BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

THOMAS SMITH Petitioner,	)	
	)	SEAC No. 07-18-050
vs.	)	
LOGANSPORT JUVENILE CORRECTIONAL FACILITY BY INDIANA DEPARTMENT OF CORRECTION Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction and Summary

On January 17, 2019, 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 Thomas Smith ("Petitioner"), pro se, timely replied to the Motion on February 18, 2019. Thereafter, on March 6, 2019, Respondent filed a response in support of its Motion.

This case considers Petitioner's time-served suspension from April 4, 2018-April 23, 2018 for failing to use proper judgment when he initiated force on a misbehaving student on March 18, 2018. The controlling pleadings for purposes of this decision is the Complaint originally received on July 9, 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 pertinent times since the start of his employment in April, 1999, Petitioner was an unclassified, at-will employee, but most recently served as a Correctional Lieutenant (Pet'r Compl., Resp't Motion)

2. On March 18, 2018, a student at Respondent's facility was misbehaving and was eventually sent to a room by himself as a result of his behavior (Resp't Motion).

3. Soon thereafter, Petitioner entered the room to talk with the student (Resp't Motion, Ex.C-1).

4. As he entered the room, the student had his back against the wall, was not visibly upset and his hands were low on his body (Resp't Motion, Ex. C-1).

5. Once the conversation ended, Petitioner started to leave the room, but abruptly reentered after the student displayed insubordinate behavior towards Petitioner (Pet'r Compl.; Resp't Motion, Ex. C-1).

6. Once Petitioner reentered the room, he directed the student to face a side wall, which the student did, after which the two engaged in more conversation (Pet'r Compl.; Resp't Motion, Ex. C-1).

7. During the conversation, Petitioner placed his hand on the student's back and forcibly turned him to again face the wall (Resp't Motion, Ex. C-1).

8. The student then turned again to face Petitioner, at which point Petitioner forced the student to the ground, after which the student was subdued and complied without further incident (Pet'r Compl; Resp't Motion, Ex. C-1).

9. On April 3, 2018, Respondent opened an investigation into the incident (Resp't Motion, Ex. C).

10. On April 4, 2018, Petitioner was placed on unpaid leave pending the outcome of the investigation (Resp't Motion, Ex. B).

11. During the investigation, Petitioner spoke to Respondent's investigators on two (2) separate occasions (Pet'r Compl; Resp't Motion, Exs. B, C).

12. Respondent concluded its investigation on April 23, 2018, by finding that while Petitioner's use of force was correct given the circumstances, said circumstances did not give rise to the use of force in the first place. It was determined that Petitioner should return to work (Resp't Ex. C).[2]

13. Petitioner returned to work on April 24, 2018, where he was given the results of Respondent's investigation and told that his suspension constituted the discipline Petitioner incurred (Pet'r Compl.; Resp't Motion, Ex. C).

[2] During its investigation, Respondent also found that the student exaggerated his injuries, which resulted in the student receiving a conduct report (Pet'r Compl.; Resp't Motion Ex. 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. 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. At the outset, the ALJ notes that Petitioner does not allege, either in his Complaint or in his Reply that he was discriminated against by Respondent. Instead, Petitioner disagrees with the discipline he received and alleges that his use of force was justified based on Respondent's Use of Force in Youth Services Facilities Policy ("Policy").[3] Therefore, the ALJ will focus on such Policy when discussing Petitioner's contentions below.

6. Respondent's Policy states that physical force is a last resort to be used only after lessor forms of compliance are unsuccessful, or when a youth is in danger of harming himself or others.

7. The Policy further states that the best way to avoid conflicts is by being prepared, which consists of three (3) main things: knowing the population, knowing yourself, and practicing good communication skills.

8. Under the first category, the Policy states that, among other things, youth offenders may act impulsively and exhibit a lack of concrete thinking and/or emotional control.

9. The second major category of the Policy cautions employees to control their behavior regardless of the situation, as well as having the ability to control their ego and giving non-emotional responses to all situations.

10. Third, the Policy states that an employee should approach the youth with a calm demeanor and display empathic listening, be nonjudgmental, offer to listen to the youth's issues in a more confidential area and, most importantly, to relax, stay calm and minimize distractions.

11. The Policy concludes by listing five (5) stages of escalation, as well as the appropriate responses for each. The stages are defined (in increasing order) as Potential for Escalation, Verbal Escalation, Verbal Expression, Non-Directed Assault and Directed Assault. In all cases, the Policy directs that debriefing should occur after the event.

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[3] In Petitioner's Reply, he makes mention of the fact that another employee received a lesser form of discipline on June 13, 2018, for an incident occurring on May 21, 2018 (Pet'r Reply, Ex. 1). However, Petitioner provided no further context regarding it and any argument Petitioner may have regarding disparate treatment is otherwise waived. It is well settled that "speculation may not be used to manufacture a genuine issue of fact." *Springer v. Durflinger,* 518 F.3d 479, 484 (7th Cir. 2008).

Similarly, in his Reply, Petitioner makes mention of the fact that he was not able to review a piece of evidence concerning his co-worker, who aided Petitioner during the altercation. However, as Respondent noted in its surreply, Petitioner did not ask for this particular piece of evidence during discovery; therefore, Respondent was under no obligation to provide it. "The time for securing relevant evidence was during the period allotted for discovery, not afterwards." *In re Sulfuric Acid Antitrust Litig.,* 231 F.R.D. 331 (N.D. Ill. 2005). For the sake of transparency, however, Respondent submitted two (2) DVDs containing both audio and video interviews with the coworker in question (Resp't surreply Exs. E-F). After review, the ALJ finds that the evidence presented on the DVDs supports the fact that Petitioner did not exercise proper judgment during the altercation.

