitioner because they were at different levels of employment and had different roles and responsibilities in the situation than Petitioner.

11. Harshbarger was on leave for several days in February, 2018 and was not aware that Petitioner had failed to discuss Boonstra's discipline with HR staff, despite her direction that he do so (Resp't Motion Exs. C, D). Further, it was Petitioner, not Harshbarger, who was responsible for conducting administrative hearings and contacting HR staff regarding these types of incidents (Resp't Motion Ex. D). As noted above, Harshbarger received a written reprimand for her inappropriate handling of the incident (Resp't Motion Ex. C).

12. While Blackburn did not receive discipline in this matter, Petitioner fails to provide evidence indicating that Blackburn was responsible for either holding administrative meetings or contacting HR staff in this incident, nor showing Blackburn even played a role in Boonstra's discipline.

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[3] Hershberger was promoted to Deputy Warden on April 8, 2018 (Resp't Motion Ex. G); the nature of Blackburn's current employment with Respondent is unclear from the pleadings.

13. Hershberger did not receive discipline in this instance because he merely heard about the incident on the radio and subsequently saved the video footage of the incidents so he could provide them to his supervisors. Additionally, Hershberger, a Correctional Lieutenant, was outranked by Harshbarger, Petitioner, and Blackburn (Respt' Motion Ex. G). Further, Petitioner has failed to show that Hershberger played or even had the ability to play, a role in the administration of Boonstra's discipline.

14. Finally, Davis was not notified of the incidents until March 16, 2018 (Pet'r Ex. I). Once Davis became aware of the incidents and reviewed the reports, he contacted Harshbarger as to inquire what disciplinary steps had been taken and was informed that Boonstra had already been disciplined (Resp't Reply Ex. V). Davis did not have access to the video footage of the incident and was left to rely on the judgment of facility staff.

15. Therefore, while Petitioner suggests he received discipline inconsistent with other staff, there is no evidence indicating that anyone other than Harshbarger or Petitioner decided on the discipline to provide Boonstra. Harshbarger did receive discipline for her involvement in the incident; however the facts support the notion that Harshbarger was not aware Petitioner had failed to contact HR prior to issuing Boonstra's discipline, thus limiting her culpability as compared to Petitioner (Resp't Motion Ex. D).

16. Further, in support of his position, Petitioner presented fifteen (15) videos of incidents of force that occurred after his demotion (Pet'r Exs. 1-15). Petitioner contends that the incidents are very similar to the incidents involving Boonstra, yet the disciplinary outcomes of the employees involved are all different and inconsistent.

17. However, not only does Petitioner fail to provide evidence showing how the use of force incidents were similar to Boonstra's, Petitioner fails to provide any evidence of what, if any, disciplinary actions were taken against the employees involved in the fifteen (15) incidents. Petitioner instead simply states in his reply that all of the use of force events resulted in "a lack of consistency in justification, contacting DCS and or investigations by the I.G's office and the filing of chargers [sic]." (Pet'r Reply).

18. The failure to support the offered evidence does not provide the ALJ with anything to compare Petitioner's situation to that of the claimed comparators. For example, Petitioner does not explain, or offer evidence demonstrating, what the events in the videos are, when they occurred, who was involved, the final outcomes on any investigation into the use of force, or any subsequent discipline or lack thereof.

19. "A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Once the moving party satisfies this burden through evidence designated to the trial court, the non-moving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. Mere speculation is insufficient to create a genuine issue of material fact to defeat summary judgment." *Biedron v. Anonymous Physician 1*, 106 N.E.3d 1079 (Ind. Ct. App. 2018) (internal citations omitted).

20. Further, an adverse party to a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Ind. Trial Rule 56(E). "A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto." Ind. Trial Rule 56(C). "Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court." *Id.*

21. Petitioner failed to designate to the ALJ a material issue of fact through his submission of the videos. Without further explanation or evidence, the ALJ cannot construe the videos as supportive of Petitioner's contention that similar events were handled in a different manner than his situation.

