BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

DARRELL G. SCHLIEP	)
Petitioner,	)
	) SEAC NO. 11-11-171
vs.	)
	)
MIAMI CORRECTIONAL FACILITY	)
BY INDIANA DEPARTMENT OF	)
CORRECTION	)
Respondent.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND NON-FINAL ORDER OF ADMINISTRATIVE LAW JUDGE GRANTING SUMMARY JUDGMENT TO RESPONDENT MCF

On November 18, 2011, Petitioner (pro se) filed with the Commission a complaint for administrative review governed by the State Civil Service System under Ind. Code §§ 4-15-2.2-1, 42 (the "Civil Service System") and I.C. 4-21.5-3 (AOPA). Petitioner Schliep is a former unclassified (at-will) employee for Respondent Miami Correctional Facility (MCF), which is part of the Indiana Department of Correction (DOC). Following the entry of a case management order, Respondent, by counsel, moved for summary judgment on May 4, 2012 (the "Motion"). Petitioner did not respond, timely or otherwise, to that Motion. Being duly advised in the premises the Administrative Law Judge (ALJ) determines that the Motion is ripe for ruling. Respondent MCF has shown that Petitioner Schliep cannot satisfy the required elements of a public policy claim to challenge his termination as an at-will state employee under the Civil Service System. Respondent demonstrates there are no genuine issues of material fact in dispute, and demonstrates it is entitled to judgment as a matter of law. Respondent's motion for summary judgment is hereby **GRANTED**. The following findings of fact, conclusions of law, and non-final order granting summary judgment to Respondent MCF are entered.

I. Standard of Review

AOPA proceedings, including SEAC proceedings, follow Ind. Trial Rule 56 when considering summary judgment motions. I.C. 4-21.5-3-23. A summary judgment motion should only be granted when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Ind. T.R. 56(C). "The burden is on the moving party to prove the nonexistence of a genuine issue of material fact; if there is any doubt, the motion should be resolved in favor of the party opposing the motion." *Oelling v. Rao (M.D.) et al*, 593 N.E.2d 189, 190 (Ind. 1992). "Once the movant has sustained this burden, however, the opponent may not rest upon the mere allegations or denials in his pleadings, but must respond by setting forth specific facts showing that there is a

genuine issue for trial." *Id*. When a non-moving party fails to timely respond to a summary judgment motion, a court should accept the designated factual materials of the moving party (and not consider, for instance, any late filed materials by the non-movant). *Marvin Miller M.D. v. Tiffany Yedlowski et al*, 916 N.E.2d 246, 249-252 (Ind. App. 2009). *See also, Naugle et al. v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1062 (Ind. 2007)(review is limited to those materials timely designated to the court).[1]

As applied to this matter, Petitioner Schliep has not opposed the factual contentions submitted in the summary judgment motion by movant Respondent MCF. [2] Therefore, the factual contentions of the Respondent's Motion, and the Complaint where the motion is otherwise silent, are accepted as the only evidence for purposes of the motion. (See Section II.) Moreover, Respondent MCF has satisfied its initial motion burden. Petitioner offers no rebuttal, and nor may Petitioner's pleadings serve as a rebuttal. Respondent demonstrates there are no genuine issues of material fact in dispute, and demonstrates it is entitled to judgment as a matter of law.

II. Findings of Fact

1. Petitioner Schliep was an unclassified employee working as a Correctional Sergeant for Respondent MCF at the time of his termination.

2. On September 10, 2011 Petitioner exited the control pod of the K-Housing Unit at the same time the front door to the control pod was open while offenders returned from the eating area. This resulted in both doors to the control pod being unsecured at the same time, contrary to Respondent's internal workplace standards. Offenders were thus able to enter a restricted hallway or move in a manner not permitted by policy. (Respondent's Motion, pp. 4-5 and Complaint; herein the "POD Door" incident).

