SEAC ISSUED
OCT 29 2013

BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

GAYLE COLE Petitioner,	)
	) SEAC No. 02-12-019
vs.	)
INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT (FT. WAYNE) Respondent.	)

NOTICE OF FILING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER OF ADMINISTRATIVE LAW JUDGE

The attached "Findings of Fact, Conclusions of Law and Non-Final Order of Administrative Law Judge" granting judgment on the merits after evidentiary hearing to Respondent DWD has been entered as required by I.C. 4-21.5-3. To preserve an objection to the document, either the Petitioner or the Respondent must submit a written objection that:

1. Identifies the basis of the objection with reasonable particularity.
2. Is filed at the following address, with service to the other party, by **November 18, 2013**:

State Employees' Appeals Commission
Indiana Government Center North
100 N. Senate Avenue, Room N501
Indianapolis, IN 46204-2200

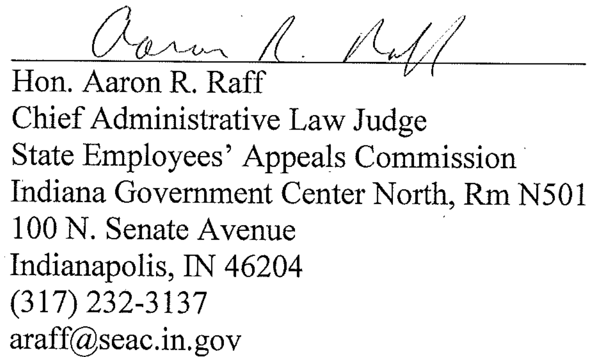
Since the Commission has designated the Administrative Law Judge as the "trier of fact" for this cause, objections will not include items of evidence. If evidence is included with the objections it will be returned to the filing party. The objections may include a brief addressing the applicable law being relied upon by the party.

If objections are filed within the time specified, the State Employees' Appeals Commission (SEAC) will hear the objections at a regularly scheduled meeting. Prior to that meeting any motions filed regarding the objections will be dealt with by the Administrative Law Judge.

During the time specified above any member of the SEAC may express the desire to review any specific issue addressed in the "Findings of Fact and Conclusions of Law" pursuant to I.C. 4-21.5-3-29(e). If such a review is ordered, it will be conducted at a regular scheduled meeting of the SEAC, and each party will be notified.

A party may move to strike any objections believed to be untimely. The Administrative Law Judge shall act upon a motion to strike. If the Administrative Law Judge grants the motion, the attached document will become final absent any desire to review an issue expressed by a member as discussed above. If the Administrative Law Judge denies the motion to strike, the findings and non-final order shall be reviewed by to the SEAC as outlined above.

DATED: October 29, 2013



Hon. Aaron R. Raff
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Petitioner,)
) SEAC No. 02-12-019
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INDIANA DEPARTMENT)
OF WORKFORCE DEVELOPMENT)
(FT. WAYNE))
Respondent.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER OF THE ADMINISTRATIVE LAW JUDGE

Starting February 8, 2012, Petitioner Gayle Cole timely filed a series of classified Civil Service complaints[1] with the State Employees' Appeals Commission ("SEAC" or the "Commission") against the Fort Wayne Adjudication Center, part of the Indiana Department of Workforce Development ("DWD"). This administrative review is conducted pursuant to I.C. 4-15-2.2 (the Civil Service System's classified provisions).[2] Petitioner Cole is a former classified employee, a Claims Deputy 5, for Respondent DWD. The main issues before SEAC are as follows: (1) whether Respondent DWD had just cause, by a preponderance of the credible evidence, to discharge and take other discipline actions as to Petitioner Cole's state employment; (2) whether the discipline was unlawful as being the product of illegal race discrimination or harassment; and/or (3) the product of unlawful retaliation for protected activity.

An evidentiary hearing in this matter was held over the course of four days[3] before the undersigned Chief Administrative Law Judge (the "ALJ") at SEAC's main conference room in Indianapolis, Indiana. Petitioner Cole appeared pro se. Respondent DWD appeared by counsel, Ms. Cynthia Lee and Mr. John Gannon. Having reviewed the arguments, witness testimony, admitted evidence, the applicable law, and proposals[4], and being duly advised, the ALJ makes the following Findings of Fact, Conclusions of Law, and Non-Final Order. Judgment for Respondent. First, Respondent DWD proved by a preponderance of the credible evidence that

[1] Petitioner Cole subsequently filed two additional Civil Service complaints against Respondent DWD. All three of Petitioner Cole's complaints were consolidated into this action.
[2] The proceedings were also under the Administrative Orders and Procedures Act ("AOPA"). I.C. 4-21.5-3.
[3] The four non-consecutive hearing dates were as follows: June 21, July 15, July 16, and July 24, 2013. There were over 70 exhibits; most marked by numbers, some by letters.
[4] Both parties were also given the optional opportunity for post-hearing briefing or proposals. Respondent filed proposals on September 27, 2013. Petitioner did not. The ALJ also takes official notice of the docket.

just cause supported the discharge and lesser adverse employment actions ending Petitioner Cole's state employment. Second, the preponderance of the credible evidence shows that Respondent DWD's adverse employment actions were lawful. The employment decisions were not caused by unlawful race discrimination, harassment or retaliation.

I. **Legal Standards and Doctrines**

I.1. Just Cause

This is a classified (just cause) case under the Civil Service System. A state agency may only discharge or take lesser adverse employment action against a classified state employee for just cause. I.C. 4-15-2.2-23. In a disciplinary case involving a classified employee, the state agency, here Respondent DWD, has the initial and ultimate burden of proving by a preponderance of the credible evidence that there was just cause for imposing the adverse employment action. I.C. 4-15-2.2-42(g). Therefore, if just cause is not established by the state, the challenged adverse employment action is invalid.

To establish just cause, the respondent-agency may refer to the petitioner-employee's work performance or service rating. I.C. 4-15-2.2-36(e). An agency's service ratings and employee performance standards "must be specific, measurable, achievable, relevant to the strategic objective of the employee's state agency or state institution, and time sensitive." *Id.* Therefore, in determining whether just cause was established, SEAC may consider the petitioner-employee's performance as compared to the respondent-agency's employee performance standards. I.C. 4-15-2.2-12, 36 and 42.

Additionally, the inquiry focuses on the reasonableness of the employer agency's workplace expectations. Employer expectations must be reasonably well communicated and consistently applied to similarly situated employees. See *Non-Final and Final Orders in Miller v. FSSA*, SEAC No. 05-12-060, February 21, 2012. The reasonable expectations of the respondent-agency may include its communicated employee performance standards and expected outcomes. *Miller*; I.C. 4-15-2.2. In *Miller*, just cause was established by showing, *inter alia*: the petitioner-employee's failure to perform at the minimal required performance level over a period of time; repeated mistakes by the petitioner-employee; issuance of a work improvement plan ("WIP"); progressive discipline; and similar treatment of the petitioner-employee's co-workers. The just cause standard requires the respondent-agency to act with reasonableness, not perfection. See *Conklin v. Review Bd. of DWD*, 966 N.E.2d 761, 764 (Ind. Ct. App. 2012); *Ghosh v. Ind. State Ethics Com'n*, 930 N.E.2d 23 (Ind. 2010); *Tacket v. Delco Remy*, 959 F.2d 650 (7th Cir. 1992) (just cause standards in other contexts in Indiana similarly looks to the reasonable expectations of the employer).

Furthermore, the federal employment just cause standard is persuasive authority and concurs that the overarching inquiry is: whether the employer acted reasonably and consistently towards those similarly situated. The federal employment just cause standard is "such cause as will promote the efficiency of the service." 5 U.S.C. § 7513. See also *Free Enterprise Fund v. PCAOB*, 130 S. Ct. 3138 (US 2010) (federal system looks at factors such as inefficiency, neglect of duty, and reasons provided by the legislature); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); and *Morrison v. Olson*, 487 U.S. 654 (1988).[5]

If an agency establishes just cause, "the [C]ommission shall defer to the appointing authority's choice as to the discipline imposed. . . ." I.C. 4-15-2.2-42(g). The ALJ is not authorized to substitute his own judgment after the agency proves it had just cause to impose adverse employment action.

I.2. Race Discrimination and Harassment

Employment actions must be lawful to support just cause, and the claims in this case invoke additional layers of legal elements. I.C. 4-15-2.2. Title VII, 42 U.S.C. § 2000e (the Civil Rights Act of 1964, as amended), makes it unlawful under federal law for an employer to terminate an employee because of discrimination against that person's race, among other grounds. Indiana law contains similar, state law-based, public policy prohibitions. I.C. 22-9-1 (Indiana Civil Rights Act); See also, I.C. 4-15-2.2-1-12, and -24. Furthermore, Indiana civil rights laws look to federal law for guidance. *Filter Specialists, Inc. v. Dawn Brooks et al.*, 906 N.E.2d 835, 839-842 (Ind. 2009).

