**BEFORE THE**
**STATE EMPLOYEES' APPEALS COMMISSION**

IN THE MATTER OF:

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| JONATHAN BENCHIK<br>Petitioner, | )<br>) | |
| | ) SEAC No. 11-18-078 | |
| vs. | )<br>) | ISSUED |
| INDIANA FAMILY AND SOCIAL<br>SERVICES ADMINISTRATION<br>Respondent. | )<br>)<br>) | SEP 30 2020<br>STATE EMPLOYEES' APPEALS COMMISSION |

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

### I. Introduction and Summary

On August 31 – September 1, 2020, a hearing was held in this matter under I.C. § 4-15-2.2-42.[1] Petitioner, Mr. Jonathan Benchik ("Petitioner") appeared by counsel, Ms. Carla Pyle. Respondent, Indiana Department of Family and Social Services Administration ("Respondent") appeared via counsel, Mr. Matt Brown.

This case considers Petitioner's termination by Respondent on August 29, 2018, for poor workplace performance. Petitioner alleges that his working test period ended prior to his termination such that he should be considered a classified employee. Petitioner also argues that he was the victim of discrimination, harassment and was subject to a hostile work environment. Petitioner finally argues that he was terminated in contravention of Ind. Code § 4-15-10-4 for reporting two (2) cases of food stamp fraud to his supervisor in the days leading up to his termination.

Respondent argues that because Petitioner was inside of his working test period at the time of his termination, he cannot seek redress in this forum. I.C. § 4-15-2.2-34(e). Under I.C. § 4-15-2.2-42(f), an unclassified employee's complaint must demonstrate a violation of a law, rule or public policy to oppose the challenged employment decision, while under I.C. § 4-15-2.2-42(e) a classified employee may only be terminated for just cause, which must be proven by the agency. In the alternative, Respondent argues that Petitioner was terminated for just cause.

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[1] Due to the ongoing COVID-19 pandemic, the hearing was held virtually via Microsoft Teams. All Parties participated from their respective offices.

The ALJ finds that while Petitioner was no longer within his working test period at the time of his termination, Respondent has shown just cause for the termination. Thus, the ALJ ultimately finds for Respondent. [2]

## II. Findings of Fact[3]

1. Petitioner began his employment with Respondent on September 25, 2017, in Respondent's Crown Point, Indiana office as a State Eligibility Consultant (Pet'r Compl).

2. Upon his hiring, Petitioner was subject to a probationary period, known as a working test, which could last anywhere from six (6) to twelve (12) months (Pet'r Test.).

3. Soon after Petitioner began, his new supervisor, Kimberly Thompson ("Thompson") informed Petitioner that before Petitioner's hiring, the office staff (which consisted entirely of women), had previously shared both the men's and women's restrooms, but must now all share the women's restroom, while Petitioner was able to have sole use of the men's restroom (Pet'r Compl).

4. In an effort to eliminate confusion, a sign was placed on the men's restroom door alerting the staff that Petitioner was inside (Thompson Test.).

5. Thereafter, Thompson would constantly stop by Petitioner's cubicle to announce each time she was going to use the men's restroom (Pet'r Compl; Pet'r Test.).

6. Petitioner was fearful of confronting Thompson over the use of the restroom, since he was still within his working test, so Petitioner decided to defuse the situation by exclusively using the men's restroom in the lobby of Respondent's building, which he stocked with supplies paid for by Petitioner (Pet'r Compl; Pet'r Test.).

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[2] Commission proceedings are governed by the Administrative Orders and Procedures Act (AOPA), Ind. Code § 4-21.5 *et seq*. *See* Ind. Code § 4-15-1.5-6(1). Accordingly, the Commission has delegated to its Administrative Law Judges pursuant to Ind. Code § 4-21.5-3-28 of AOPA, the authority to issue final orders in this class of proceedings.

[3] The ALJ notes that the facts presented at the hearing did not differ substantially from those the ALJ earlier delineated at the summary judgment phase of these proceedings. Therefore, unless otherwise specified, the ALJ adopts those findings and incorporates them by reference for purposes of this decision. Also, the ALJ notes that, while the Parties did not stipulate to any evidence, many of their exhibits are identical.

7. On December 12, 2017, Petitioner received a Written Counseling[4] for using his Facebook account at work to research a client's date of birth, which was prohibited based on the State's Information Resource Use Agreement Policy, which outlines how State-owned electronic devices can be used (Resp't Ex. G).

