CIVIL NOTICE
ELKHART SUPERIOR COURT 1

Ernest Pickens vs. Indiana Department of Correction,State Employees Appeal Commission — 20D01-1210-PL-000218

To: State Employees Appeal Commission
IGCN
100 N Senate Ave
Room 501
Indianapolis IN 46204

ATTORNEYS	PARTIES
	PLAINTIFF / PETITIONER Ernest L Pickens
Jay Lauer	
	DEFENDANT / RESPONDENT Indiana Department of Correction; State Employees Appeal Commission
Corinne Terese Welch Gilchrist	

EVENTS:

Entry Date	File Stamp/ Order Signed/ Hearing Date	Event and Comments
11/25/2013	11/25/2013	Order Issued (The Court having taken the Verified Petition for Review (filed 10/1/12), Plaintiff's Memorandum in Support (filed 4/22/13), Defendant's Response (filed 6/10/13), and Plaintiff's Reply (filed 7/3/13 and 7/8/13) under advisement, and after considering the arguments presented on 11/1/13, the Court now enters an Order on 11/25/13. **SEE ORDER** Copy of Order and Notice to the attorneys of record. Cause of action ordered off the active docket. ESR/lfk-d)

SEAC # 10-11-160

STATE OF INDIANA	)	**IN THE ELKHART SUPERIOR COURT No. 1**
	)SS:	
COUNTY OF ELKHART	)	**CAUSE NO: 20D01-1210-PL-00218**

ERNEST PICKENS,)
Plaintiff,)
)
v.)
)
INDIANA DEPARTMENT OF)
CORRECTION and STATE)
EMPLOYEES APPEAL COMMISSION,)
Defendants.)

ORDER

Before the Court is Plaintiff's Verified Petition for Review filed 10/1/2012, Plaintiff's Memorandum in Support of his Verified Petition for Review filed 4/22/2013, Defendant's Response in Opposition to Petition for Judicial Review filed 6/10/2013, and Plaintiff's Reply to Respondent's Response in Opposition to Petitioner's Verified Petition for Judicial Review filed 7/3/2013 and 7/8/2013. Arguments were presented 11/1/2013, with Plaintiff appearing by counsel, Attorney Lauer and Defendant appearing by counsel, Attorney Welch Gilchrist. Following review and consideration of the arguments presented, the Court now enters the following findings of fact and conclusions of law:

Findings of Fact:

1. Plaintiff requests that the Court set aside the Final Order in an administrative proceeding pursuant to I.C. § 4-21.5-5-6 et seq. and remand the cause to the ALJ for reconsideration.[1]

2. The Court adopts and incorporates the Findings of Facts one through eight in the ALJ's Final Opinion. In dispute, is finding nine which states:

> Petitioner Pickens cannot demonstrate the ***in writing*** requirement in the WBL, which is the first required legal element for a WBL claim. The Petitioner also cannot satisfy the refusal exception under public policy. It was the dispatcher's, not

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[1] The "Final Order Granting Respondent's Motion to Dismiss" was entered 8/29/2012 by Chief Administrative Law Judge, A. Raff.

> Petitioner Pickens, who were engaged in or potentially liable for the alleged ghost employment. [Footnote omitted] Petitioner did not refuse unlawful conduct at the behest of the employer upon which the retaliation was based. . . . (Emphasis in original)

3. The ALJ's decision was based on an interpretation of I.C. § 4-15-10-4, of the Whistle Blowing Law [hereafter "WBL"].[2]

4. Succinctly stated, the conflict between the parties is whether "in writing"' is a requirement of a complaint. Plaintiff reads the "may"' in the statute to refer to the in writing phrase, whereas Defendant argues that the "may" applies to an employee's ability to report and not to the "in writing" language.

Conclusions of Law:

1. Because this issue is a matter of law, this Court reviews it de novo.[3] However, deference is given to an agency's interpretation of a statute it is charged with administering.

2. Courts have limited power to review agency actions under the AOPA. A reviewing Court may only set aside a judgment, under I.C. § §4-21.5-5-14, if it is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) contrary to constitutional right, power, privilege, or immunity;
> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (4) without observance of procedure required by law; or
> (5) unsupported by substantial evidence.

3. An administrative decision is arbitrary and capricious only when it is willful and unreasonable, without consideration or in disregard of the facts and circumstances of the case, or without some basis which could lead a reasonable person to the same conclusion.

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[2] Which reads, in relevant part: "Section 4 (a) Any employee may report in writing the existence of:"

[3] *Ghosh v. Indiana State Ethics Com'n*, 930 N.E.2d 33 (Ind. 2010).