The Title VII discrimination analysis is often referred to as the modified *McDonnell Douglas*[6] burden-shifting framework. See *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 burden of establishing a *prima facie* case of discrimination through either direct or indirect evidence. *Coleman v. Donahoe*, 667 F. 3d 835, 845 (7th Cir. 2012). Direct evidence "essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus." *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003). See also, *Morgan v. SVT, LLC*, 2013 U.S. App. LEXIS 16045 (7th Cir. 2013). Absent the rare case where direct evidence of discrimination is available on the record, the petitioner-employee must offer indirect evidence that: (1) (s)he is a member of a protected class; (2) his/her job performance met the respondent-agency's legitimate expectations; (3) (s)he suffered an adverse employment action; and (4) another similarly situated individual, who was not in a protected class, was treated more favorably than the petitioner-employee. See *Pantoja.* Second, if the petitioner-

[5] At will is the default in Indiana. I.C. 4-15-2.2-22, 24. The General Assembly also recognized some employees were to be classified given federal regulations and laws, but did not define "just cause" in the Civil Service System. The ALJ first looks to Indiana law, but it is also helpful to regard the federal standard.

[6] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

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 is a 'pretext,' which in turn permits an inference of unlawful discrimination." *Id.*

According to the Supreme Court of Indiana, in an employment discrimination lawsuit the central question is one of causation: "What caused the adverse employment action of which the plaintiff complains?" *Filter Specialists* at 839. An adverse employment action is wrongful, unlawful and against public policy when it is motivated by (caused by) illegitimate reasons. *Id.* at 840 (quoting *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003)). A respondent-agency is held strictly/vicariously liable (as opposed to a negligence standard) for an illegally-motivated adverse employment action caused by a "supervisor". However, "supervisors" are only employees empowered by the respondent-agency to take tangible employment actions against the petitioner-employee. See *Vance v. Ball State University*, No. 11-556, 2013 WL 3155228 (U.S. June 24, 2013).

To prove a harassment claim at an evidentiary hearing, as distinct from discrimination generally, the petitioner-employee must show intentional harassment directed to a protected characteristic (a racial purpose or character). *Huff v. Sheahan*, 493 F.3d 893, 902-3 (7th Cir. 2007); *Vance v. Ball State University*, 646 F.3d 461, 469-471 (7th Cir. 2011). The harassment must be severe and pervasive from an objective standpoint. *Id.* The employee's material working conditions must be altered by the severe and pervasive harassment. *Id.* The character of the whole relevant workplace interaction is examined. *Id.* There must be a basis of employer liability such as actionable supervisor harassment or co-worker harassment where the employer negligently/unreasonably fails to control the same. *Id.*

I.3. Unlawful Retaliation

Retaliation against an employee for the filing of an EEOC charge or the reporting of discrimination to the employer is also unlawful under Title VII. 42 U.S.C. § 2000e-3(a); *Coleman v. Donahoe*, 667 F.3d 835, 845 (7th Cir. 2012). Similar to Title VII discrimination claims, the petitioner-employee can provide indirect evidence of the prohibited animus through the modified *McDonnell Douglas* burden-shifting framework. *Hobgood v. Illinois Gmaing Board*, 722 F.3d 1030 (7th Cir. 2013). Or instead, a direct case of retaliation can be made by showing that the petitioner-employee: (1) engaged in statutorily protected activity; (2) the respondent-agency took an adverse employment action against him/her; and (3) the adverse action was causally connected to the petitioner-employee's protected activity. *Hobgood*; and *Gary Comm. School Corp. v. Powell*, 906 N.E.2d 823, 830 (Ind. 2009).

Unlike Title VII discrimination claims, the petitioner-employee may not succeed by establishing motivating-factor causation for a retaliation claim. Title VII retaliation claims must be proved according to traditional principles of but-for causation. . See *University of Texas Southwestern Medical Center v. Nassar*, No. 12-484, 2013 WL 3155234, *14 (June 24, 2013).

To constitute statutorily protected activity, the petitioner-employee must indicate that the discrimination occurred because of sex, race, or some other protected class. No magic words are required to give notice, but vague complaints of general harassment (with no mention of a protected class) are insufficient. *Northington v. H&M Int'l*, 712 F.3d 1062 (7th Cir. 2013); *Kodl v. Board of Education*, 490 F.3d 558, 563 (7th Cir. 2007). Furthermore, the necessary causal connection can be severed if the time lapse between the statutorily protected activity and the adverse employment action is too remote. See *Everroad v. Scott Truck Systems, Inc.*, 604 F.3d 471, 481 (7th Cir. 2010); *Haywood v. Lucent Techs., Inc.*, 323 F.3d 524, 532 (7th Cir. 2003) (holding a one year time lapse to be too remote); *Oest v. Illinois Dep't of Corrections*, 240 F.3d 605 (7th Cir. 2001).

II. Findings of Fact

1. At all relevant times, Petitioner Gayle Cole, a black female, was a classified state employee, a Claims Deputy 5 (CD5) within Respondent DWD's Fort Wayne Adjudication Center ("the FWAC")[7]. (See Exhibit ["Ex."] 11; Twyman & Cole Testimony).

2. The FWAC is an adjudicatory division of Respondent DWD located in Fort Wayne, Indiana. Claims deputies ("CDs") at the FWAC resolve issues and investigate unemployment claim discrepancies for Northern Indiana. (See Ex. 40; Freeman & Cole Testimony). Although the FWAC's personnel composition has changed since 2010, there has at all relevant times been a CD staff and a management/supervisory team. (See Twyman, Freeman, & Essex Testimony).

3. The controversy in this matter relates to Petitioner Cole's state employment discharge and other adverse employment actions taken by Respondent DWD, including: a written reprimand in or around November 2011; a five-day suspension in or around February 2012, and; termination from state employment on September 28, 2012. (See Exs. 1, 4, & 6; Cole Testimony).

4. Communication or pre-deprivation hearing was held for each of the discipline actions taken against Petitioner Cole's employment. (See Ex. 38; pleadings; Twyman & Cole Testimony). As Petitioner Cole's supervisor, Respondent DWD's Karen Freeman ("Freeman") had the authority to supervise her team, to reprimand Petitioner and to initiate the pre-deprivation hearing procedure for the suspension and discharge discipline. (Freeman Testimony).

[7] Petitioner Cole was hired at the FWAC as a Claims Deputy 6 ("CD6"), but was promoted to a CD5 by April 2009.

5. As to the suspension and discharge, Freeman delivered Petitioner Cole's production reports and employee file to human resources, who then set up the pre-deprivation hearing and transmitted the reports and file to the assigned officer. The independent pre-deprivation officer had the sole discretion to issue the disciplinary action after reviewing Petitioner Cole's reports and file. (See Ex. 38; Twyman & Freeman Testimony). Petitioner Cole was given a reasonable opportunity to respond at the pre-deprivation stage. Her procedural rights as a classified employee were sufficiently respected by Respondent DWD. (See Ex. 38; Twyman & Cole Testimony).

6. On February 8, 2012, Petitioner Cole timely filed her Step III (SEAC) complaint with respect to the written reprimand. On May 2, 2012, Petitioner Cole timely filed her Step III complaint with respect to the five-day suspension. On December 29, 2012, Petitioner Cole timely filed her Step III complaint with respect to her termination from state employment. (See Exs. 1, 4, & 6). These three complaints were consolidated into the above-named cause.

7. On August 5, 2011, Petitioner Cole also attempted to file an earlier complaint with respect to her 2010 performance appraisal and early-2011 Work Improvement Plan (WIP).[8] However, this filing was not made within the statutorily required thirty (30) day period. (See Exs. 8 & 9; Twyman & Cole Testimony). Accordingly, the August 5, 2011 complaint was filed untimely and cannot support relief.

8. The parties also had a prior dispute over Petitioner's earlier discharge in 2010 resulting in a settlement and General Release. The language of the General Release clearly shows the parties cannot re-litigate that older matter. (See Exhibits C-1 & C-3). However, on Petitioner's motions and requests claiming the relevance of 2010 facts, the ALJ overruled the Respondent's objections as to factual evidence and discovery on 2010. The parties were permitted to present factual evidence for this instant controversy as to year 2010 background. Introduction of year 2010 evidence did not, however, improve Petitioner's case.

9. Petitioner Cole claims all the discipline lacked just cause, and was unlawful as the product of racial discrimination or harassment, or unlawful retaliation. (See Cole Testimony). Respondent DWD claims Petitioner's low work production established just cause for each of the disciplinary actions. (See Twyman & Freeman Testimony).

[8] The issuance of a WIP is not a disciplinary action taken against an employee. However, failure to complete a WIP satisfies just cause for a resulting disciplinary action. A WIP is to help a struggling employee improve. (See Tywman, Jenkins & Freeman Testimony).

II.1. Work Production (Just Cause)

10. CDs at the FWAC were required to satisfy work production requirements based on metrics set by Stephanie Park, director of the FWAC, with an unspecified amount of input from the executive staff in Indianapolis.[9] (See Twyman, Freeman, & Essex Testimony). At all relevant times, line manager Freeman evaluated each CD's weekly performance as compared to the metrics set by Parks and Respondent DWD. (See Freeman Testimony).

11. The preponderance of the credible evidence shows that Freeman only imposed discipline if a CD's performance fell below 80% of the established work performance metric. (See Exs. R/R2, 11-22, 23, & 38; See also Exs. 27-36, Q and 65; Twyman, Freeman & other Testimony).

12. During the first few years FWAC's existence, work production was the sole means by which CDs were evaluated due to a backlog. As time progressed, there was a shift to a focus on quality and the production metrics were reduced several times in response. Parks/DWD also reduced the production metrics in response to an evolving understanding of how many issue determinations the CDs could reasonably process in a given period of time. (See Freeman, Jenkins, & Essex Testimony).

13. At all relevant times, Respondent DWD had a legitimate business interest in work production and there were metrics to be met by its CDs. (See Freeman, Jenkins, & Essex Testimony).

