

**BEFORE THE  
STATE EMPLOYEES' APPEALS COMMISSION**

IN THE MATTER OF:

|                       |                      |
|-----------------------|----------------------|
| JASON BROWN           | )                    |
| Petitioner,           | )                    |
|                       | ) SEAC No. 11-16-055 |
| vs.                   | )                    |
|                       | )                    |
| INDIANA DEPARTMENT OF | )                    |
| TRANSPORATION         | )                    |
| Respondent.           | )                    |

SEAC ISSUED  
JUL 13 2017

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
NON-FINAL ORDER**

**I.     Introduction and Summary**

This administrative review is conducted pursuant to Ind. Code § 4-15-2.2 *et seq.* (the “Civil Service System”) and Ind. Code § 4-21.5-3 *et seq.* (“AOPA”). The operative pleading is Petitioner Jason Brown’s (“Petitioner”) Complaint filed November 20, 2016, with the State Employees’ Appeals Commission (“SEAC”) against Respondent Indiana Department of Transportation (“Respondent”). Petitioner was an unclassified (at-will) employee working as a Crew Leader for Respondent at the time of his termination. The issue before SEAC is whether Petitioner was terminated in contravention of a law, rule or public policy.<sup>1</sup>

An evidentiary hearing in this matter was held on May 24, 2017, before the undersigned Chief Administrative Law Judge. Petitioner Brown appeared pro se. Respondent appeared by counsel, Ms. Linda Jelks. Following the hearing, the ALJ gave each party an opportunity to file proposed findings of fact and conclusions of law, which Petitioner did on June 15, 2017, and Respondent on June 30, 2017. Having reviewed the arguments, witness testimony, admitted evidence, applicable law, and proposals, and being duly advised, the ALJ issues the following Findings of Fact, Conclusions of Law, and Non-Final Order. Petitioner was unable to prove by a preponderance of the credible evidence that Petitioner’s termination breached public policy. Judgment for Respondent.

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<sup>1</sup> See, Ind. Code § 4-15-2.2-24(b) (stating that an unclassified employee may be terminated for any reason that does not contravene public policy).

## II. Legal Standard

Under the Civil Service System, a state agency may dismiss, demote, discipline, or transfer an employee in the unclassified service “for any reason that does not contravene public policy.” Ind. Code § 4-15-2.2-24(b). “An employee in the unclassified service is an employee at will and serves at the pleasure of the employee’s appointing authority.” I.C. § 4-15-2.2-24(a). “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 v. Meyers Construction*, 861 N.E.2d 704, 706 (Ind. 2007) (citations omitted).

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 liability. Put another way, the courts ask whether the termination or discipline itself was illegal in light of applicable statutory law;<sup>2</sup> 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*, 861 N.E.2d at 706-707 (Ind. 2007); *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997); *Frampton v. Cent. Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

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<sup>2</sup> Non-comprehensive examples include illegal discrimination on the basis of race, national origin, sex, age, disability, veteran status, religion, free speech, political affiliation; or retaliation for filing a discrimination complaint or exercising statutory rights such as workers’ compensation rights.

### III. Findings of Fact

1. Petitioner began his employment with Respondent on September 2, 2003, as a Highway Technician, an unclassified employee.<sup>3</sup> (Pet'r Compl.).

2. On January 13, 2005, Petitioner backed into a garage door at one of Respondent's facilities, which resulted in Petitioner receiving a counseling.<sup>4</sup> (Resp't. Ex. I).

3. On June 22, 2005, Petitioner hit a barrier wall while setting up work signs, damaging the stake bed of Respondent's truck. Petitioner received a written reprimand for this offense. (Resp't. Ex. I).

4. On March 21, 2006, Petitioner ran into the rear end of a vehicle during an Ice and Snow operation. Respondent found that Petitioner should have had more control over his vehicle during hazardous weather conditions. For this, Petitioner received a one (1) day suspension. (Resp't. Ex. I).