4. "The party challenging an agency decision bears the burden of demonstrating its invalidity. When reviewing an administrative agency's decision, '[n]either the trial court nor this court may reweigh the evidence or reassess witness credibility.' Rather, we must accept the facts as found by the agency factfinder. In addition, in light of an administrative agency's expertise in its given area, we give deference to the agency's interpretation of the statutes and rules it is charged with enforcing."[4]

5. In describing the deference given to administrative interpretations of statutes, the Indiana Court of Appeals states:

> An interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself . . . Deference to an agency's interpretation of a statute becomes a consideration when a statute is ambiguous and susceptible of more than one reasonable interpretation. When a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency. If a court determines that an agency's interpretation is reasonable, it should terminate its analysis and not address the reasonableness of the other party's proposed interpretation. Terminating the analysis recognizes the general policies of acknowledging the expertise of agencies empowered to interpret and enforce statutes and increasing public reliance on agency interpretations. However, an agency's incorrect interpretation of a statute is entitled to no weight. If an agency misconstrues a statute, there is no reasonable basis for the agency's ultimate action and the trial court is required to reverse the agency's action as being arbitrary and capricious.[5]

6. Here, the ALJ read the WBL to include a writing requirement. Plaintiff argues that the writing element is permissive.

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[4] *Indiana Horce Racing Com'n v. Martin*, 990 N.E.2d 498 (Ind.Ct.App. 2013)(internal cites omitted).

[5] *Indiana Horse Racing Com'n v. Martin*, 990 N.E.2d 498 (Ind.Ct.App. 2013)(internal cites omitted).

7. The relevant portion of the WBL states:

Sec. 4. (a) Any employee may report in writing the existence of:

(1) a violation of a federal law or regulation;
(2) a violation of a state law or rule;
(3) a violation of an ordinance of a political subdivision (as defined in IC 36-1-2-13); or
(4) the misuse of public resources;
to a supervisor or to the inspector general.

(b) For having made a report under subsection (a), the employee making the report may not:

(1) be dismissed from employment;
(2) have salary increases or employment related benefits withheld;
(3) be transferred or reassigned;
(4) be denied a promotion the employee otherwise would have received; or
(5) be demoted.

(c) Notwithstanding subsections (a) and (b), an employee must make a reasonable attempt to ascertain the correctness of any information to be furnished and may be subject to disciplinary actions for knowingly furnishing false information, including suspension or dismissal, as determined by the employee's appointing authority, the appointing authority's designee, or the ethics commission. However, any state employee disciplined under this subsection is entitled to process an appeal of the disciplinary action under the procedure as set forth in IC 4-15-2.2-42.

(d) An employer who violates this section is subject to criminal prosecution under IC 35-44.2-1-1.

8. The rules of statutory construction are well known:

The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used." If the language of a statute is clear and unambiguous, it is not subject to judicial interpretation. However, when the language of a statute is reasonably susceptible to more than one construction, we must construe the statute to

> determine the apparent legislative intent. If a statute is subject to different interpretations, the interpretation of the statute by the administrative agency charged with the duty of enforcing the statute is entitled to great weight. However, an agency's interpretation that is incorrect is entitled to no weight. If an agency misconstrues a statute, there is no reasonable basis for the agency's ultimate action, and, therefore, the trial court is required to reverse the agency's action as being arbitrary and capricious.[6]

9. The plain language of the statute dictates that the employee may report and not that the report may be in writing; however, even if it did not and how 'may' modifies 'report in writing' is ambiguous, the Court determines that the agency decision is a reasonable interpretation of the statute entitled to deference.

10. The redacted sentence of the legislature reads: "Any employee may report in writing the existence of . . . (2) a violation of a state law or rule . . . to a supervisor or to the inspector general."

11. The plain language of the statement "may report in writing" is that an employee may permissively report, but is not required to do so; however, the report must be in writing. If the statute is read to apply may to the entire phrase "report in writing," nowhere else does the statute authorize any other type of report. The statute only authorizes one type of report and that report is a written one. Of course, an employee does not have to report such a violation. But the basis for an action is one authorized specifically under the statute.

12. Further support for this conclusion is found in examining the grammar of the sentence. May is an auxiliary verb, which acting in a supporting role modifies a non-finite verb, in this case 'report'. Modifiers generally modify the terms closest to it. Further, because the legislature chose to include 'in writing' and did not chose to place commas around it, the phrase 'in writing' is a restrictive prepositional phrase. Restrictive phrases are necessary for the understanding of the sentence; hence, the label 'restrictive'; they restrict what they are modifying to a smaller, more particular class. In the English language the grammatical difference between a restrictive and nonrestrictive clause is the use of commas to separate nonrestrictive clauses from the rest of the sentence. The legislature here has chosen to include the phrase in writing and has not chosen to include any commas, which would indicate the phrase is nonrestrictive additional information, therefore a writing is a requirement.

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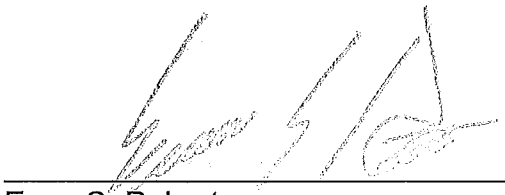
[6] *Indiana-Kentucky Elec. Corp. v. Commissioner, Indiana Dept. Of Environmental Management*, 820 N.E.2d 771 (Ind.Ct.App. 2005).

13. Even if the statute in ambiguous and can be read as permissively authorizing both oral and written reports by the language used, the administrative agency charged with enforcing this statute has decided that 'in writing' is the first element of a claim under the WBL. This is a reasonable interpretation and is entitled to deference, without case law to the contrary.

14. The Court therefore DECLINES to reverse the Final Administrative Order in this cause and DENYS the Verified Petition for Judicial Review.

So ORDERED this 25th day of November, 2013. Copy and Notice to Attorneys of Record. ESR/lfk



Evan S. Roberts
Judge, Elkhart Superior Court No. 1