14. The distinct production metrics periods were as follows. Until approximately mid-June 2010, claims deputies 5 ("CD5s") were required to process 22.4 issue determinations per day and claims deputies 6 ("CD6s") were required to process 37.8 issue determinations per day.[10] From approximately mid-June 2010 until approximately October 2011, all CDs were required to process 20 issue determinations per day. From approximately October 2011 until approximately May 2012, all CDs were required to process 12-15 issue determinations per day. From approximately May 2012 until Petitioner Cole was discharged, all CDs were required to process 1.47 issue determinations per hour. (See Exs. R/R2 & 11-22).[11]

15. The preponderance of the credible evidence shows that CDs were given sufficient notice of the required metrics, and as they evolved. When there was a change in metrics, CDs were given notice through training meetings, electronic correspondence, and a April-May 2012 formal memo. Testimony from current and former CDs indicated that they were generally aware of the

[9] Similar metrics were applied to CDs working at the FWAC's sister office, the Indianapolis Adjudication Center.
[10] Intermittent claims deputies were required to process 3 issue determinations per hour.
[11] Sometime after Petitioner Cole's discharge, the metric was changed to approximately 1.3 issue determinations per hour. This remains the metric for work production at the FWAC for all CDs. (See Freeman and Essex Testimony).

metrics after they received notice and clarification if necessary.[12] (See Exs. 10, 34, 45; Freeman, Stahlhut, Crowe, Whetstone, Jenkins, Raines, Mader, Johnson, & Cole Testimony).

16. Prior to approximately May 2012, work production calculations at the FWAC were not regularly adjusted for a CD's time away from his or her desk (i.e., meetings with management). This sometimes resulted in lower work production for the effected week. However, in part due to Petitioner Cole's recommendations, Freeman amended the policy around May 2012 to properly account for such time. Of most significance, all CDs at the FWAC were treated the same both prior to and after the policy was implemented. (See Woltjer, Twyman, Freeman, & Cole Testimony).

17. Each party contends that the ALJ should restrict the work production analysis to specific dates or specific CDs, based on various legal arguments (e.g., similar situation, similar treatment/duties). The parties were unable to agree on an ideal set of data that would produce a fair and objective analysis of Petitioner Cole's work production. However, as a fall-back or second choice position, both parties agreed that it would be appropriate to limit analysis to the work production data from May 2012 until Petitioner Cole's termination, but each party maintained discontent. (See docket, briefs, closing arguments, and Cole Testimony). Certain witnesses, without a direct stake in the matter, also gave helpful opinion testimony about the most appropriate date ranges to look at. Most witnesses asked told the ALJ that carving off Special Project Lists/CSD Lists (discussed below) and/or using the period after May, 2012 would be an especially accurate and fair view of production to compare. (See Stahlhut, Crowe, Whetstone, Jenkins, Raines, Mader, Johnson, Essex & other Testimony).

18. In response, the ALJ engaged in a detailed analysis of work production at the FWAC based on testimony, argument, and numerous exhibits. (See Exs. R/R2, 11-22, 23, & 38; See also Exs. 27-36, Q and 65; and all relevant Testimony). The work production data was isolated in various ways according to evidence and legal argument, taking into account each party's contentions. The data question asked was whether Petitioner Cole's work production could be found to meet the reasonable expectations of Respondent DWD. The following data sets are illustrative of some of the major ways to analyze the data.[13]

a. _Jan. 2010-Sept. 2012, All CDs (e.g. All Data)._ Petitioner Cole's monthly average and also daily work production was consistently below the metrics and the 80% requirement set by Freeman. As compared to the rest of the CDs at the FWAC, Petitioner Cole's average work production during any given metric period was at all times the lowest or within the lowest group of co-employees.

[12] During testimony, some CDs expressed that they had asked questions in meetings and thought the earlier, higher metrics were harder to satisfy.
[13] All of the following figures in this section are approximate and may be math rounded.

During the metric period of 22.4 issues/day for CD5s (80% is 17.9), Petitioner Cole's average work production was 13.4 issues/day (59% of the metric). The next lowest CD's average work production was 15.2 issues/day (Cari Mader) and the average work production for the full CD staff was 20 issues/day.

During the metric period of 20 issues/day (80% is 16), Petitioner Cole's average work production was 12.7 issues/day (64% of the metric). The average work production for the full CD staff was 19.3 issues/day. One other CD, Octavia Underwood (black), had a lower average work production than Petitioner Cole of 11.1 issues/day for this metric period, resulting in her termination from state employment.

During the metric period of 12-15 issues/day (80% is 9.6), Petitioner Cole's average work production was 6.5 issues/day (54% of the low end of the metric). The next lowest CD's average work production (R. Crowe) was 9.6 issues/day and the average work production for the full CD staff was 14.5 issues/day.

During the metric period of 1.47 issues/hour (80% is 1.18), Petitioner Cole's average work production was 0.93 issues/hour (63% of the metric). The average work production for the full CD staff was 1.45 issues/hour. The other three lowest CDs' average work production (Rhonda Crowe, Deborah Edgar, & Patricia Stahlhut – all white) were 0.95 issues/hour, 0.77 issues/hour, and 0.87 issues/hour. Petitioner Cole and these three other lowest performers were terminated from state employment within days of each other.

In summary for the all-data set, Petitioner Cole consistently produced at or near the bottom of the CD staff at the FWAC. There were isolated days or weeks where Petitioner Cole's work production would meet or exceed the 80% requirement, but this was rare. A number of these times were clustered in or around her 2011 WIP period. This shows that Petitioner Cole could produce as required, and Respondent DWD recognized this through successfully passing her on the 2011 WIP. During times of maintained low production, progressive discipline was issued appropriately, ultimately resulting in Petitioner's final discharge. Petitioner Cole maintained a substandard average work production of approximately 60% of the established metric. She rarely achieved a daily, weekly or monthly work production that satisfied the required 80% requirement set by Freeman.

b. *Jan. 2011-Sept. 2012, All CDs.* At various times, Respondent DWD objected to the use of 2010 facts. This data set has been analyzed in response.

Since Petitioner Cole's average work production during the metric period in 2010 was slightly lower compared to her average during the subsequent metric periods, her overall average work production actually increased to approximately 61% *by not including* the 2010 data in this analysis. However, even with this slight increase, Petitioner Cole consistently produced at or near the bottom of the CD staff at the FWAC from January 2011 until her discharge in September 2012. Producing at 61% of the established metrics is still substandard and does not satisfy Respondent DWD's reasonable expectations. No other CD failed to meet the metrics as often as Petitioner Cole during the 2011-2012 period. For example, Petitioner Cole did not meet 80% of the metrics during at least 40 weeks in 2011 and 37 weeks in 2012.

c. *May 2012-Sept. 2012, All CDs.* The parties generally agreed that limiting analysis to May 2012 until Petitioner Cole's discharge would produce the 'second best' and fairest picture of her overall work production. In May 2012, the elimination of the CD6 position resulted in a better comparison from Respondent DWD's perspective, and more consistently applied policies at FWAC from Petitioner Cole's perspective. This data set has been analyzed in response.

The metric period of 1.47 issues/hour (80% is 1.18) began in May 2012, and Petitioner Cole's average work production was 0.93 issues/hour (63% of the metric). The other three lowest CDs' average work production (R. Crowe, D. Edgar, & P. Stahlhut) were 0.95 issues/hour, 0.77 issues/hour, and 0.87 issues/hour. The average work production for the full CD staff was 1.45 issues/day.

In summary for this data set, each CD with an average work production of consistently less than 1 issue/hour was discharged in late-September 2012.[14] All other CDs that were not terminated maintained an average work production of close to or greater than the 80% discipline requirement set by Freeman.

d. *Feb. 2010-Sept. 2012, Non-Customary Shutdown Months Only, All CDs.* Petitioner Cole maintained that one of the major causes of an unlevel playing field at the FWAC was favoritism shown by Freeman toward a certain group of CDs, which did not include Petitioner. Specifically, Petitioner contended that Freeman's favorite CDs received exclusive access to lists of customary shutdowns, holiday shutdowns, and school shutdowns (collectively the "CSD lists") that would boost work production

[14] The ALJ also identified a CD (Gurden) who appears to be a newer employee at the FWAC. Gurden's average work performance typically satisfied Freeman's 80% requirement, with weaker performance mainly occurring after Petitioner Cole was discharged. Gurden was not discussed by the parties nor did she testify. The ALJ thus determines that Gurden is a neutral data point that neither helps nor harms either party.

numbers. (See Section II.3 for further discussion). This data set thus excludes the six calendar months[15] that were most saturated with the CSD Lists.

During the non-CSD months in the metric period of 22.4 issues/day for CD5s, Petitioner Cole's average work production was 13.8 issues/day. And, during the non-CSD months in the metric period of 20 issues/day, Petitioner Cole's average work production was 14 issues/day. For the 20 issues/day metric, the next lowest CD's average work production (Crowe) was 16.1 issues/day and the average work production for the full CD staff was 19.9 issues/day. One other CD, Underwood, had a lower average work production than Petitioner Cole of 12.6 issues/day for this metric period, resulting in her termination from state employment.