8. On December 12, 2017, Petitioner received a second Written Counseling for using his personal cell phone in an area other than the break room or within his lunch period. (Resp't Ex. H).

9. On January 16, 2018, Petitioner received a Written Counseling for making inappropriate comments in the chat window during an online training session (Pet'r Ex. 24).

10. In late March, 2018, believing he had successfully completed his working test, Petitioner confronted Thompson and asked her to stop telling Petitioner every time she planned to use the men's restroom and told Thompson that Petitioner was exclusively using the lobby restroom (Pet'r Compl; Pet'r Test.). Thompson then ceased the behavior (Pet'r Test.; Thompson Test.)

11. Petitioner, around the same time, received an undated and unsigned Working Test Appraisal ("Appraisal"), which noted that Petitioner failed to meet expectations in the areas of Job Knowledge and Problem Solving/Decision Making (Pet'r Compl; Pet'r Ex. 14). The Appraisal noted that a ninety (90) day extension was sought. *Id.*

12. The Appraisal only noted under Job Knowledge and Problem Solving that Petitioner did not yet possess the skills needed to do his job, since he recently completed training. *Id.*

13. On April 4, 2018, Petitioner received another Appraisal (which was signed and dated) which noted that Petitioner needed improvement in the areas of Job Knowledge, Adaptability/Flexibility and Problem Solving (Pet'r Ex. 15). The Problem Solving and Job Knowledge narratives reflected the undated Appraisal noted above, while the Adaptability section stated that Petitioner did not work well under pressure, gets frustrated easily and takes more time than needed to adapt to changes in the workplace. *Id.* While the Appraisal sought to extend his working test by sixty (60) days, a box was checked that stated a six (6) month extension was sought. *Id.*

14. Petitioner then met with management in early May, 2018, to discuss the ongoing harassment and lack of support (Pet'r Compl; Pet'r Test.).

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[4] A counseling is not considered formal discipline but does serve to alert an employee that his behavior must improve or be subject to more formal discipline. https://www.in.gov/spd/files/discrandp.pdf.

15. In early June, 2018, Petitioner was transferred to Respondent's Hammond, Indiana office, in an effort to improve his situation (Pet'r Compl.).

16. Petitioner asked for a mentor on several occasions soon after his arrival in the Hammond office, but was told that none were available, due to the workload of the office (Pet'r Test.).

17. Petitioner's new supervisor, Pamela Former ("Former") instead enrolled Petitioner in online training classes which she felt would help Petitioner (Former Test.).

18. During the training sessions, Petitioner often sought help by asking questions through the chat function of the training module, but his questions were not answered immediately (Pet'r Test.).

19. Petitioner told Former about the perceived lack of support, after which Former told Petitioner that the trainer was fielding a lot of questions and could only answer during certain times. Petitioner was asked to be patient and wait for the trainer to answer (Former Test.).

20. Following the training sessions, Petitioner was scheduled to take lunch at 11:00 A.M. daily, per a schedule created by one of the office assistants (Pet'r Test.; Former Test.).

21. According to one of Petitioner's former co-workers, Lanetta Inman ("Inman"), interviews could take between fifteen (15) to forty-five (45) minutes, depending on their complexity. (Inman Test.).

22. If an interview ran into an employee's lunch hour, the employee was to email their supervisor once the interview was over to let the supervisor know that the employee was taking a late lunch (Inman Test.). This was an uncommon occurrence. *Id.*

23. Petitioner had interviews scheduled at either 10:30 A.M., 10:45 A.M. or 11:00 A.M. throughout his time in the Hammond office (Pet'r Ex. 18).

24. While Petitioner would email Former each time his interviews ran into his lunch hour, Petitioner did not ask for his lunch hour to be changed (Pet'r Test.). Former also reminded Petitioner about the length of interviews and his subsequent need to take a full lunch hour (Resp't Ex. L).

25. Sheocki Booker-Rodgers ("Rodgers") who sat opposite Petitioner in Respondent's Hammond office, would often give Petitioner helpful tips and pointers as Petitioner conducted his interviews, both at Petitioner's behest and of her own volition (Rodgers Test.).

26. Additionally, signs were placed around the Hammond office and also were distributed to employees that they were to ask probing questions during their interviews (Pet'r Ex. 12; Rodgers Test.).