22. Additionally, Petitioner failed to comply with Ind. Trial Rule 15(D), which states in part, "[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Petitioner did not indicate to the ALJ prior to the filing of his Reply that any events which could possibly impact Petitioner's claims had transpired since the filing of his Complaint.[4]

23. The ALJ will next discuss Petitioner's contention that he was not responsible for contacting the Department of Child Services ("DCS") following the incidents as Respondent contends.

24. Indiana citizens have a duty to report suspected child abuse. Ind. Code § 31-35-5-1. Petitioner indicates that because no physical injury had occurred, it was unnecessary to contact DCS.

[4] The ALJ realizes that Petitioner has been proceeding *pro se* since the outset of these proceedings; however, such status does not confer a free pass upon Petitioner to ignore the Trial Rules. Rather, Petitioner is reminded "that a litigant who proceeds pro se is held to the same established rules of procedure that trained counsel is bound to follow." *Rickels v. Herr*, 638 N.E.2d 1280, 1283 (Ind. Ct. App. 1994).

25. Similar to the above contentions, Petitioner suggests that DCS was not notified in several other use of force instances, lending to his claim that Respondent inconsistently applies its policy. Also similar, however, is Petitioner's failure to provide anything more than a mere accusation. Petitioner did not provide the ALJ with any evidence showing that similar cases did not involve DCS being contacted nor that Respondent was inconsistent with its application of discipline in such cases.

26. Further, even if Petitioner was in part demoted for failing to contact DCS, it appears that Respondent did not demote Petitioner solely because he failed to contact DCS; rather he was demoted for failing to follow instructions and include HR in the decision involving Boonstra's discipline. Therefore, while Petitioner could prevail on this theory, his lack of support for this position dooms him.[5]

27. Petitioner next contends that his discipline was egregious, excessive, and unsubstantiated (Pet'r Reply).

28. Respondent's Information and Standards of Conduct for Departmental Staff ("Policy") states that "[s]taff are prohibited from refusing to obey a lawful job-related order from a superior." Staff who violate the Policy are subject to disciplinary action. (Resp't Motion Ex. T). Petitioner was asked by Harshbarger, his superior, and reminded by Ebert to consult with HR prior to issuing discipline (Resp't Exs. E, D). Petitioner failed to do so and thus was in direct violation of Respondent's Policy.

29. No other public policy exception has been raised by Petitioner, and therefore, the ALJ concludes that SEAC lacks subject matter jurisdiction to further consider Petitioner's Complaint. Thus, Respondent's Motion must be granted.

To the extent a finding of fact is deemed a conclusion of law, or a conclusion of law is deemed a finding of fact, it shall be given such effect.

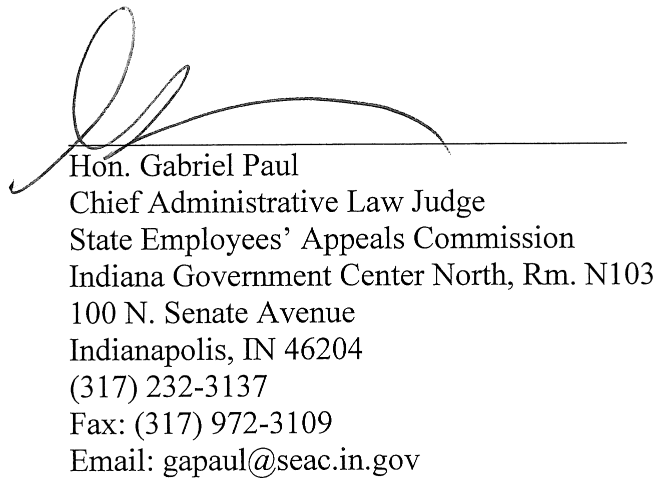
V. Final Order of Dismissal

Respondent's Motion for Summary Judgment is GRANTED. This action is hereby dismissed with prejudice. All case management deadlines are vacated.

This is the final order of the Commission. A person who wishes to seek judicial review must file a petition in an appropriate court within thirty (30) days of this order and must otherwise comply with Ind. Code § 4-21.5-5.

[5] Assuming *arguendo* that Petitioner prevailed on this theory, the ALJ questions whether this fact alone would be material enough to warrant denying summary judgment to Respondent.

DATED: March 27, 2019



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