BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

EDWARD YOUNG JR.,	)	
Petitioner,	)	
	)	
v.	)	SEAC No.: 08-12-085
	)	
EDINBURGH CORRECTIONAL	)	
FACILITY BY INDIANA DEPARTMENT	)	
OF CORRECTION	)	
Respondent	)	

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

On November 28, 2012 Respondent ECF, by counsel, moved for summary judgment. Petitioner Young, pro se, has not responded to the motion. This case considers, under the Indiana Civil Service System (I.C. 4-15-2.2-1, 42), the Petitioner's termination of employment from Respondent ECF on May 23, 2012 for tobacco use contrary to the Non-Tobacco Use Agreement (NTUA) signed by the Petitioner. Having duly reviewed the record, the Administrative Law Judge (ALJ) determines there are no genuine issues of material fact and Respondent ECF is entitled to judgment as a matter of law. Respondent ECF's Motion for Summary Judgment is therefore **GRANTED**. The ALJ enters the following findings of fact, conclusions of law and non-final order.

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 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).

When a non-moving party fails to timely respond to a summary judgment motion, a court should accept the designated factual materials of the moving party. *Marvin Miller M.D. v. Tiffany Yedlowski et al*, 916 N.E.2d 246, 249-252 (Ind. App. 2009). See also, *Naugle et al. v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1062 (Ind. 2007)(review is limited to those materials timely designated to the court).

II. Employment at Will

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 including "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). A termination or lesser discipline of an unclassified, at will state employee may not violate public policy. I.C. 4-15-2.2-42. Otherwise, an unclassified state 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).

III. I.C. 22-5-4 regarding Off Duty Use of Tobacco & the NTUA

Indiana offers protection from employment discrimination for off-duty tobacco use by preventing employers from requiring employees to refrain from smoking as a condition of their prospective or continued employment. I.C. 22-5-4-1(a)(1). Indiana also forbids employers from discriminating against employees with respect to their pay, benefits or conditions of employment based on the employee's off-duty use of tobacco. I.C. 22-5-4-1(a)(2). However, there is an exception to this statute which allows employers to implement financial incentives which are intended to reduce tobacco use and are related to employee health benefits. I.C. 22-5-4-1(a-b).

The Non-Tobacco Use Agreement (NTUA) offered to state employees is a voluntary program that offers the financial incentive of a reduction in health insurance premiums in exchange for a state employee's promise not to use tobacco. This agreement clearly states that an employee will be subject to testing for nicotine and will be terminated if he or she uses tobacco after accepting the agreement. [1] Once an at-will state employee voluntarily enrolls in the state's NTUA they can be terminated or disciplined for a perceived breach of that Agreement as any other at-will employee may be. As SEAC has previously held, a state employee must choose to reject the reduced premium if they wish to have statutory protection for off-duty tobacco use

[1] An employee may rescind the agreement, and return the premium benefit, but must do so before the state tests for or discovers alleged tobacco use.

under the clear terms of I.C. 22-5-4-1(a-b). See *Lineberry v. Pendleton Juvenile Correctional Facility*, SEAC 06-12-062, July 11, 2012 SEAC Final Order (Reviewing I.C. 22-5-4-1(a-b) in conjunction with the Civil Service System, and incorporating the previous Notice of Dismissal).

IV. Contracts and the Duty To Read

Written contracts are to be enforced and construed in light of their plain terms and conditions. Indiana follows the long standing rule that parties to a contract have a duty to read contracts they agree to and know the contents. See *Safe Auto Ins. Co. v. Enterprise Leasing Co. of Indianapolis, Inc*., 889 N.E.2d 392,397 (Ind. App. 2008). Parties to a contract cannot use as a defense that they did not read what they signed. *Safe Auto, supra*.; *See also, Heller Financial, Inc. v. Midwhey Powder Co., Inc*., 883 F.2d 1286, 1292 (7th Cir. 1989)(Discussing similar Illinois law.).

V. Findings of Fact

The following facts are taken from the designated evidence, as construed in the light most favorable to Petitioner Young. Petitioner did not designate evidence or respond to the Motion.