27. If an employee felt like the answers given were misleading or otherwise incomplete, additional follow up questions were to be asked (Former Test.). However, at no time were employees directed to ask accusatory or otherwise make inflammatory accusations. Instead, if fraud was suspected, employees were told either to put the call on hold so a supervisor could be consulted, or to fill out a suspected fraud form at the conclusion of the call and submit it to their supervisor. *Id.*

28. On June 20, 2020, Petitioner received another sixty (60) day extension to his working test period, which was signed by Thompson, who was by now Petitioner's former supervisor (Pet'r Compl; Pet'r Ex. 16). It noted that Petitioner needed improvement in the areas of Job Knowledge, Customer Service, Adaptability/Flexibility and Problem Solving/Decision Making. Under Job Knowledge, the Appraisal stated that Petitioner is often confused regarding the proper steps to take if issues arise with a case and often requires assistance. *Id.* Under Customer Service, the Appraisal noted that Petitioner received a customer complaint, often gets stressed when not understanding the work and complains to co-workers about his work. *Id.* Under Adaptability, the Appraisal noted that while Petitioner had improved, multi-tasking was still an issue and that interviews took longer than necessary. *Id.* Under Problem Solving, the Appraisal noted that Petitioner was unable to work a case through to completion without assistance. *Id.*

29. Once again, though, a box was checked on the Appraisal which sought to extend Petitioner's working test by six (6) months. *Id.*

30. On August 8, 2018, Petitioner revived a Written Counseling for approving SNAP[5], which was prohibited for employees within their working tests to authorize (Former Test; Rodgers Test, Resp't Exs. M-N).

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[5] SNAP is generally known by its more common name of food stamps. While the counseling submitted into evidence was in the form of an email, it did have a signature block for both Petitioner and Former to sign and date. Neither signed, but Petitioner testified that he likely slipped a signed copy under Former's door (Pet'r Test.).

31. On or about August 27, 2018, while Petitioner was conducting an interview, he suspected potential food stamp fraud and proceeded to ask accusatory questions. Per his training, however, he placed the call on hold, during which time Petitioner consulted with Former about the case via email (Pet'r Test, Resp't Ex. X).

32. Former responded with tips to help Petitioner complete the call. However, Petitioner continued to ask accusatory questions such that the client hung up on Petitioner (Resp't Ex. Y).

33. On August 28, 2018, Petitioner discovered a second potential case of food stamp fraud. However, Petitioner did not consult with Former, but rather continued to interrogate the client, who hung up on Petitioner after a time. Petitioner did follow up with Former via email afterwards (Resp't Ex. Y).

34. On August 29, 2018, Petitioner was informed that he did not meet expectations in the areas of Job Knowledge, Teamwork, Customer Service, Change Management, Adaptability/Flexibility and Problem Solving/Decision Making. As a result, Petitioner failed his working test and was terminated the same day (Pet'r Compl.).

35. On August 31, 2018, Petitioner filed a claim of sexual harassment against Thompson with the Indiana State Personnel Department (Resp't Ex. D).

36. Caitlin Floyd ("Floyd") investigated the Complaint and spoke to Petitioner on the phone during her investigation, but ended the conversation after Petitioner became belligerent (Floyd Test.). Investigators are trained not to engage with claimants who mistreat or are otherwise rude to them, but rather to tell such claimants that the conversation can continue when the claimant is more calm. *Id.*

37. Thereafter, Petitioner sent Floyd an email in which Petitioner apologized for his actions and provided further information to Floyd (Pet'r Ex. 27).

38. On September 14, 2018, Floyd filed her report, stating that Petitioner's claims were unsubstantiated (Resp't Ex. D).

## III. 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." Ind. Code § 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, 653-55 (Ind. 2009); *Meyers v. Meyers Construction*, 861 N.E.2d 704, 706-7 (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. 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 Complaint to survive.

5. In the unclassified (at-will) context, absent a breach of public policy, Respondent may discipline inconsistently or without sufficient evidence, while a classified employee can only be terminated for just cause. Ind. Code § 4-15-2.2-24, 42. *See further, Baker v. Tremco Inc.*, 917 N.E. 2d 650, 653-55 (Ind. 2009); and *Meyers v. Meyers Construction*, 861 N.E.2d 704, 705-6 (Ind. 2007).

6. If an employee is classified however, the discipline must be for just cause. I.C. § 4-15-2.2-23(a).

7. Before the ALJ can decide whether or not Petitioner's termination was proper, a threshold determination must be made regarding his status as either a fully classified employee or whether he was a classified employee within his working test period, in which case he is without remedy here. (*See* https://www.in.gov/spd/files/Performance%20Management%20Policy.pdf; 31 IAC 5-3-1; I.C. § 4-15-2.2-34).