During the non-CSD months in the metric period of 12-15 issues/day, Petitioner Cole's average work production was 5.8 issues/day. The next lowest CD's average work production (R. Crowe) was 9.6 issues/day and the average work production for the full CD staff was 13.6 issues/day. During the non-CSD months in the metric period of 1.47 issues/hour, Petitioner Cole's average work production was 0.9 issues/day. The other three lowest CDs' average work production (Crowe, Edgar, & Stahlhut, all white) were 0.84 issues/hour, 0.94 issues/hour, and 0.93 issues/hour. Petitioner Cole (black) and these three other lowest performers (all white) were terminated from state employment within days of each other. The average work production for the full CD staff was 1.31 issues/hour.

In summary, average work production numbers at the FWAC were less impressive when the impact of the CSD lists was mitigated, yet Petitioner Cole's average work production was no better in the non-CSD months. CDs that were identified as Freeman's favorites did suffer a decrease in average work production without the CSD lists. However, even in comparison with these non-inflated numbers, Petitioner Cole still maintained an overall average work production of 60% and consistently produced at or near the bottom of the CD staff at the FWAC.

Manipulating the year range, by excluding or including 2010, also does not materially change the subset analysis. The effect of CSD lists also diminished after May, 2012.

e. <u>*Jan. 2010-Sept. 2012, Non-"Favorite" CDs Only Variant.*</u> This data set excludes all CDs that were consistently identified as Freeman's favorites, resulting in a work production analysis of the CDs that clearly had the same opportunities as Petitioner.

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[15] June-August and November-January excluded. Adding half of September (etc) did not materially change results.

This data did not support Petitioner Cole's contentions. Most of the CDs who were identified as not receiving the benefits of favoritism from Freeman were able to achieve average work production numbers that satisfied the 80% requirement at the FWAC. Petitioner Cole's average work production was consistently below or near the bottom of the other non-favorite CDs.

f. *Jan. 2010-Sept. 2012, Freeman Team and CD5s Only.* Respondent DWD objected to an analysis of the work production of any CD6 or any CD on the team of John Smoot, the other manager at the FWAC, due to the contention that they were not similarly situated. In response, this data set only includes work production data from CD5s on Freeman's team.

For example, during the metric period of 12-15 issues/day, the CD5s on Freeman's team had an average work production of 14.6 issues/day, Petitioner Cole had an average work production of 6.5 issues/day, and the next lowest CD5 on Freeman's team (Whetstone) had an average work production of 12.5 issues/day.

During the metric period of 1.47 issues/hour, the CD5s on Freeman's team had an average work production of 1.6 issues/hour, while Petitioner Cole had a low average work production of 0.93 issues/hour. One other white CD5 on Freeman's team (Edgar) had a lower average work production than Petitioner Cole of 0.77 issues/hour, and she was subsequently discharged too.

In summary for this data set, Petitioner Cole was consistently the lowest performing CD5 on Freeman's team, with the possible exception of Edgar who was discharged within days of Petitioner. Petitioner Cole's average work production was always below the average work production of the CD5 staff on Freeman's team and daily work production rarely rose to the 80% requirement set by Freeman for discipline.

g. *Holistic or 'Eye-ball" Approach by ALJ*

The data shows that CDs with known discipline at the various times were the lowest group of performers at the FWAC. By the preponderance of the credible evidence, Respondent DWD engaged in progressive discipline with its low-producing CDs, including both whites and blacks. Low production ended Petitioner Cole's employment. Those CDs that did not show improvement after receiving progressive discipline were eventually discharged. For example, out of the about seven CDs discussed with discipline, five were eventually terminated from state employment. On the other hand, CDs that responded positively to progressive discipline and improved their work performance were not discharged.

By way of example, Cari Mader (a white female), following a successful WIP, had received a verbal warning, written reprimand, and three-day suspension for some periods of low production. However, after Mader returned from her suspension in approximately January 2012, Mader's average work production improved to the point of meeting or coming close to Freeman's 80% discipline requirement. At no time did Mader's average work production linger at the low levels sustained by Petitioner Cole.

19. Petitioner Cole did not meet the reasonable work production of her CD5 position on Freeman's team. Her performance was consistently in the bottom group, where other CD employees, both white and black, were disciplined or counseled. Cutting the data many different ways did not help Petitioner's case. The parties spent much of their time at trial – and before trial in discovery disputes – fighting about the definition of similar situation and what data was argued relevant. There is little difference in the parties' offered distinctions. The data strongly favors that the Respondent DWD acted reasonably and consistently in ultimately discharging Petitioner for unsatisfactory work production.

20. Petitioner's Cole suggestion at trial and in closing argument that the entire data set, years of data for the office, should be thrown out must be rejected. She sought the information, and other information about co-workers, in discovery. Respondent had a legitimate business practice to have work production standards.

21. Here the preponderance of the credible evidence shows that Petitioner could not maintain her performance between 2010-2012 regardless of her knowledge base and training background. Petitioner Cole did not subjectively agree with the metrics, but the employer was engaged in a reasonable process of metrics refinement in 2010-2012, the metrics were reasonably well communicated (especially on Freeman's team) and Respondent's discipline was color-neutral and consistent enough to pass cause muster.

22. Respondent DWD proved by a preponderance of the credible evidence the factual just cause basis of insufficient work production to discipline and discharge Petitioner Cole. The rest of this opinion delves deeper into the management and civil rights components of this case.

II.2. Similarly Situated Employees

23. Prior to May 2012, the CD staff at the FWAC included intermittent CDs, CD6s, and CD5s. In May 2012, the CD6 position was eliminated, effectively transitioning all CD6s into CD5s, and some intermittent CDs were given the option of becoming CD5s. (See Ex. 41; Twyman, Freeman, & Stahlhut Testimony). Prior to approximately January 2011, all CDs reported to the same supervisor, Stephanie Parks, with certain CDs serving as team leaders,

designated Acting-In-Charge. (See Jenkins & Cole Testimony). In January 2011, Parks[16] became the director of the FWAC, which led to the hiring of Karen Freeman and John Smoot as supervisors. At all relevant times after January 2011, the CD staff was split into two teams, managed by Freeman and Smoot. (See Exs. R/R2, 11-22; Twyman, Freeman, Jenkins, & Cole Testimony).

24. Prior to mid-June 2010, CD6s were required to process 37.8 issues/day and CD5s were required to process 22.4 issues/day. At all relevant times after mid-June 2010, CD6s and CD5s were required to meet the same metric. (See Exs. R/R2, 11-22). CD6s received a minimum annual salary of $21,944 while CD5s received a minimum annual salary of $23,764. CD6s were required to process "intermediate-level eligibility determinations" while CD5s were required to process "intermediate and complex eligibility determinations." (See Ex. 40). The main difference in duties between CD6s and CD5s is that CD5s were responsible for all issues handled by CD6s as well as more complex separations. There were also special projects, such as the CSD lists, that went more often to CD6s before May 2012, which is later discussed. (See Freeman, Jenkins, & Cole Testimony).

25. Before the Freeman and Smoot teams, all CDs reported to Parks as their supervisor. The CDs designated as Acting-In-Charge did not have supervisory duties and could not impose discipline or counseling. (See Twyman, Jenkins, & Cole Testimony). After the Freeman and Smoot teams were implemented, each CD reported to his or her respective manager.

26. Each manager had distinct control and responsibility over his or her own team and neither manager could make supervisory decisions for a CD on the other team. (See Twyman, Freeman, & Jenkins Testimony).

27. Freeman was described by multiple witnesses as more professional and knowledgeable than Smoot. Freeman had requisite knowledge of CD issues, adequately communicated work production numbers to her CDs, and acted professionally overall. (See Jenkins, Whetstone, Raines, Ort, & Johnson Testimony).

28. Freeman was also the only manager at the FWAC who dealt with the CSD lists and distributed them to the CDs on both teams. (See Freeman, Crowe, Stahlhut, Jenkins, Johnson, & Cole Testimony).

29. After Petitioner's dismissal Smoot left state employment and Freeman supervised both teams in the same manner. Smoot had more likely than not been discharged, resigned or asked

[16] Parks left state employment after Petitioner's discharge and did not testify. Parks may have been disciplined for some unrelated matter, but Essex (her replacement) did not know why. There was substantial testimony about Parks' alleged roles. (Freeman, Cole and Essex testimony.)

to leave by DWD for his generally unprofessional leadership. (See Crowe, Johnson, Underwood, Essex & other witness Testimony)

30. In summary, at relevant times, the CDs reported to two different managers with exclusive disciplinary discretion, styles of management, and levels of involvement with their teams. However, all CDs at the FWAC were tasked with the same duties, were subject to the same work production metrics, and received the CSD lists exclusively from Freeman.

31. It is thus found that the CD5s were not similarly situated to CD6s. It is found that the CDs on Freeman's team were not similarly situated to Smoot's team as to management. But, it is found that the duties of CDs on the teams were similar to the duties on the other team.

32. It is found that year 2010 is a less relevant/weighty period compared to years 2011-12. However, the 2010 period is relevant background to Petitioner's contentions and must be considered to some degree.

33. These similar situation findings do not heavily impact the results because the production and civil rights evidence shows the Respondent still acted with just cause even when all the data is considered to see if it supported Petitioner's contentions.

II.3. FWAC Policies and Management

34. *Training.* Around the opening of the FWAC, initial training was provided to the claims deputy staff by a team from Indianapolis. (See Ex. 67; Freeman, Whetstone, Jenkins, Mader, & Cole Testimony). After initial training and before Stephanie Parks established the acting-in-charge position, CDs engaged in a peer-to-peer support system.