5. On August 19, 2016, Petitioner failed to complete a pre-trip inspection of a loader.<sup>5</sup> (Pet'r Am. Compl.). Petitioner and two (2) other employees were using the truck to put a salt brine tank in the back of a dump truck. *Id.* When the other employees could not separate the forks, Petitioner got out of the truck to help. The truck began to move and ultimately hit the leg of one of the other employees, breaking it in the process.<sup>6</sup> *Id.*

6. On September 21, 2016, Petitioner was in charge of setting up the work safety zone for a mobile operation being conducted on the two (2) exit ramp lanes on westbound I-465 at U.S. 31.<sup>7</sup> (Pet'r. Compl.).

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<sup>3</sup> During his employment, Petitioner was promoted to a Crew Leader, which was also an unclassified position. However, the record does not provide a specific date.

<sup>4</sup> Under The Indiana State Personnel's ("SPD") Discipline Policy, "[a] counseling is not discipline, but may serve as notice that failure to correct the performance or repetition of the misconduct may result in disciplinary action." See <http://www.in.gov/spd/files/discpol.pdf>.

<sup>5</sup> A loader is a type of tractor. (Pet'r Compl.). When a fork attachment is placed on the loader, it then becomes a power industrial truck and is no longer considered an earth mover. *Id.* In this case, Petitioner was using a power industrial truck.

<sup>6</sup> The ALJ assumes that the Petitioner did not receive a disciplinary action for this incident as the record is devoid of such evidence.

<sup>7</sup> A mobile operation is a work activity that moves along the road either intermittently or continuously. . (Pet'r. Ex. E).

7. Petitioner used Respondent's Mobile Operations Guide ("Guide") to set up the work safety zone. (Pet'r. Ex. E).

8. Ryan Miller, Respondent's Greenfield District HR Manager, testified that at least one employee working at the site under Petitioner's leadership reported to Respondent that he felt unsafe during the operation because vehicles were passing through the gore zone.<sup>8</sup> (Miller Test).

9. After an investigation, Petitioner was terminated on September 30, 2016 for a continued pattern of unsafe behaviors that did not meet Respondent's standards. (Pet'r Compl).

#### 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. *See 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); *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.*

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<sup>8</sup> According to Colby Birt, a Crew Leader, the gore zone is the area between the main highway and the exit ramp that serves to diverge the two lanes. (Birt Test).

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. A viable public policy exception must be present for the Controlling Complaint to survive.

5. In the unclassified (at-will) context, absent a breach of public policy, Respondent may discipline inconsistently or without sufficient evidence. I.C. § 4-15-2.2-24, 42. See further, *Baker v. Tremco Inc.*, 917 N.E. 2d 650, 653-655 (Ind. 2009); and *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705-706 (Ind. 2007).

6. Petitioner alleges that Respondent failed to provide him with the training necessary to successfully perform his job tasks, thus invoking a public policy violation. (Pet'r. Compl.).

7. Since Petitioner did not appeal any of his previous discipline, the ALJ will only address his two most recent actions, starting with Petitioner's safety violation on August 19, 2016.

8. Petitioner contends that although he failed to complete the pre-trip inspection of the loader, he was never informed that loaders should receive a pre-trip inspection, nor was he trained on how to inspect the equipment. (Pet'r. Am. Compl., Pet'r. Test).

9. However, James Patrick, Unit Foreman, testified that Respondent provides annual loader training as part of its Ice and Snow Training program. (Patrick Test). This program includes a section on loader training with a pre-trip inspection instructional video that can also be found on Respondent's Intranet. *Id.*

10. Patrick also testified that the particular loader Petitioner used on August 19, 2016, was "red-tagged". (Patrick Test). A red tag is used on Respondent's equipment to indicate that the particular piece of equipment is not safe for use at that time and is scheduled to have maintenance performed on it. *Id.* In other words, an employee should not operate a red-tagged vehicle for operational purposes.