8. Petitioner's first Appraisal is undated but shows a review period of September 25, 2017 through April 2, 2018. In it, Petitioner's rating is shown as "Needs Improvement" and requests a six (6) month extension, which is allowable. (Pet'r, Ex. 14).

9. However, in the additional comments section of the Appraisal, it states that Respondent is seeking only a ninety (90) day extension. *Id.*

10. The ALJ openly questions what length of extension Respondent sought. Additionally, the Appraisal is dated April 4, 2018, which is after the original six (6) month term of Petitioner's working test, which was March 25, 2018.

11. Also, Respondent issued Petitioner a second version of this Appraisal, which only called for a sixty (60) day extension (Pet'r, Ex. 15). Therefore, the ALJ is unsure as to Respondent's intent. *Id.*

12. I.C. § 4-15-2.2-34(a) clearly states that at least once *during the working test period*, an Appraisal shall be prepared, while I.C. § 4-15-2.2-34(d) provides that a copy of such Appraisal shall be given to the employee (emphasis added).

13. Former testified that short delays in preparing the Appraisals are somewhat common, due to the availability of required personnel (Former Test.).

14. While the ALJ finds that this Appraisal should have been prepared in advance of the end of Petitioner's original working test (which would have been March 25, 2018), the ALJ finds that a short delay was reasonable.

15. However, the ALJ finds that this Appraisal only extended Petitioner's working test by sixty (60) days, as noted in the comments section and not by six (6) months. Therefore, Petitioner's working test was properly extended through June 2, 2018.

16. Petitioner's next Appraisal was dated June 25, 2018 and signed by Thompson, who by now was Petitioner's former supervisor in Crown Point. This Appraisal sought to extend Petitioner's working test by either sixty (60) days or six (6) months, depending on the box checked as noted above.

17. This Appraisal, too, though, suffers from deficiencies. First and foremost, Petitioner was already working in the Hammond office under a new supervisor when this Appraisal was issued. Also, it is signed by Thompson, who did not possess the authority to do so. Additionally, it was issued more than three (3) weeks after the expiration of Petitioner's working test as described above. Finally, the Appraisal asks for a six (6) month extension, but in the comments section states that sixty (60) days is sought. *Id.*

18. Respondent did not present any evidence that leads the ALJ to find that Thompson had authority to issue the Appraisal described above. Additionally, it was presented to Petitioner well after the expiration of his most recent working test extension. As a result, the ALJ finds it null and void. Therefore, the ALJ finds that Petitioner's working test ended on June 2, 2018, after which time he was a fully classified employee.[6]

19. Therefore, Respondent must show that it had just cause to terminate Petitioner.

20. Turning now to Petitioner's contentions, the ALJ will first analyze whether Petitioner was the victim of discrimination.

21. The Title VII discrimination analysis is often referred to as the modified *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973); *See also Pantoja v. American NTN Bear. Manuf. Corp.*, 495 F.3d 840, 845 (7th Cir 2007). There are three steps to this analysis. First, the petitioner-employee "has the initial burden of establishing a prima facie case of discrimination" through either direct or indirect evidence. *Ind. Civil Rights Comm'n v. S. Ind. Gas & Elec. Co.*, 648 N.E.2d 674 (Ind. Ct. App. 1995).

22. Second, if the Petitioner-employee establishes a prima facie case of discrimination, the burden shifts to the Respondent-agency to show a legitimate, nondiscriminatory reason for the adverse employment action(s). *Id.* Third, once the Respondent-agency shows such reason, the burden shifts back to the Petitioner-employee to "present evidence that the stated reason was just a 'pretext' which in turn permits an inference of unlawful discrimination." *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012) (citing *McDonnell Douglas*, 411 U.S. at 804). "Evidence is evidence," and are means to "consider whether one fact . . . caused another . . . and therefore are not 'elements' of any claim." *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016) (citations omitted). The legal standard is merely "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action." *Id.*

[6] The ALJ also concludes that as a result of this finding, Petitioner's last Appraisal, dated September 4, 2018 is also null and void.

23. While the *McDonnell Douglas* analysis is still employed, SEAC has adopted the doctrine first laid out under *Ortiz*, which directs the ALJ to look at the evidence as a whole, rather than employ the burden shifting method when analyzing claims of discrimination under McDonnell Douglas. *Id.* "Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself-or whether just the 'direct' evidence does so, or the 'indirect" evidence.'" *Ortiz*, 834 F.3d at 765.

24. Petitioner mainly bases his discrimination claim upon the bathroom procedure at Respondent's Crown Point office, where Petitioner first worked.