35. CD5s with prior experience (*e.g.*, Whetstone, Falbe, Dance, and Petitioner Cole) helped answer questions and provided advice to the others. However, by the preponderance of the credible evidence, the CD5s with prior experience did not have the status of official trainers. (See Freeman, Whetstone, Jenkins, Mader, & Cole Testimony).

36. When trainers were appointed, CDs were instructed not to go to fellow CDs with questions but to use their trainers for individual training. (See Freeman, Stahlhut, Crowe, & Jenkins Testimony).

37. After the trainers were appointed, the entire CD staff was provided with periodic training through group meetings led by either of the team trainers or by Freeman. At these meetings, CDs received training on changes in policy/metrics or on performance areas that were lacking in the office overall. (See Exs. 10 & 24; Freeman, Jenkins, & Cole Testimony).

38. Tonya Jenkins was appointed to the position of trainer for Freeman's team. At the beginning of her time as trainer, she was overburdened with questions from CDs. So, Jenkins implemented a system with certain hours set aside for questions and sign-up lists for CDs.

39. The CDs that expressed frustration with Jenkins' availability were generally satisfied with the new system. (See Freeman, Stahlhut, Crowe, & Jenkins Testimony). However, although many CDs utilized Jenkins' training, Petitioner Cole did not voluntarily avail herself of the resource. (See Jenkins Testimony).

40. Furthermore, mentors were provided to those CDs who were suffering from low production. Petitioner Cole had the opportunity to receive mentoring from Whetstone, although Petitioner only asked for one such session and thought the advice of limited use. (See Exs. 54 & 55; Freeman, Whetstone, & Cole Testimony).

41. Freeman also provided individual training and support to the CDs on her team, including Petitioner Cole. (See Exs. 27 & 36; Freeman & Cole Testimony). Petitioner Cole received additional individual training and encouragement, yet she was unable to improve her work production. (See Exs. 7 and 10; various email exhibits, and Freeman & Jenkins Testimony).

42. *Management.* Supervisor duties at the FWAC included monitoring production, quality, attendance, payroll, and behavior in the office. Before Freeman took over both teams, Freeman and Smoot each managed 10-15 CDs and generally attended training meetings. Although there were two separate teams, the two supervisors were responsible for making sure their CDs attained production at the metrics set by Parks. (See Freeman Testimony).

43. Parks, the director of the FWAC at the time, was described as being hands off, except for setting overall metrics (applicable to all) and her regular breakfasts with the two supervisors.

44. In general, Smoot had a more lenient style of management, giving freer rein to his CDs and providing less support and input on performance. Smoot also did not run reports for his CD staff's production in the beginning, but eventually started doing so. Smoot also did not have prior CD experience and did not have the requisite knowledge to provide support regarding substantive questions. Smoot did not supervise Petitioner Cole at any time. (See Twyman, Freeman, & Cole Testimony).

45. Freeman was generally described as a professional and knowledgeable CD boss, and it is so found.

46. Freeman provided production spreadsheets[17] from the beginning and handled extra tasks beyond the supervisor duties at the FWAC, such as maintaining the CSD lists for the entire state.

47. Some CDs described Freeman as not being approachable if she didn't like them, but the majority of CDs described Freeman as running a tight ship and willingly providing help whenever necessary. On balance, Freeman's management style was reasonable enough to support imposing discipline in the work production context.

48. *Work ('Work Issue') Distribution.* At the beginning of the FWAC through approximately the end of 2010, CDs received regular work issues by way of random distribution, generated in the Workflow system and populated into their email inboxes on a daily basis. (See Freeman, Jenkins, & Cole Testimony).

49. In approximately 2011, issues were distributed based on blocks of social security numbers instead of being populated through the Workflow system. (See Ex. 28; Freeman & Jenkins Tesimony).

50. After the social security number blocks, issues have been distributed to CDs based on state-generated lists from Indianapolis.

51. Freeman or, when necessary, Jenkins would pull groups of issues from those lists and distribute them to CDs that were ready for fresh work. (See Ex. 29; Freeman, Crowe, Jenkins, & Cole Testimony).

52. While it was possible for Freeman to look at the difficulty of an issue before distributing it to a CD, the preponderance of the credible evidence established that it was time-consuming and difficult to do so. Freeman did not engage in such practices contrary Petitioner's accusation. (See Twyman, Freeman, Jenkins, & Essex Testimony).

53. CDs also received special projects from time to time that were distinct from the regular issue distribution. CD6s would generally receive the easier special projects and originally handled the majority of the CSD lists. CD5s would also receive the CSD lists on occasion, especially when a certain CD had already done work for a specific employer in the past. (See Ex. 29; Freeman & Jenkins Testimony).

54. When a CD was away on vacation or medical leave, other CDs would be asked to handle issues that we going negative to prevent stale cases. (See Freeman Testimony).

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[17] Exs. 11-22 are based on the production spreadsheets prepared by Freeman in the normal course of her duties as supervisor. Cynthia Woltjer, an administrative assistant, authenticated the exhibits and Petitioner Cole did not subsequently attack their validity. The paper data is highly credible. (Woltjer, Jenkins and Essex Testimony).

55. It was possible for CDs to engage in a practice known as "cherry-picking issues," whereby the CD could go into the state-generated lists and choose what they thought to be easier issues. However, Parks set forth in the beginning of the FWAC that this practice was heavily discouraged. Freeman later reiterated this anti-cherry-picking policy. (See Twyman, Freeman, Stahlhut, Crowe, Jenkins, & Essex Testimony).

56. *Freeman's Alleged Favoritism and the CSD Lists.* By the preponderance of the credible evidence, Freeman maintained a group of favorite CDs and extended certain levels of favoritism towards them before May 2012. But the favoritism was non-racial, did not substantially change Petitioner's Cole overall work production potential and was legitimately based on factors normal to offices such as personality fit, subject matter expertise[18] and certain people volunteering for tasks. The favoritism shown, being color-neutral, did not impair the discipline just cause in this matter. Moreover, Freeman's overall qualities as a manager were good. She ran a tight ship most of the time, enforcing standards even-handedly.[19] (See Freeman, Stahlhut, Crowe, Jenkins, Reigns, Mader, Cole and all other Exhibits and Testimony).

57. The extent of the favoritism ranged from mild social interaction to the distribution of the CSD lists (which was screened out in certain data sets). Freeman sometimes ate lunch with her favorite CDs and "chit-chatted" with her favorite CDs in her office during work hours. (See Freeman, Stahlhut, Crowe, & Cole Testimony). If a CD was particularly disliked by Freeman, she might be less approachable to them, occasionally portraying mannerisms such as eye-rolling and sighing. This applied to whites and blacks. (See Stahlhut & Jenkins Testimony).

58. Freeman's management style and mannerisms were not race directed, though Petitioner subjectively perceived the opposite.

59. By the preponderance of the credible evidence, the following CDs were part of Freeman's favorite group: Renee Cook, Carolyn Falbe, Shayna Johnson, Nancy Raines, Angie Steinbacher, Margaret Steinbacher, and Susan Whetstone. Most notably, Petitioner Cole was not one of Freeman's favorite CDs.

60. Prior to May 2012, Freeman would generally only distribute the CSD lists to her favorite CDs at the FWAC.[20] (See Stahlhut, Crowe, Whetstone, Jenkins, Raines, Mader, Johnson, & Cole Testimony). Although it was announced to the full CD staff at the FWAC when there were available CSD lists, it was established that sometimes Freeman would deny giving a list to one of her non-favorites and instead hold it for a favorite CD.

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[18] For example, one co-worker CD often received alien status issues, which might have been easier for one highly familiar with them. Eventually, this employee was told she had to broaden out by Freeman or Essex. There was also a rule before May 2012 that those under WIP or discipline, like Cole, were not eligible for extra projects or overtime. This rule was a custom of the office management and not race related.

[19] The only witnesses that denied favoritism at the FWAC were Freeman and those CDs identified as her favorites.

[20] Freeman was in charge of distributing the CSD lists to all CDs at the FWAC, including those on Smoot's team.

61. By way of example, according to Mader, she asked for the CSD lists and was denied approximately 4-5 times even though other CDs received the lists subsequent to her requests. According to Stahlhut, she personally witnessed Freeman holding onto the CSD lists after a general announcement to the FWAC until one of her favorite CDs came to her office, even though Stahlhut had just been denied. (See Stahlhut & Mader Testimony).

62. All that said, Petitioner Cole in about May, 2012 – along with other non-favorites – all received a CSD list to work. (See Freeman, Cole, Mader, Stahlhut and other witness Testimony).

63. Moreover by May, 2012 (well before Petitioner's discharge), Freeman had reformed her practice and started giving more CSD lists to everyone on a rotation basis. This was more likely than not a constructive response to worker and Indianapolis feedback.

64. Factoring out any CSD list favoritism in the data consideration did not materially lift Petitioner's work production numbers compared to others or change the overall situation. It is also true that by May, 2012 the CSD effect on the data is de minimus, because Freeman had started giving the CSD lists out even-handedly.

65. The CSD lists were characterized as easier work that boosted work production for the assigned CD. Some testimony described the CSD issues as easy counts with fewer steps necessary to complete and resulting in 'countable' appeals hearings. (See Stahlhut & Crowe Testimony). Other testimony described the CSD issues as easy counts only because they were more efficient when handled by the same small group of CDs every time. (See Whetstone & Jenkins Testimony).

66. Contrary to Petitioner's assertions of "impossibility", non-favorite CDs were able to maintain their production at or near the established metrics without receiving the CSD lists. Witness Mader, white, for example, was not a favorite and improved production after discipline.