12. In particular, the ALJ finds that the student's behavior on the day in question rises to level two (2), or "Verbal Escalation" under the Policy. Inside this level, a student's behavior is categorized by specific verbal and physical indications that continue to escalate and include behaviors such as caustic remarks and insults.

13. The ALJ supports this finding by referring to Petitioner's comments he made to Respondent's investigators about the incident, when he stated that he turned around and re-entered the room because the student verbally insulted Petitioner and started to make a sound that could lead to Petitioner being spat upon by the student (Resp't Motion, Ex. C-2).

14. To alleviate a "Verbal Escalation" situation, the Policy states that the appropriate responses include managing emotions and body language.

15. Instead of managing his emotions, however, which Petitioner admitted he could have done by simply ignoring the comment and walking out of the room, he instead felt the need to reenter the room and physically confront the student (Resp't Motion, Ex. C-2).

16. It was undisputed that the student, at all times during the incident, was in a non-threatening pose. Therefore, Petitioner could have taken the types of actions described above to deescalate the situation, but instead failed to control his emotions and body language such that the use of force could have been avoided.

17. As a result, Respondent was within its rights to discipline Petitioner as it did, based upon his violation of the Policy.

18. Petitioner finally argues that Respondent failed to follow progressive discipline, nor was he given a predeprivation meeting.

19. With regard to the latter, the State's discipline policy ("Discipline Policy") is clear that predeprivation meetings are only guaranteed to classified employees. *See* https://www.in.gov/spd/files/discpol.pdf. Therefore, Petitioner, as an unclassified employee, was not entitled to one.

20. The Discipline Policy, when discussing progressive discipline, also states that discipline should be corrective and progressive in nature and should be determined by taking into account such factors as the seriousness of the offense and the record of the employee's service with the State. *Id.*

21. While such discipline should be progressive, the Discipline Policy also says that the State reserves the right to impose discipline commensurate with the offense. *Id*

22. Therefore, given Petitioner's use of force, Respondent had the right to issue a time-served suspension. Had Respondent's investigation found that Petitioner's use of force was excessive as well as unwarranted, Petitioner likely would have been subject to termination. Thus, Respondent, when making its decision, followed the Discipline Policy by taking into account the seriousness of the offense. *See Pruet v. Fayette Reg'l Health Sys.* 2013 U.S. Dist. LEXIS 132359 (S.D. Ind. 2013) (holding that an employee's work record can be indicative of the type of punishment issued).

23. Petitioner also contends that Respondent did not follow the State's Discipline Policy when reinstating him.

24. According to the Discipline Policy, an employee can be placed on an emergency suspension without pay, pending the results of an investigation. The Discipline Policy further states that if the misconduct which warrants discipline is not substantiated by that investigation or disposition of the charges is favorable to the employee, the employee shall be reinstated with full back pay and benefits, less any wages he/she may have earned during the suspension period.

25. While Petitioner was found to have acted with reasonable force, Respondent also found that such force was not necessary, given the circumstances (Resp't Motion, Ex. C).

26. Thus, the disposition of the charges was not entirely favorable to Petitioner. Further, the plain reading of the Discipline Policy does not lead the ALJ to believe that full reinstatement with back pay is an option if something less than all of the charges levied against Petitioner were found to be unsubstantiated.

27. Since some of the charges against Petitioner were found to be substantiated (Petitioner's instigation of the use of force), Respondent had the right to issue Petitioner a time-served suspension under the Discipline Policy.

28. Petitioner finally submits a copy of his most recent (2018) Performance Appraisal ("Appraisal") in support of his position that he was unfairly disciplined (Pet'r Reply, Ex. 3).

29. While Petitioner's overall rating was "meets expectations", with some categories rated as "exceeds expectations", the ALJ notes that under the "Performance Expectations" category, Petitioner was rated as a "does not meets expectations" as it related to reducing the number of staff/student physical incidents over the previous year. Indeed, Respondent, in the "results" section of this performance indicator stated that while Petitioner generally adhered to policies and procedures, Petitioner did receive a suspension in April, 2018 for inappropriate judgment resulting in the use of force.

30. The Appraisal states that if a "does not meets expectations" is received, it could lead to an overall rating of "does not meets expectations" and/or placement on a Work Improvement Plan. However, Respondent took neither action here, apparently concluding that Petitioner's work outside of the April, 2018 incident was otherwise good enough to warrant an overall rating of "meets expectations."

31. Additionally, it is also well established that when evaluating "the question of whether an employee was meeting an employer's legitimate employment expectations, the issue is not the employee's past performance but whether the employee was performing well at the time of discipline." *Peele v. Mut. Ins. Co.*, 288 F.3d 319 (7th Cir. 2002)

32. The Court concluded in the Peele case that it was "unpersuaded by Peele's argument that evidence of her poor job performance must be balanced against the 'favorable performance reviews, raises, and promotions' she received." *Id.* Therefore, Petitioner cannot seek to have his Appraisal act as a mitigating factor in arguing that his discipline was otherwise unfair.

33. Since Petitioner submitted no further evidence, the ALJ cannot conclude that an issue of fact exists such that this case should continue.

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.

DATED: March 26, 2019

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Chief Administrative Law Judge
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