3. Petitioner blames the POD officer for this door error. This is the first alleged basis for the Complaint. "Not having any control over the front door it is impossible to know when the door will be opened by the POD officer. I Sgt Schliep have no control over other staff actions. This incident was only noted due to the over zealous investigation by [Captain] Truax who acted in an overbearing and inappropriate manner." (Complaint, p. 2.) As further discussed below, whether or not it was Petitioner himself who opened the POD door is irrelevant.

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[1] Petitioner's lack of response does not, by itself, grant summary judgment in favor of Respondent. Yet, as here, a failure to respond often does not avail a party. *See, Murphy v. Curtis*, 930 N.E.2d 1228, 1233 (Ind. App. 2010); Ind. T.R. 56(B)

[2] Respondent filed its Motion for Summary Judgment under Ind. T.R. 56. However, Respondent's Motion did not formally designate evidence (or provide a statement of material facts not in dispute) for the record, as required by Ind. T.R. 56. *See, State ex rel. Berkshire v. City of Logansport*, 928 N.E.2d 587, 595 (Ind. App. 2010). Yet, the non-disputed facts were easily distilled from the Motion's narrative form and Complaint. The Motion is meritorious. Petitioner did not respond at all to the Motion. Under these circumstances, the ALJ concludes that a preference for a judgment on the merits supersedes avoiding such judgment due to Respondent's procedural inaccuracy to not strictly follow all of Ind. T.R. 56's requirements.

4. Around this same time, and perhaps a consequence of the POD door being opened (although it is of no relevance herein), an offender assaulted another offender. Petitioner alleges that: "The only video that Capt. Truax needed to see was the actual assault on another offender but he took it upon himself to continue viewing the video in hopes of attaining some type of infraction of the code of conduct. This particular infraction occurs on a daily basis but goes unreported. In this case it was reported and used in conjunction with past disciplinary actions to justify the termination. It was also used to terminate me due to the report of code of conduct violations against Capt. Truax which you Mr. Sevier received a copy of and there was no actions taken." (Complaint., p.2.)

5. Respondent MCF began investigating Petitioner Schliep's actions relating to the POD Door incident the same day, September 10, 2011. (Respondent's Motion, p. 5)

6. Petitioner second alleged in the Complaint that Respondent did not follow its internal policy(s) in investigating or otherwise effecting the termination. Specifically, Petitioner claims that Captain Dale Truax (Capt. Traux), Assistant Superintendent Darly Walls and/or Superintendent Mark Sevier (Superintendent Sevier) violated various provisions of the Respondent's internal policy number 04-03-103, the DOC's Information and Standards of Conduct policy (the "DOC Conduct Policy").

Relevant portions of the DOC Conduct Policy are referenced or otherwise quoted in both the Complaint and the only attachment to Respondent's Motion.[3] Distilled down, Petitioner alleges that Capt. Truax violated the DOC Conduct Policy's sections concerning the Code of Ethics and the Code of Conduct by acting overbearing in searching the video of the POD door incident looking for any misdeeds by Petitioner.

7. Lastly, Petitioner's November 18, 2011 Complaint challenged the basis of the termination as a pre-textual retaliation for reporting alleged misconduct by his supervisor, Capt. Truax, under Indiana's Whistle Blowing statutory protections for state employees (the "WBL"; I.C. 4-15-10-4 to 5, part of the State Employees' Bill of Rights). (Respondent's Motion, p. 4 and Complaint.)

8. As mentioned above, Petitioner filed a memorandum to Major M. Hale on September 14, 2011, in which he accuses Capt. Truax of various policy violations. This memorandum *post-dates* the POD Door incident upon which the discipline arose, and was after Respondent was *already investigating* Petitioner's conduct or role in the POD Door incident.