67. In summary, it is found that the favoritism shown by Freeman in her management style was materially harmless, diminished over time, based on normal office factors and not race motivated. The data comparisons could also blank out that factor.

68. *Cole-Freeman Relationship.* By the preponderance of the credible evidence, Freeman and Petitioner Cole mutually disliked each other. Petitioner Cole was not one of Freeman's favorite CDs and occasionally would roll her eyes or sigh audibly at Petitioner Cole's questions and comments. (See Cole Testimony). Meanwhile, Petitioner Cole sent emails to Freeman with language and tone that portrayed discontent and dislike for Freeman and her managerial style. (See Exs. 24, 27-30).

69. Petitioner Cole became increasingly adversarial in her communication with Freeman. Petitioner requested transfer to Smoot's team on multiple occasions because Petitioner believed Smoot was not "on his people" as much as Freeman was. (See Exs. 24, 27-34, 36, 43-47, 49, 62-63; Freeman & Cole Testimony).

70. However, their mutual general dislike was contained to Freeman's and Petitioner Cole's subjective perception and did not manifest itself in any objectively hostile or racial concerning way.

71. Many of the emails that Petitioner Cole identified as being "sarcastic" or otherwise negative were objectively neutral and appropriate in a supervisory relationship. In one such email, Petitioner Cole took offense to Freeman's choice of language as being "sarcastic" or adversarial towards her. However, this particular email was directed to the entire CD staff and had no specific mention of Petitioner Cole. (See Ex.30; Freeman & Cole Testimony).

72. Other CDs did not interpret such staff-wide emails as singling out Petitioner Cole, nor notice Freeman treat Petitioner Cole differently than anyone else at the FWAC. (See Stahlhut, Crowe, Mader, & Whetstone Testimony).

73. Petitioner Cole had the tendency to be easily offended and took group communication personally. (See Freeman, Jenkins, Whetstone, & Johnson Testimony).

74. Freeman attempted to be encouraging with Petitioner Cole, which was supported by the fact that Petitioner Cole's production was almost always below the 80% requirement yet she was disciplined on only a few occasions. Freeman put Petitioner Cole on a WIP to help her improve work production and set up a mentor for Petitioner Cole for extra help.[21] (See Exs. R/R2, 11-22; Twyman, Freeman, Jenkins, & Whetstone Testimony).

75. Freeman also responded to Petitioner Cole's emails, even when they were adversarial in tone, with encouragement and reaffirmations that Freeman thought Petitioner Cole had the potential ability to meet the metrics. (See Ex. 30).

76. *The Desk Move*. Petitioner Cole was moved to a desk closer to Freeman at one point. Petitioner described this as being put in 'front of the class'. Petitioner felt Freeman was trying to make Petitioner uncomfortable and to embarrass her.

77. The relevant part of the FWAC was a medium-sized room that was large enough to seat

[21] Petitioner Cole described being put on the WIP as Freeman attempting to embarrass her. However, a WIP is the recommended corrective action for poor production and is also more forgiving than recommending discipline. Many other CDs did not even notice that Petitioner Cole was placed on a WIP.

all of the CDs in cubicles with extra space occupied by empty cubicles. The two teams were separated by a wall with an opening larger than a normal door, giving it the feel of a partition.

78. Before Petitioner Cole was moved, she sat at what was described as the back of the room, on the opposite side of Freeman's office. Petitioner Cole was then moved to the side of the room closest to Freeman's office, which she described as being in "front of the class." However, the desk was not at the front of the office but instead at the end of a row.

79. Some of the witnesses stated that they would also be uncomfortable sitting in that desk, but other witnesses stated that they had no issue with that desk and made no inference as to the reason for Petitioner Cole's move. (See Stahlhut, Crowe, Whetstone, Mader, Johnson, & Cole Testimony).

80. Freeman testified that Petitioner Cole's move to the new desk was completely random; while Petitioner contended the desk move was an obvious attempt to embarrass her. However, Petitioner Cole was moved approximately when she was placed on the WIP and the new desk was closer to Jenkins, the team trainer.

81. By the preponderance of the credible evidence, Freeman intentionally moved Petitioner Cole to a location more conducive to successfully completing her WIP or work performance. However, the desk move was lawful, and not race related. Neither Freeman nor Cole testified fully credibly on this topic and the ALJ finds the truth is in the middle based on the demeanors. (See Freeman, Cole & Jenkins Testimony).

82. *Meetings*. Petitioner asserts she was distracted by meetings from production, especially in 2012 before the discharge. It is true that Petitioner Cole had more meetings with Freeman compared to the other CDs at the FWAC. (See Freeman, Crowe, Mader, & Cole Testimony).

83. Petitioner Cole incorrectly claims these meetings were called by Freeman and were an unnecessary distraction that prohibited her from meeting metrics. Relevant emails show Petitioner Cole as the person often requesting the meetings with Freeman. (See Exs. 24 et al.).

84. Petitioner Cole testified that she requested many meetings with Freeman to complain about issues in the office or about discipline she received. (See Cole Testimony). There is no evidence that Freeman initiated more meetings with Petitioner Cole than with other CDs. More likely than not, any extra meetings were attributable to Petitioner Cole herself.

85. *Counseling and Progressive Discipline.* At the FWAC, production that did not meet the 80% requirement and lack of improvement were the main grounds for discipline for all CDs. (See all production and discipline related Exhibits, and Twyman & Freeman Testimony).

86. Freeman generally did not abruptly enforce her 80% work production requirement and instead engaged in a series of counseling and warnings before implementing progressive discipline.

87. Freeman typically assessed her team's production on a weekly basis. For isolated or irregular periods of low production, Freeman would notify the CD (often by email), help determine the underlying cause, and provide advice to improve.[22]

88. If a CD suffered a short but extended period of poor work production, Freeman would give them a verbal warning that he or she needed to improve to above the 80% requirement or face discipline.

89. Freeman or Jenkins would then generally recommend that the CD sit with another CD, called a mentor, to learn new techniques for improving production.

90. The next step, if a CD's work production was still below metrics or if an annual appraisal indicated a poor service rating, Freeman would recommend placing the CD on a WIP. Twyman, in her capacity with the human resources officer, would develop a personalized WIP for the CD based on her discretion after receiving Freeman's recommendation.

91. During a WIP, the CD would generally sit with Freeman or Jenkins on a weekly basis, but the frequency would increase or decrease depending on improvement and severity of the work production problem.

92. A WIP typically lasts thirty (30) or sixty (60) days and the CD must show improvement to successfully complete it. A CD's failure to complete a WIP with improvement is grounds for discipline.

93. Progressive discipline, which is state policy for classified employees like Petitioner, would typically be taken against a CD only when counseling[23] did not lead to a satisfactory increase in work production.

94. When Freeman determined that serious discipline was necessary, she would send her recommendation and the CD's employee file to human resources for independent processing. Human resources would then assign a pre-deprivation officer, who would independently review the evidence and decide what discipline was necessary, if any.[24] Under this system, the FWAC managers have input, but do not make the final decision on the resulting discipline.

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[22] Freeman would sometimes delegate non-disciplinary corrective action to Jenkins, especially when it was counseling or training in nature.

[23] *E.g.*, verbal warnings, mentoring, and WIPs

[24] Typical discipline includes: written reprimands, three-day or five-day suspensions without pay, and termination.

95. Although Petitioner Cole consistently failed to meet Respondent DWD's expectation of producing at 80% of the metrics, she received lenient or progressive treatment for almost two years before being discharged.

96. Petitioner Cole received frequent notifications or reminders from Freeman that her work production was not meeting expectations.

97. After receiving an annual appraisal for 2010 of not meeting expectations, Petitioner Cole was placed on a thirty-day WIP to help her improve. Although Petitioner claimed the training or WIP was embarrassing, Petitioner herself requested that the WIP be extended to sixty days.

98. At the end of the WIP, Petitioner Cole had improved her work performance and was considered to have successfully completed it by Respondent DWD. However, shortly after ending the WIP, Petitioner Cole's work production dropped below the 80% Freeman target again and continued to get worse. Petitioner then received a November, 2011 written reprimand, which touched off the instant litigation.

99. Despite the November, 2011 written reprimand, Petitioner Cole continued to produce substantially below the 80% target or 100% actual metric, resulting in a pre-deprivation officer issuing a suspension against her. Despite the February 2012 suspension, Petitioner Cole's work production did not improve and a pre-deprivation hearing resulted in her termination from state employment in September, 2012. By the preponderance of the credible evidence, the pre-deprivation officer's decisions to discipline Petitioner Cole were independent and not improperly influenced by any supervisor at the FWAC.

100. Petitioner Cole's discipline determinations were comparable to determinations made for the rest of the CDs. Although Petitioner Cole claims she was unfairly subjected to discipline, she actually received more leniency than most of the other CDs. Other CDs (*e.g.*, Edgar, Cook, Jenkins) received written reprimands for poor work production numbers that were actually closer to the 80% requirement than Petitioner Cole's numbers. Some CDs did not receive discipline for low work production because they improved their numbers before discipline was recommended. Petitioner Cole's numbers, on the other hand, steadily got worse.

101. A few days after Petitioner Cole was discharged around September 28, 2012, three other white CDs (Edgar, Stahlhut, and Crowe) were also discharged for low production. Witnesses testified that they were not surprised to hear about the discharges and stated that each of those CDs had problems retaining information, changing their techniques, and working efficiently.