11. Petitioner attended Respondent's Ice and Snow Training on multiple occasions, including, but not limited to: February 10, 2004, November 3, 2004, November 8, 2005, November 6, 2006, November 4, 2010, and November 2, 2011. (Pet'r. Ex. A).

12. Also, on January 27, 2012, Petitioner signed an acknowledgement stating that he received a copy of Respondent's Employee Handbook, which indicated that Petitioner agreed to review and abide by the contents within. (Resp't. Ex. H). The Employee Handbook provides the website (Respondent's intranet) on which employees may view additional safety information. (Resp't. Ex. G, at 9).

13. Petitioner therefore had access to Respondent's intranet and the employee safety videos, including a video segment on pre-trip inspections.<sup>9</sup>

14. Additionally, the ALJ takes judicial notice of and finds, *sua sponte*, that Respondent's Highway Technician Program Guidelines are applicable here ("Program Guidelines"). The Program Guidelines state that crew leaders are responsible for performing "equipment maintenance such as...pre-trip inspections." *See* <http://www.in.gov/indot/files/HighwayTechnicianProgramGuidelines.pdf>. Therefore, as a crew leader, Petitioner should have been aware he was required to perform pre-trip inspections on equipment, including loaders.

15. Because Petitioner had received annual training on pre-trip inspection of loaders (via Respondent's Ice and Snow training), had access to safety videos online, and was responsible for conducting pre-trip inspections of equipment as a crew leader, the ALJ finds that Petitioner had the necessary training and information to perform such an inspection. Therefore, Petitioner's failure to do so was a violation of Respondent's safety policy.

16. The ALJ now turns to the circumstances surrounding the events of September 21, 2016.

17. Petitioner claims that he was not provided the necessary direction to set up a mobile operation involving two (2) ramp lanes, which were the conditions of the work zone on September 21, 2016.

18. Respondent provides employees with multiple guidebooks regarding its policies and procedures, including the Mobile Operations Guide ("Guide") that contains samples of safety setups for a variety of work zones. (Pet'r. Ex. E).

19. Petitioner contends that the Guide does not provide a diagram depicting the appropriate set up for a two-lane exit ramp mobile operation. (Pet'r. Am. Compl., Pet'r. Test).

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<sup>9</sup> *See* <http://intranet.indot.state.in.us/safety/index.asp>

20. While true, according to Respondent's Work Zone Traffic Control Guidelines ("Control Guidelines"), the diagrams contained in the Guide provide the minimum requirements needed for the operation. (Resp't. Ex. D). According to Roy McMillan, Supervisor of the Indianapolis Freeway Service Patrol, it is Respondent's policy that the additional information contained in the Control Guidelines is to be utilized in conjunction with the Guide. (McMillan Test).<sup>10</sup>

21. It is common practice amongst those who set up the safety zones to use pieces from multiple suggested diagrams to create the safest work zone possible for the crew members. (McMillan Test).

22. Colby Birt, a crew leader, testified that Petitioner's set up should have, at the least, included a tandem axle dump truck adjacent to the work zone to protect the crew members from a potential vehicle strike. (Birt Test., Resp't Ex. K). The set up should also have included an additional shadow vehicle to direct traffic away from the work zone. *Id.*

23. Additionally, Petitioner failed to maintain a standard distance of no more than 2/10<sup>th</sup> of a mile between the rear of the shadow vehicle and the blocker (tandem axle dump) truck. (Birt Test; Pet'r Ex. D at 72). Petitioner instead kept a distance of 4/10<sup>th</sup> of a mile between the vehicles, which allowed passing vehicles to reenter the work zone. *Id.*

24. As a crew leader, Petitioner was held to a higher standard than other crew members. According to Respondent's Program Guidelines, a crew leader "[e]nsures work conforms with appropriate procedures and policies."<sup>11</sup>

25. The ALJ finds that Petitioner's inappropriate work zone setup and failure to maintain a suitable distance from the blocker truck did not conform to the appropriate procedures and policies set forth by Respondent.