9. On September 19, 2011, Respondent MCF terminated the employment of Petitioner Schliep.

[3] Petitioner directed his Step One Complaint to Superintendent Sevier on September 23, 2011, and Respondent's Motion attaches a memorandum from Petitioner to another superior, Major Hale, on September 14, 2011, which are both part of the record. Together these reflect a pair of memorandums by Petitioner to his DOC superiors dated September 14 and 23, 2011

10. Petitioner Schliep timely appealed his termination reaching Step 3 of the Civil Service Complaint process, SEAC, on November 18, 2011.

11. Respondent filed a Motion for Summary Judgment on May 4, 2012, which is ripe for ruling.

12. Petitioner did not file a response to the Respondent's Motion for Summary Judgment.

13. Official notice is taken of a portion of the state's Employee Handbook as discussed in detail in Conclusion of Law 5.

III. Conclusions of Law & Analysis

1. 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." I.C. 4-15-2.2-24(a) (Civil Service System, Section 24(a)). "An employee in the unclassified service may be dismissed, demoted, disciplined, or transferred for any reason that does not contravene public policy." I.C. 4-15-2.2-24(b). "Indiana generally follows the employment at will doctrine, which permits both the employer and the employee to terminate the employment at any time for a good reason, bad reason, or no reason at all." *Meyers v. Meyers Construction*, 861 N.E.2d 704, 706 (Ind. 2007)(internal quotes omitted).

2. 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 penal consequence. Put another way, the courts ask was the termination or discipline itself illegal in light of applicable statutory law[4]; a merely foolish or arbitrary choice by an employer to terminate or discipline does not invoke an exception. *Baker v. Tremco Inc*., 917 N.E. 2d 650, 653-655 (Ind. 2009); *Meyers*, 861 N.E.2d at 706-707; *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); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

3. An alleged foolish or arbitrary termination by the employer, without more, does not violate any statute associated with at-will employment. Correspondingly, such a claim does not state an at-will exception allowing SEAC jurisdiction or a claim upon before SEAC which relief can be granted in an unclassified (at-will) Civil Service System case. *Meyers and authorities, supra;* I.C. 4-15-2.2-42.

4. Under the at-will doctrine, as Respondent correctly argues, Petitioner's first basis

[4] Non-comprehensive examples include illegal discrimination on the basis of race, national origin, sex, age, disability, veteran status, religion, free speech, political affiliation or retaliation for filing a discrimination complaint or exercising statutory rights such as workers' compensation rights.

for the Complaint fails. It is of no legal consequence whether Petitioner or another officer opened the POD door on the day in question. Respondent was legally free to discipline Petitioner for opening the POD door whether or not Petitioner was in fact the officer employee responsible. An alleged breach of subjective fairness by an at-will employer is not a public policy issue. Respondent was not required to be factually accurate about employee responsibility as to the POD Door incident (or otherwise) in applying at-will discipline.

5. As to the application of internal DOC Conduct policy, the Complaint likewise does not survive summary judgment. Petitioner cites to DOC's internal conduct policy No. 04-03-103 in his Complaint. More specifically, Petitioner alleges that Capt. Truax violated the DOC Policy's sections concerning the Code of Ethics and the Code of Conduct by either acting overbearing in searching the video of the POD door incident looking for misdeeds by Petitioner. Petitioner may also suggest that Respondent MCF, by various superiors, did not follow internal DOC policy as to the termination or workplace conditions generally. (See Finding of Fact 6, supra.)

However, Respondent's Conduct Policy is part of the larger umbrella of the Indiana State Employee Handbook or, at least, a lower level state policy that is not codified by a statute. The ALJ takes official notice of the State Employee Handbook ("Handbook").[5] The Handbook contains a clear disclaimer that internal state employment policy does not alter the at-will standards for unclassified employees under the Civil Service System. The Handbook, on page one (1) prominently states (emphasis added): "**The Employee Handbook is not an employment agreement or contract. The contents are subject to change and do not constitute 'public policy' for the purposes of the exception to the employment at will doctrine.**" This disclaimer is enough to end any reasonable reliance on the Respondent's internal policies as limiting the at-will employment power of the state employer.