102. Based upon a review of the work production numbers for that time, the four CDs that

were terminated were the only ones with average work productions under 1.00 issues/hour for the entirety of the 1.34 issues/hour metric period.

103. *Overtime.* At the FWAC, working overtime was permitted if eligible, but not required. (See Freeman, Cole and other Testimony and Exs. 42, 49, 56-60) To be eligible for overtime, CDs generally must not have recently received a disciplinary action against them and must be meeting their metrics. When a CD worked overtime, he or she had to meet work production for that time as well as the regular time, and so overtime did not help increase work production. Petitioner Cole did not request to work overtime, or if she did at some point, she was not eligible to do so because of her consistently poor production and discipline.

104. Regardless, working overtime would not have boosted Petitioner Cole's work production because she would be responsible for additional issues/hour for each hour of overtime worked.

105. *Sidebar on Work Quality and Petitioner's Work Style.* The parties spent time arguing on this, and introduced character evidence, so the ALJ addresses it. Petitioner Cole was educated and knowledgeable about the CA5 job in general. (See Exs. 61, 67.) Petitioner helped peer-to-peer train others in 2009-2010 when FWAC was getting rolling. Petitioner's work demeanor was very meticulous, but it harmed her pace of delivery. (Cole Testimony.)

106. As the call standard[25], metrics and other factors changed in 2011-2012, Petitioner showed some stubbornness to adapt. She felt secure in the prior procedures.

107. Petitioner's performance in quality terms was strong for most of 2010-2011, and in the past. However, by later 2011 and 2012 her frustration was showing and Petitioner was allowing her work product to become untimely.

108. The state proved one specific example where Petitioner Cole failed an informal review/audit on the amount of 'negative' or too-slowly performed claim reviews under statutory requirements. Petitioner had many more negative issues than all other CDs. (See Ex. 24-35, and other exhibits; Cole, Stahlhut, Underwood, Jenkins and other Testimony.) Quality was not the primary basis of the termination, but DWD is correct that Petitioner Cole's direction in this area started positive and was heading negative.

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[25] One 2011 change in the office was a firm requirement that CDs call both parties in a separation review matter (employee and employer). The previous standard in 2010 had been looser. Petitioner asserted she was dis-advantaged because some people in the office didn't always call both. Freeman and Parks cracked down after the standard changed. Petitioner's choice to always call both was reflective of Petitioner's conscientious, but slower, style. No racial factor appeared in the quality evidence.

II.4. Retaliation Claim (or Theory of Conspiracy)

109. From Petitioner Cole's subjective point of view, her poor work production and the discipline actions that lead to her final discharge were the result of a retaliatory conspiracy against her at the FWAC. (See Exs. 1 & 4). A review of Petitioner Cole's testimony, contentions, and complaints related to her time at the FWAC convinces this ALJ that she genuinely held this belief. But, that subjective view is undermined by the preponderance of the credible, objective evidence.

110. As a preliminary, the ALJ rejects DWD's arguments that Petitioner Cole did not adequately inform DWD of her claims prior to discharge. This part of Petitioner's prima facie case is intact. Petitioner complained early, often and vigorously to Freeman, by Petitioner's 2010 settled claim (of which HR was well aware), and in her four different 2011-2012 Civil Service filings, and yet more in 2011 and/or 2012 meetings. It is true that some of Petitioner's complaints to Freeman were slightly vague. Freeman did testify that she didn't understand the breadth of the Complaints until litigation. But magic words are not required by a complaining employee.

The state was at all relevant times on sufficient notice that Petitioner was unhappy with the workplace based on work standards and allegations of racial discrimination, harassment or retaliation. (Cole and Freeman Testimony, docket, and litigation exhibits). The point is that Petitioner subjectively perceived unjust or unlawful treatment, and complained, but it was not actually happening by a preponderance of the credible evidence. DWD's employment decisions were lawfully made based on work production just cause.

111. Now to the specific merits: Petitioner Cole claims that she was disciplined in retaliation for events surrounding her discharge and rehiring in 2010. Approximately two years passed between the 2010 events and her final September 2012 discharge. When Petitioner Cole received an annual performance appraisal for 2010 of "does not meet expectations," Respondent DWD placed her on a WIP to help her succeed instead of issuing discipline. When Petitioner Cole improved during her WIP, Respondent DWD successfully passed her. Although Petitioner Cole was consistently the (or close to) the poorest performing (as to work production) CD at the FWAC, Respondent DWD engaged in progressive discipline, exhausting all typical options before finally discharging Petitioner Cole near the end of 2012.

112. All but two of the other witnesses perceived the FWAC as a typical work environment and refused to validate Petitioner Cole's conspiracy theory when questioned by either party.

113. The only situation that elicited similar conspiracy-based testimony from other witnesses, Rhonda Crowe and Pat Stahlhut, related to the successive discharges of Petitioner Cole, Rhonda Crowe, Pat Stahlhut, and Deb Edgar in November 2012.

114. Crowe was suspicious that she and the two other CDs were discharged only two days after Petitioner Cole's discharge "to cover up any potential issues with [Petitioner Cole]'s dismissal." However, Crowe's only explanation for this suspicion was the fact that the dismissal was "out of the blue with no warning."[26] (See Crowe Testimony).

115. Stahlhut was suspicious that the three of them were discharged as part of a conspiracy to purge the FWAC of older employees, but she was unable to substantiate this claim when questioned. (See Stahlhut Testimony).

116. None of the other witnesses from the FWAC could identify anything improper or abnormal surrounding the discharges. In fact, multiple witnesses testified that they were not surprised when it happened, generally describing the four discharged CDs as unable to retain information, understand basic procedures, or produce near the typical level of the rest of the FWAC.

117. The conspiracy claim that Petitioner Cole relied upon most frequently surrounded her belief that the members of management, human resources, and some of the CDs were engaged in a clandestine, yet highly cooperative, effort to effect Petitioner Cole's separation from the FWAC over the course of approximately two years based on events that took place in 2010.

118. For instance, Petitioner Cole attributed management's breakfast meetings (which Petitioner was not at) to talking about her over a period of years. Freeman credibly rebutted that.

119. Petitioner Cole asserts that Parks had been working from behind the scenes as a puppet master by exerting control over Freeman's management decisions, resulting in policies and relationships that prevented Petitioner Cole from being able to meet work production metrics. No credible evidence or regular witnesses at trial supported this conjecture. No documents revealed such a conspiracy. Freeman rebutted credibly that while she was checking in with Parks, it was Freeman (Petitioner's team) or Smoot (other team) calling the shots on the ground.

120. Petitioner Cole's conspiracy claims were generally unsubstantiated and speculative in nature. In the rare instances that there was offered testimony in support of a conspiracy claim, it would either be minimally relevant or rebutted by far stronger evidence against the claim.

121. By additional example, one of the conspiracy claims was that Twyman (an HR Director) was also influenced by Parks and therefore improperly denied Petitioner Cole's civil service complaints without sufficient investigation. However, Twyman established that the steps she took to review Petitioner Cole's civil service complaints were reasonable.

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[26] Crowe, Stahlhut, and Edgar were all in working test periods, or had been previously employer disciplined or counseled, or a mixture at the time of their dismissal.

122. Most importantly, Twyman reinstated Petitioner Cole in 2010 after Twyman realized the 2010 discharge was Respondent DWD's administrative mistake. Namely, Twyman had determined that DWD had incorrectly discharged Petitioner Cole in a working test period in 2010, after she had already vested.[27] A mutual settlement followed.

123. These facts do not make Twyman a very good conspirator – Twyman reversed both the state and Parks in 2010. By the preponderance of the credible evidence, Twyman's reinstatement of Petitioner Cole and sufficient review of her civil service complaints are actions wholly inconsistent with the retaliation or conspiracy claim.

124. Respondent, through Freeman and Parks, also sent encouraging messages, offered training and passed Petitioner on her 2011 WIP – a rarer period when Petitioner's performance was slightly higher. Why would the alleged conspirators wait until late 2012 to retaliate when they could have fired Petitioner in mid 2011; the retaliatory view is strongly impeached.

125. Petitioner Cole claimed that many of Freeman's daily managerial decisions were implemented as part of the overall clandestine effort to prevent Petitioner Cole from attaining the metrics. Although Petitioner Cole claimed that Freeman's policies were unfair and prevented her from meeting the metrics, they were applicable to the entire team with equal effect. Any policy that negatively affected Petitioner Cole's work production was equally likely to negatively affect every CD on Freeman's team. The sole exception is the pre-May 2012 CSD (special project) lists, where Freeman preferred certain team members for a wide variety of lawful, normal office reasons. Any impact of the CSD lists is easily factored out in the data analysis and shows that Petitioner was not materially disadvantaged by the same.

126. Petitioner Cole specifically complained about policies that did not provide for work production adjustment for time spent on non-production tasks away from the desk, such as meetings with management. However, the non-adjustment effected each CD's work production equally. Most significantly, Freeman changed the policy and implemented work production adjustment in response to Petitioner Cole's complaints and suggestions. Freeman thus acted contrary to her alleged role in the conspiracy theory by amending the policy for the benefit of Petitioner Cole's work production. The retaliation or conspiracy claim is illogical and deficient under the evidence.