26. The ALJ, *sua sponte*, also finds that, according to SPD's Discipline Policy Statement ("Policy"), "[w]here appropriate, employee disciplinary actions are to be corrective and progressive in nature. *See* <http://www.in.gov/spd/files/discpol.pdf>. The discipline imposed 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.* An employee's work record may provide the basis for differentiating in the degree of discipline imposed for like or similar

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<sup>10</sup> In order to avoid possible confusion in the future, Respondent should consider consolidating all appropriate diagram examples in one set of guidelines.

<sup>11</sup> The ALJ takes judicial notice of these guidelines. *See* <http://www.in.gov/indot/files/HighwayTechnicianProgramGuidelines.pdf>.

offenses. *Id.* While the State will generally follow the principles of progressive discipline, the State reserves the right to impose discipline commensurate with the offense.” *Id.*

27. Petitioner failed to adhere to Respondent’s safety policies on five (5) documented occasions dating back to 2005. Respondent adhered to SPD’s Policy noted above in that each successive occurrence resulted in a greater amount of discipline. After Petitioner’s shortcomings with regard to the operation conducted on September 21, 2016, Respondent felt that Petitioner’s repeated safety violations (one of which resulted in serious bodily injury to another employee, and one which easily could have), made his continued employment with Respondent a risk it was unwilling to take. Petitioner had multiple opportunities after each occurrence to alter his careless behavior, yet failed to do so. While Petitioner did go more than ten (10) years between the incidents described above and the ones that ultimately led to his dismissal, the fact remained that given Petitioner’s accident history and his position, Respondent felt that it could no longer attempt to rehabilitate Petitioner’s behavior.

28. Petitioner’s access to the necessary safety policies and procedures, his recurring safety violations, and Respondent’s appropriate usage of increasingly severe punishments show that Petitioner’s termination for failing to adhere to Respondent’s safety policies does not contravene public policy. In conclusion, The ALJ finds that Petitioner has not shown that Respondent was in violation of a law, rule, or public policy such that he should be reinstated.

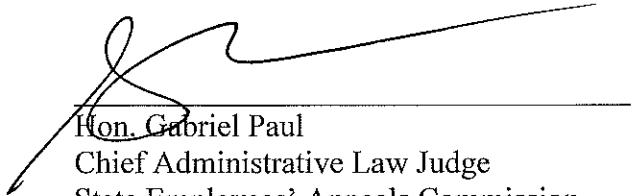
Prior sections are hereby incorporated by reference, as needed. To the extent a given finding of fact is deemed a conclusion of law, or a conclusion of law is deemed to be a finding of fact it shall be given such effect.

#### V. Non-Final Order

Judgment is entered in favor of Respondent. Petitioner’s termination is **UPHELD**. The Parties shall bear their own fees and costs.



DATED: July 13, 2017

A handwritten signature in black ink, appearing to read "Hon. Gabriel Paul", is written over a horizontal line. The signature is stylized and extends to the right of the line.

Hon. Gabriel Paul  
Chief Administrative Law Judge  
State Employees' Appeals Commission  
Indiana Government Center North, Room N103  
100 N. Senate Avenue  
Indianapolis, IN 46204  
(317) 232-3137  
gapaul@seac.in.gov

A copy of the foregoing was sent via email to the following:

Jason Brown  
3970 North State Road 9  
Greenfield, Indiana 46140  
Bravo24onthemove@yahoo.com

Linda Jelks  
Counsel  
Indiana Department of Transportation  
IGCN Room N730  
Indianapolis, Indiana 46204  
LJelks@indot.IN.gov

Courtesy Copy to:

Matt Brown  
State Personnel Department  
402 W. Washington Street  
Room W161  
Indianapolis, IN 46204  
mabrown@spd.in.gov