BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

KELLY D. GROCE	)
Petitioner,	)
	) SEAC NO. 07-13-051
vs.	)
	)
PLAINFIELD CORRECTIONAL FACILITY	)
FACILITY BY INDIANA DEPARTMENT	)
OF CORRECTION	)
Respondent.	)

FINAL ORDER OF DISMISSAL

You are notified the Administrative Law Judge, acting on behalf of the State Employees' Appeals Commission, now enters a final order of dismissal as to the Complaint of Petitioner McNutt because SEAC lacks statutory jurisdiction. The reasons for the initial proposed dismissal are set forth in the ALJ's July 23, 2013, "Notice of Proposed Dismissal For Lack of Jurisdiction Under Ind. Code §4-15-2.2-42" entered previously (the "Notice"). The Notice is incorporated by reference herein.

Petitioner Groce timely responded to the Notice on July 30, 2013. The Response is treated both as argument and an Amended Complaint to give every inference in Petitioner's favor to the pleadings for purposes of this review. Mr. Groce's response is discussed herein, but not availing to rescue the Complaint's jurisdictional defects.

For context, the original Notice explained:

> "Petitioner Groce does not allege a public policy exception to the 2013 demotion. Petitioner does not assert any specific protected classes to which [he – stet] belongs for which discrimination was undertaken by the employer. (See, Complaint.) Nor does Petitioner allege intentional retaliation against statutorily protected activity. *Id*. As a matter of law, the state employer Respondent could be incorrect about the incident specifics or the reporting and still demote the Petitioner under the at-will doctrine. Similarly, due process did not apply to an at-will demotion and the demotion could be sudden as a matter of law. I.C. 4-15-2.2. *Darnell Cole v. Milwaukee Area Technical College District, et al.*, 634 F.3d 901, 903-906 (7th Cir. 2011); *Samone Redd v. Rosemarie Nolan et al.*, 663 N.E.3d 287, 296 (7th Cir. 2011)(no due process or 'property' right in at-will employment)." See, Notice at p. 2

In response, Petitioner Groce first replies with a new argument that the state was late in responding to his lower Step I or Step II complaints, prior to reaching Step III at SEAC.

Specifically, Petitioner alleges the agency DOC was two (2) days late responding at Step I and the State Personnel Department (SPD) was two (2) days late responding at Step II. However, the docket and AOPA show that the state was not late. I.C. 4-21.5-3-1 to 2. Civil Service litigation before SEAC is procedurally governed by AOPA. I.C. 4-15-2.2; I.C. 4-15-1.5. A party generally receives three days added to a response time when served by mail. I.C. 4-21.5-3-2(e). Studied from Petitioner's Complaint, Petitioner served the state at Steps I-II by various forms of mail, thus adding the three days to the state response time at each Step.

The ALJ makes an additional observation as well. The state did respond to the Complaint and Petitioner was able to reach SEAC at Step III. No prejudice to Petitioner is shown by the alleged two day delay. Estoppel is disfavored against Indiana government in this kind of context. *Biddle v. BAA Indianapolis, LLC,* 860 N.E.2d 570, 581 (Ind. 2007) A plain reading of the step process in Section 42 requires a petitioner-employee to file steps timely or face complaint waiver, but does *not* provide a petitioner an automatic win by default because the state is a few days late responding at Steps I-II. I.C. 4-15-2.2-42. This may be partially one-sided inside the statute.

However, such is a statutory balancing choice made by the General Assembly in drafting the statute that should not be disturbed. Instead, SEAC has and continues to construe Civil Service Section 42 to allow a petitioner-employee to consider a lower step constructively "exhausted" if the state does not respond timely at Steps I-II so the Petitioner can keep exhausting the steps until SEAC. See, *Porter v. DCS,* SEAC No. 11-12-118 (December, 2012 Notice and January 30, 2013 Final Order). This sufficiently benefits a petitioner-employee to continue their case when the state is alleged late, presuming a petitioner otherwise timely files. Here there is no question of exhaustion – Petitioner reached Step III.

Finally, the end of Petitioner's Response offhand mentions "hostile work environment". 'Hostile work environment' is a term of legal art referring to a type of unlawful race, national origin or sex based discrimination in the workplace. Not all different treatment or mere employer inconsistency creates an unlawful 'hostile work environment'. Here, Petitioner does not apply that term of art to the case's facts or support all the prima facie legal elements of a hostile work environment claim. Several elements are missing from the quick reference. The mere reference therefore does not rescue the Complaint from dismissal.

A prima facie claim of hostile work environment under federal and Indiana civil rights laws[1] requires a petitioner-employee to factually allege certain key elements including: (1) that the work environment was both subjectively and objectively offensive; (2) that the harassment was based on membership in a protected class; (3) that the conduct was severe or pervasive (enough to alter material employment conditions); and (4) that there is a basis for employer liability." *Vance (cite below) citing Mendenhall v. Mueller Streamline Co.*, 419 F.3d 686, 691 (7th Cir. 2005); *Wyninger v. New Venture Gear, Inc.,* 361 F.3d 965, 975 (7th Cir. 2004). Conduct that is unpleasant, but is not severe or pervasive, will not constitute a hostile work environment prohibited by Title VII. *Vance v. Ball State University*, 1:06-cv-1452-SEB-JMS (S.D. Ind. 2008) See also, *Filter Specialists, Inc. v. Dawn Brooks et al*., 906 N.E.2d 835, 839-842 (Ind. 2009).

[1] See generally, Title VII of the federal Civil Rights Act of 1964, as amended, or the Indiana Civil Rights Act.

Petitioner's Response does not make this basic showing. For instance, Petitioner does not establish he is in a protected class, that the harassment related to that protected class or that it was so severe and pervasive as to alter his material employment conditions.

The Complaint, and this action, is hereby **DISMISSED**. This is the Final Order of the Commission in this matter. 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 I.C. 4-21.5-5.

DATED: September 16, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
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