127. Finally, Petitioner Cole's poor work production and issues with management was independently reviewed on numerous occasions by non-FWAC (e.g. Indianapolis DWD or SPD) actors, including human resources, a quality management team in Indianapolis, and several pre-deprivation officers. None of these independent investigations found evidence of foul play and they consistently concluded that Petitioner Cole's poor work production was due to her own

[27] Petitioner speculates the state reversed itself for finding race discrimination, which Twyman rebutted under oath.

misgivings as a CD5, including inefficiency and a stubborn inability to adopt recommended techniques. (See Twyman, Jenkins & Whetstone Testimony).

II.5. Race Discrimination and Harassment

128. Petitioner Cole claims that her discipline was the product of race discrimination and harassment, and identifies her supervisor, Freeman and the entire FWAC management team, as the wrongful actors in her complaints. (See Exs. 1, 4 & 63; Cole Testimony). When Twyman received Petitioner Cole's (and Octavia Underwood's) complaints, she investigated the allegations of discrimination by talking to the named people. However, due to a lack of evidence, Twyman closed the investigations. (See Twyman Testimony).

129. The majority of the CDs identified were white. Less than five were identified as non-white. When questioned on the race of each CD, Freeman identified Petitioner Cole, Octavia Underwood, Margaret Steinbacher, and Angie Steinbacher as being black. Freeman identified the other CDs as being either white or Hispanic. However, when asked by the ALJ about the race of an employee, Freeman often had to think before answering and was unsure of many of her race-identifying answers, typified by her responding, "I believe Caucasian?" (See Freeman Testimony). Freeman had "absolutely no problem with Ms. Cole being black."

130. Most CDs, all but Petitioner and Underwood, thought Freeman treated Petitioner Cole in a non-discriminatory manner. Petitioner Cole did not publically complain about discrimination or race at the FWAC – she complained to HR, by litigation papers, Freeman and Jenkins privately (See Freeman, Stahlhut, Crowe, Whetstone, Jenkins, Raines, Mader, Johnson & Cole Testimony; litigation exhibits).

131. On one occasion, Mader overheard a racist comment made by Smoot about driving out a black CD on his team (not Petitioner). Mader does not know why the person left, but can confirm that CD was discharged for attendance a week later. (See Mader Testimony). Smoot also made some passing insensitive comments about Asians.

132. However, Smoot was never the discipline decision maker with respect to Petitioner Cole. Ms. Cole was not on his team. Remarkably, Petitioner Cole testified she got along well with Smoot and often tried to join his team. Petitioner's attempt to distance herself from her own testimony on this point in closing argument was not persuasive. (Cole Testimony).

133. David Dance, a former FWAC CA5 who did not testify, was productive and competent, but was described as what Title VII law affectionately calls an "equal opportunity jerk" by multiple witnesses. He was a difficult personality towards whites and blacks. He was Petitioner Cole's co-worker, and did not supervise Petitioner Cole for the relevant discipline.

134. At some point, Dance switched teams from Smoot's team to Freeman's team, but soon after Petitioner Cole, still on Freeman's team, moved physically to Smoot's side of the office partition. Petitioner Cole focused heavily that Dance was 'not supposed' to work with her. She had complained about Dance in 2010. Petitioner insisted that was an 'extra term' in the parties' 2010 General Release (it is true that Parks did keep them apart for a while), but the term does not appear in the final settlement version. There is no credible evidence to show that Dance effected the discipline in 2011-2012.

135. During an office party, Freeman referred to a dish as "monkey bread," which was taken offensively by the black CD who brought it in. (See Underwood Testimony). However, Freeman explained on rebuttal that this was a normal food dish she liked that could be bought at the store under the same name. (See Freeman Testimony).

136. In general, the CDs did not notice discrimination or racism at the FWAC. Freeman disciplined both white and black CDs for bad performance. Most notably, the three other CDs that were discharged around the time Petitioner Cole was discharged were white and performing at a substandard level like Petitioner. Finally, Angie Steinbacher, a black or non-white CD, was part of Freeman's group of favorite CDs. (See Stahlhut and Johnson Testimony).

Additional Summary of the Evidence

137. In sum, based on a preponderance of the credible evidence, following Petitioner's return in 2010 to DWD through the September, 2012 termination, there was no invidious or unlawful racial discrimination or harassment directed to the material conditions of Petitioner's employment or discipline. The state is entitled to judgment against those claims.

138. There was no evidence or claim that Freeman, Twyman, nor any of the pre-deprivation officers were motivated by race discrimination or retaliation to discipline Petitioner Cole. The state shows a complete breakdown of those causal chains.

139. Petitioner subjectively perceived racial harassment and complained about it to DWD and FWAC management at various times. Her relationship with supervisor Freeman was imperfect, and deteriorated at the end, but in large part due to Petitioner's own tone and actions. Freeman remained reasonably professional in her dealings with Petitioner. The preponderance of the credible evidence shows that there was no objectively severe and pervasive racially motivated harassment. DWD is entitled to judgment against the harassment claim.

140. Respondent DWD has proven affirmatively by the preponderance of the credible evidence that it had just cause to discipline and discharge Petitioner Cole for lack of work production in 2010-2012. Respondent is overall entitled to judgment.

III. Conclusions of Law

1. By a preponderance of the credible evidence, Respondent DWD proved just cause for the termination of Petitioner Cole. Respondent DWD thus established its burden of required proof to show just cause for the termination under the classified Civil Service provisions and AOPA. I.C. 4-15-2.2; and I.C. 4-21.5-3. Petitioner's pre-deprivation and procedural rights, under the classified provisions of the Civil Service System, were also respected in the discipline processes.

2. Petitioner did not satisfy the reasonable performance expectations of Respondent DWD as a Claims Deputy 5 at the FWAC. Petitioner Cole only made progress during her passed WIP. During all other times, her average work production was below Respondent DWD's reasonable expectations of 80% of the established metrics.

3. At all viewed times (2010-2012), Petitioner Cole maintained the lowest average work production or was in the lowest-performing group out of the entire CD staff. In part, Petitioner Cole did not meet the reasonable expectations of Respondent DWD due to inefficiency and a growing obsession with her self-perceived issues with management. Petitioner Cole, despite reasonable and repeated guidance, could not match the work production required of those similarly situated in the FWAC. To the degree Petitioner Cole was negatively impacting her own work production, as testified, to be extra meticulous or to provide advice as an experienced CD5, she was not directed to do so. See *Miller*; I.C. 4-15-2.2-36.

4. By a preponderance of the credible evidence and under the *McDonnell Douglas* burden-shifting framework, Petitioner Cole's discipline was not the product of race discrimination or harassment. Petitioner Cole did complain to the employer, but her job performance did not meet Respondent DWD's legitimate expectations. White, similarly situated CDs were disciplined for poor work production and were treated no more favorably than Petitioner Cole. In fact, Petitioner Cole received more lenient treatment with regards to discipline during her two years of not meeting Respondent DWD's reasonable expectations than similarly situated white CDs. Therefore, Petitioner Cole did not establish a *prima facie* case of race discrimination or harassment.

5. Respondent DWD established the legitimate, nondiscriminatory reason of poor average work production for disciplining Petitioner Cole, which was not rebutted as an invidious pretext.

6. By a preponderance of the credible evidence, Petitioner Cole's discipline was lawful and non-retaliatory. The 2011-2012 discipline was not causally connected to Petitioner making or filing various complaints, nor the parties' older 2010 controversy and rehire.

7. Over two years passed between filing the complaint in 2010 and the final discharge, which alone is enough to sever the causal connection. See *Everroad, Haywood, Oest.* Respondent DWD also reversed itself and rehired Petitioner Cole after she filed her complaint in 2010, placed her on a WIP to help her improve in the beginning of 2011, and gave her a successful pass on that WIP, all of which are intervening events that sever the alleged retaliatory causal connection. These events show that Respondent was work-production 'performance focused' (and not on race or retaliation) and diminish any sense of conspiracy.

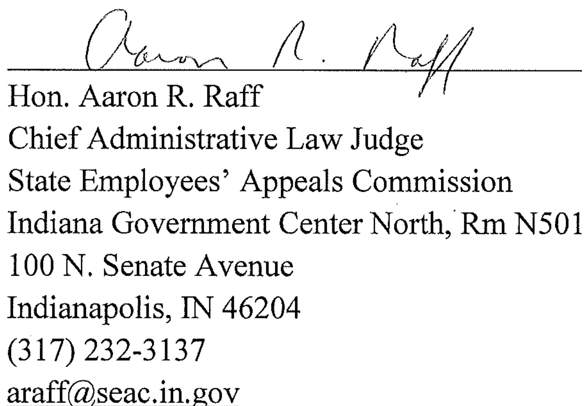
8. The parties cannot re-litigate the 2010 settlement or the fourth complaint that Petitioner filed untimely in earlier 2011. DWD also argues in a post hearing brief that Petitioner Cole cannot appeal a written reprimand as a classified employee in the Civil Service System. However, Respondent DWD affirmatively proved at trial that all the discipline was for just cause and not unlawful, so that issue is not reached.

9. All prior sections discussing the general doctrines of law are incorporated by reference. To the extent a conclusion of law stated herein is a finding of fact or the reverse, it shall be so deemed and remain effective.

IV. Non-Final Order

Judgment is entered in favor of Respondent DWD upon the merits following a four day evidentiary hearing and substantial witness testimony and written exhibits in this matter. Respondent DWD's written reprimand, five-day suspension, and termination of Petitioner Cole's state employment are **UPHELD** as being with just cause and not unlawful for any reason. Petitioner Cole's consolidated complaints are all **DENIED** in their entirety. The parties shall bear their own fees and costs.

DATED: October 29, 2013



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