25. While the ALJ finds that Thompson acted in an unprofessional manner when she constantly informed Petitioner about her need to use the restroom, that, in and of itself, does not rise to the level of discrimination needed to prevail.

26. Petitioner and Thompson both testified that there was a stop sign located on the men's room door that Petitioner could have used to alert his female co-workers that he was in the restroom. Instead, Petitioner sought to avoid what he perceived as the hassle of doing so by using and stocking the restroom in the lobby, which he was never told or advised to do.

27. Further, Petitioner testified that once he confronted Thompson about her behavior, Thompson ceased.

28. Finally, in May of 2018, Petitioner met with Arthur McLeod[7], who was then Respondent's Deputy Regional Manager in order to resolve the situation, which he did by authorizing Petitioner's move to Respondent's Hammond office-and away from Thompson (Resp't Ex. Q).

29. Given the above, the ALJ finds that Petitioner has not shown that he was the victim of discrimination.

30. Petitioner next states that he was subject to a hostile work environment, based again upon the events surrounding his time at the Crown Point office.

31. In order to prevail on a hostile work environment claim, Petitioner must establish four elements: "(1) the work environment must have been both subjectively and objectively offensive; (2) his gender must have been the cause of the harassment; (3) the conduct must have been severe or pervasive; and (4) there must be a basis for employer liability. *Orton-Bell v. Indiana*, 759F.3d 768 (7th Cir. 2017) (internal citations omitted).

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[7] The Parties stated at the hearing that McLeod passed away between the time of the events at issue and the hearing.

32. Since the facts Petitioner relies upon for his hostile work environment claim are the same as those for his discrimination claim, the ALJ will not repeat them here. While it is arguable that Petitioner meets the first and second elements, given Thompson's comments about Petitioner having sole use of the men's restroom, along with Thompson's desire to alert Petitioner whenever she had to use the restroom, the ALJ finds that, taken together, such conduct was not severe or pervasive. As Petitioner admitted, he voluntarily chose to use the restroom in the lobby, despite not being told to do so.

33. Also, Petitioner never complained about Thompson's behavior until he felt he could do so safely, which was six (6) months after he began. Despite Petitioner's fear of retaliation, the ALJ heard no testimony (other than Petitioner's, who was naturally biased) or received any evidence stating that Respondent fostered an environment where employees were suppressed from reporting alleged harassment. Taken together, the ALJ finds that Petitioner has not shown that he was the victim of a hostile work environment.

34. Petitioner next claims that he was retaliated against after he confronted Thompson when he was working in Crown Point and by Former after he reported what Petitioner perceived as fraud.

35. To prevail on a Title VII retaliation claim, Petitioner must show that a reasonable jury (here, the ALJ) could find that he engaged in a protected activity, that he suffered an adverse employment action, and that the adverse action was motivated by a protected activity. *Smith v. Ill. DOT*, 936 F.3d 554 (7th Cir. 2019).

36. As to the former, the ALJ has discussed at length why Thompson's behavior did not violate any workplace standards. While it could be construed that Thompson retaliated against Petitioner when she signed the June, 2018 Appraisal when she had no authorization to do so, the ALJ has already found that such Appraisal was not valid, which led to the earlier finding that Petitioner successfully completed his working test as of June 2, 2018. With regard to the latter, as described in more detail below, the fact that Petitioner reported suspected fraud did not lead to his termination. Therefore, the ALJ finds that while Petitioner suffered an adverse employment action, he was not participating in a protected activity, nor was his termination motivated by such. Thus, this claim fails.

37. Petitioner next argues that he was terminated in contravention of the Indiana state employee whistleblower law, found at Ind. Code § 4-15-10-4.

38. I.C. § 4-15-10-4(b) prohibits a state employee from being terminated for reporting fraud to a supervisor or the Indiana Inspector General, while I.C. § 4-15-10-4(c) allows Petitioner to pursue a remedy through the Civil Service System, even if he wasn't otherwise qualified to do so. *See also Shoemaker v. Indiana State Police Department*, 62 N.E.3d 1242 (Ind. Ct. App. 2016).

39. Petitioner testified that he encountered food stamp fraud on two (2) different occasions in the days leading up to his termination. According to Former, if an employee suspected fraud, they could either place the call on hold to further consult a supervisor or fill out a fraud form after the call (Former Test.).

40. Petitioner testified that during the first instance, he placed the call on hold and asked Former for help, after which Former gave Petitioner advice and direction on how to handle the duration of the call (Pet'r Test.; Former Test; Resp't Ex. Y.).