An employer such as Respondent MCF can break (or change) its own handbook policies and avoid liability so long as it does not violate public policy as expressed by statute. *Orr*, 689 N.E.2d at 712. Therefore, even if it was true that Respondent MCF failed to apply its internal Conduct Policy or Handbook provisions to Captain Truax's conduct (or other superiors of Petitioner), nothing in that deviation creates a public policy exception to Petitioner's termination. Petitioner was at-will as an unclassified employee, and could be terminated despite any alleged irregularities in how Respondent MCF applied its internal policies given the clear Handbook disclaimer as our Supreme Court has previously held. *Id*.

Moreover, the General Assembly has clearly decided upon at-will for unclassified state employees. Binding a state employer with an alleged internal employment policy breach that does not amount to a public policy exception is contrary to the Civil Service System's intent and language. The Respondent's Handbook or other internal policies, such as the DOC Conduct Policy, are subordinate to statute (I.C. 4-15.2.2), which

[5] A copy is publically available at the State Personnel Department's homepage: http://www.in.gov/spd/2396.htm. See I.C. 4-21.5-3-26(f).

provides for at-will employment. An employer can be inconsistent, unfair, act on a whim, change or outright violate its own handbook or internal policies so long as the violation does not constitute statutory (public policy) illegality. The classified (just cause) provisions of the Civil Service System, which might take into account the accuracy of the POD Door incident event (e.g. who was responsible) do not apply. See I.C. 4-15-2.2 (Dividing covered state service employees into unclassified (at-will) and classified (just cause)). Petitioner was unclassified (at-will) during the employment decision in question.

6. The more difficult issue of the motion to be resolved is the Whistle Blowing (WBL) claim, but the designated materials and law clearly support a summary judgment for Respondent MCF.

A state employee may seek whistle blower protection under the Civil Service System. I.C. 4-15-10-4 & 5 (the "WBL") [6], which is part of the State Employees' Bill of Rights chapter (I.C. 4-15-10). However, the claim must state the prima facie case required in the WBL statute. The SEAC considers, consistent with the recent holding of *Ogden v. Robertson*, 962 N.E.2d 134, 146 (Ind. App. 2012), that there is no Civil Service System or common law public policy protection for whistle blowing *beyond or outside* of the terms and conditions of the statutory WBL because the General Assembly has passed a specific statute on the subject.[7]

Petitioner Schliep claims at least one superior, Capt. Truax, sought reprisal against Petitioner due to his report regarding code of conduct violations by Capt. Truax. Such allegations were submitted to a superior, Major Hale, on September 14, 2011, which is about four (4) days after Respondent MCF initiated the investigation of Petitioner on September 10, 2011. The Complaint then repeated those allegations to Respondent's Superintendent Sevier on September 23, 2011.

The first threshold problem is one of timing. Petitioner's WBL claim is that his supposed whistle-blowing comes four (4) days after the POD Door incident, and after the DOC had already embarked on an investigation of his role in that incident. Accordingly, it is hard to find the Respondent responsible for possible retaliation of WBL rights when the alleged whistle-blowing came after the inquiry. Captain Truax, if one accepts the Complaint as true, may have been out to get Petitioner and looking for a pretext or excuse to do so. Yet, even if Capt. Truax was playing the villain in this role, Capt. Truax could not possibly have retaliated for an event that had not come to pass yet.

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[6] I.C. 4-15-10-4(c) states in relevant part: "Notwithstanding subsections (a) and (b), an employee must make a reasonable attempt to ascertain the correctness of any information to be furnished and may be subject to disciplinary actions for knowingly furnishing false information…However, any state employee disciplined under this subsection is entitled to process an appeal of the disciplinary action under the procedure as set forth in IC 4-15-2.2-42." *See also, Ogden* at 143-144.