1. Petitioner Young was a Correctional Officer for Respondent ECF and an at-will state employee.

2. On November 15, 2011, Petitioner Young made his insurance benefits elections for the upcoming year. (Resp. Ex. A)

3. When directed to the NTUA site the Petitioner clicked "I accept." This site allows employees to agree to "abstain from the use of any tobacco products during 2012" in exchange for a twenty five dollar bi-weekly reduction in their insurance premium. (Resp. Ex. C)

4. The NTUA states in bold letters that if an employee accepts the agreement and then uses tobacco his employment will be terminated. The site also states that an employee who accepts the agreement may be subject to nicotine testing. (Resp. Ex. B)

5. On May 16, 2012, Petitioner Young was selected to be tested for nicotine. The Petitioner tested positive for cotinine which is found in tobacco and is an indicator of tobacco use. (Resp. Ex. D)

6. While being tested for nicotine, Petitioner Young informed the lab technician that the Petitioner had not signed up for the NTUA and that he used chewing tobacco. Petitioner

Young also asserted in his complaint that he did not intentionally sign the NTUA nor intend to defraud the state. (Pet. Compl. p. 1). The technician told him that if he refused the testing the Petitioner could be fired. (Pet. Compl. p. 1)

7. On May 23, 2012 Petitioner Young was terminated from employment with Respondent ECF for violation of the NTUA. (Resp. Ex. E)

VI. 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 ECF has demonstrated that Petitioner Young was terminated for the lawful reason of violating the NTUA agreed to by Petitioner.

2. Although the Off-Duty Tobacco Statute protects employees from discrimination based on their off-duty use of tobacco, once an at-will employee enrolls in the state's Non-Tobacco Use Agreement, he can be terminated or disciplined for breaching that agreement. See, the NTUA, I.C. 4-15-2.2-42, I.C. 22-5-4-1(a-b), and *Lineberry* at 4.

3. Petitioner Young has asserted in his complaint (not by designated evidence) that he did not intentionally sign the NTUA nor intend to defraud the state. (Pet. Compl. p. 1). Petitioner did click the "I accept" button as to signing up for the NTUA. Any unilateral mistake of fact by Petitioner as to what clicking "I accept" meant, the signup instructions, or the contract's clear written terms should be charged to Petitioner under the duty to read. Furthermore, while Petitioner's honesty is fully assumed herein, intent to defraud is not necessary to find that Petitioner Young was a party to a contract, here the NTUA. Petitioner breached that contract by using tobacco products as evidenced both by his admission and positive tobacco test. Parties to a contract have a duty to read what they are signing. See *Safe Auto* at 397, and *Heller Financial, Inc*. at 1292.

4. Respondent ECF has designated evidence demonstrating that Petitioner Young was an at-will employee enrolled in the NTUA and that Petitioner breached that agreement. Respondent has therefore demonstrated that the Petitioner's employment was lawfully terminated.

5. 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 a

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

VI. Non-Final Order Granting Respondent's Motion for Summary Judgment

Summary Judgment Motion is entered in favor of Respondent ECF. There are no genuine issues of material fact to require an evidentiary hearing. Respondent is entitled to judgment as a matter of law against all claims of the Complaint. Respondent has satisfied the movant's burden under Ind. T.R. 56. Petitioner Young has not rebutted this burden. Petitioner's complaint is denied. Respondent's termination of Petitioner Young is upheld. Any remaining case management deadlines are vacated.

DATED: January 23, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
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NOTICE OF FINAL ORDER
OF THE STATE EMPLOYEES' APPEALS COMMISSION

On January 23, 2013 the ALJ issued notice and a copy of "Findings of Fact and Conclusions of Law with Non-Final Order of Administrative Law Judge Granting Summary Judgment to Respondent ECF" ("ALJ's Order"), which is incorporated by reference herein. No objections were received by either party within the time of February 11, 2013 provided. Accordingly, the ALJ's Order, in its entirety, is hereby the Findings of Fact, Conclusions of Law and Final Order of the Commission pursuant to statute and Commission delegation. Ind. Code §§ 4-21.5-3-27 to 29.

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: March 11, 2013

Hon. Aaron R. Raff
Chief Administrative Law Judge
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