41. Instead of heeding that advice, Petitioner, when he returned to the call, continued in an accusatory manner such that the claimant hung up (Resp't Ex. X).

42. In the second instance, Petitioner did not complete the call because of his accusatory demeanor towards the claimant such that another supervisor had to apologize for Petitioner's behavior (Resp't Ex. Y).

43. The ALJ thus finds that Petitioner did not properly establish a claim for whistleblowing, due to his inability to follow Respondent's directives with regards to reporting suspected fraud.

44. Petitioner finally argues that he lacked the proper training to do his job.

45. When Petitioner was hired, he began his working test period, which was designed to give Petitioner the training and support needed to do his job properly. This period only applied to classified employees like Petitioner and not to the vast majority of state employees.

46. Assuming the training was successfully completed, an employee could be expected to handle more complex claims as his working test progressed (Former Test.).

47. Also, both Rodgers and Inman stated that Petitioner was often given extra help when needed (Rodgers, Inman Test.).

48. Additionally, Petitioner himself admitted that during the trainings, he scored very highly on the testing portion, despite the occasions described above where Petitioner's questions were not answered by the trainer in what Petitioner perceived to be a timely fashion (Pet'r Test.).

49. While the average number of interviews employees conducted in a day ranged from six (6) – nine (9), Former intentionally limited the number of interviews Petitioner conducted daily in an effort to help him (Former Test.).

50. Finally, it was not uncommon for other employees to have their working tests extended, in an effort to improve their performance (Former Test.).

51. Taken together, Petitioner was afforded the same training opportunities as other classified employees in his office. Thus, the ALJ finds that Petitioner cannot blame his termination on his lack of training.

52. Having extinguished these claims, the ALJ now turns to the question of whether Petitioner's actions were such that his termination was justified.

53. According to the SPD Discipline Policy ("Policy"), just cause can include, among other things, failure to perform assigned duties or negligence in the performance of assigned job duties or conduct which adversely affects the employee's job performance or the agency of employment. https://www.in.gov/spd/files/discpol.pdf.

54. The Policy also states that employee disciplinary actions are to 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.*

55. Petitioner should have been put on notice that his behavior was deficient when he received his first counseling in December, 2017. While not formal discipline, the counseling did serve as notice that Petitioner's behavior needed to change.

56. Thereafter, Petitioner received two (2) more counsellings in January, 2018 related to his cellphone use and accessing social media to obtain information on a client. Again, despite the availability of formal discipline such as a written reprimand or suspension, Respondent chose this informal method of correction in an effort to curb the behavior.

57. In April, 2018, Petitioner was given his first (and only valid) working test extension because Petitioner did not possess the skills needed to do his job, given that he had just completed the training. This shows that Respondent was still committed to helping Petitioner.

58. While the June Appraisal was invalid, it still highlighted some of the same problems Petitioner was facing, such as multi-tasking, inability to work under pressure and the need for assistance.

59. In early August, 2018, Petitioner was still having difficulty doing his job, as evidenced by his decision to approve SNAP benefits when he wasn't authorized to do so, which led to a third counseling (Resp't Exs. M, N).

60. After Petitioner's suspected fraud cases in late August, 2018 were not handled in the appropriate manner, Respondent decided that after three (3) counsellings and one (1) working test extension, Petitioner was still not performing up to the expectations expected of him.

61. In the end, the ALJ cites to a provision of the Policy, which states that "Agencies may establish standards of conduct deemed necessary for the effective operation of that agency. These standards shall be communicated to employees and the consequences of violations made known. An employee may be expected to be aware without such notice that certain conduct such as those listed above ...will subject the employee to timely discipline."

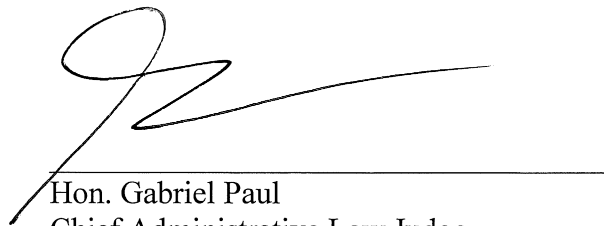
62. The ALJ thus finds that Respondent terminated Petitioner for just cause.

63. 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.

## IV. Non-Final Order

Judgment for Respondent. Petitioner's termination is hereby UPHELD. The Parties shall bear their own fees and expenses. So Ordered.

DATED: September 30, 2020



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