[7] The *Ogden* decision applied the WBL's administrative exhaustion requirement. "If we were to hold that a claimant could seek judicial review based on a right derived from the WBL through common law and, therefore, bypass the exhaustion of administrative remedies requirement of the WBL, it would make the exhaustion requirements of the WBL illusory." *Ogden* at 146.

7. Of course, Petitioner Schliep, had he favored SEAC with a brief, might have additionally contended that his WBL count survives because the termination on September 19, 2011 itself comes after the September 14, 2011 memo and therefore the termination was a form of discipline made more severe as extra punishment for perceived whistle-blowing. However, this road of reasoning comes to an unfruitful end as well. Petitioner's WBL claim additionally lacks at least one essential element as pled, which is dispositive in favor of Respondent's Motion. Namely, an alleged violation of DOC's internal Conduct Policy is not equivalent to one of four kinds of whistle-blowing violations recognized by statute in I.C. 4-15-10-4(a).

I.C. 4-15-10-4(a) &(b) states:

"(a)Any employee may report in writing the existence of:
(1) A violation of a federal law or regulation;
(2) A violation of a state law or rule;
(3) A violation of an ordinance of a political subdivision; or
(4) The misuse of public resources;
to a supervisor or to the inspector general.

(b) For having made a report under subsection (a), the employee making the report may not:
(1) be dismissed from employment;
(2) have salary increases or employment related benefits withheld;
(3) be transferred or reassigned;
(4) be denied a promotion the employee otherwise would have received; or
(5) be demoted."

I.C. 4-15-10-4(a) & (b)(emphasis added). See further, I.C. 4-15-10-5 stating: "No employee shall suffer a penalty or the threat of a penalty because he exercised his rights under this chapter [the WBL]."

Here, the reported violations by Petitioner were merely alleged violations of a DOC internal policy by superiors, and were not a reported violation(s) of a federal law or regulation or state law or rule.[8] Nor was the reported issue a violation of a local ordinance. Finally, the ALJ declines to find the reported issue related to the misuse of public resources. Based on the designated record, Captain Truax was alleged to be overzealous in searching for violations by Petitioner after the POD Door incident. None of which had anything to do with the alleged misappropriation or expenditure of material public funds, public budgeting or the like. There may be some ambiguity in the term "misuse of public resources", but SEAC does not reach that issue today. There is no need. See, *Coutee v. Lafayette Neighborhood Hous. Servs.*, 792 N.E.2d 907 (Ind. App. 2003)(ineffective management style that might result in increased administrative costs, in

[8] A publicly promulgated Indiana Administrative Code (IAC) regulation would be understood to have the force of law and be a "rule" (the Indiana state law analogy to a federal regulation). A mere internal policy or state employer handbook provision is not a statute, not part of the IAC unless so publicly adopted as a regulation, and therefore not a "rule" under the WBL.

the context of I.C. 22-5-3-3 (whistle blowing by private employees under public contract), was not "misuse"). The term "misuse of public resources" should be taken in a plain and ordinary context under the elementary rules of statutory construction, and cannot be over-expanded to fit Petitioner's allegations here of non-financial internal policy violations by a supervisor. *Id*.

8. There are no genuine issues of material fact to require a trial.

9. Respondent MCF is entitled to judgment as a matter of law against every claim of the Complaint. Respondent MCF has satisfied the movant's burden under Ind. T.R 56. Petitioner Schliep has not responded to or rebutted this burden.

10. 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 is entered in favor of Respondent MCF. There are no genuine issues of material fact to require a trial. Respondent is entitled to judgment as a matter of law against every claim of the Complaint. Respondent has satisfied the movant's burden under Ind. T.R 56. Petitioner Schliep has not responded to or rebutted this burden. The hearing date and all pretrial deadlines are vacated. Petitioner's complaint is denied. The Respondent's state employment termination of Petitioner Schliep is upheld.

DATED: July 30, 2012

Hon. Aaron R. Raff
Chief Administrative Law Judge
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