BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

GARY CROAN	)
Petitioner,	)
	) SEAC NO. 12-11-178
vs.	)
	)
PUTNAMVILLE 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 PCF

On December 21, 2011, Petitioner Croan 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).

Respondent PCF filed its Motions to Dismiss and for Summary Judgment on June 8, 2012. Petitioner responded on July 11, 2012, Respondent replied on July 30, 2012. Being duly advised in the premises the Administrative Law Judge (ALJ) determines that the Motion is ripe for ruling (and is properly viewed as a consolidated summary judgment motion). Respondent PCF has shown that Petitioner Croan cannot satisfy the required elements of a public policy claim to challenge his termination as an unclassified, 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 PCF are entered.

I. Standard of Review

SEAC has before it a motion to dismiss and a motion for summary judgment. Evidence and briefing has been designated by both parties as to both motions. The evidence includes the applicable safe harbor policy and affidavits. The Respondent's motions, and Petitioner's responses, are also essentially coterminous in their legal arguments. The motions are best and hereby resolved as a summary judgment motion under Ind. T.R. 56. See, Ind. T.R. 12(b-c), 56.

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*.

As set forth below, Respondent PCF 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

The following facts are taken from the designated evidence, as construed in the light most favorable to Petitioner:

1. Petitioner Croan was an unclassified employee working as a Correctional Lieutenant for Respondent PCF at the time of his termination. Petitioner was first employed in 1987, and had a good work history. (Petitioner Croan's Affidavit; attached as exhibit 1 to Petitioner's Response.)

2. Petitioner was dismissed on October 4, 2011 from Respondent's employment for being under the influence of alcohol at a pre-scheduled, custody supervisors work meeting on the evening of September 29, 2011.

3. "That on or about September 29, 2011, I did in fact consume alcoholic beverages." (Croan Aff. ¶1) However, Petitioner was not intoxicated at that time. Petitioner was distraught from his son moving out, and initially thought he had the day off work. (Id.)

4. "I did in fact attend a work function that evening." (Croan Aff. ¶1.) Petitioner realized he had a pre-set monthly work meeting on September 29, 2011. (Id.) Having already consumed alcoholic beverages, Petitioner considered not attending the event, but knew of another captain's demotion for failure to attend, and so felt compelled and did attend. (Id.)

5. Prior to September 29, 2011, Petitioner had recognized that he was suffering from alcohol abuse. (Croan Aff. ¶2.)

6. Petitioner notified several Respondent supervisors of his alcohol problem prior to the work function. He told Major Crabb he needed help, and contacted the state's EASY program (which could lead to an employee assistance program or EAD). On or about September 13, 2011, Petitioner told the custody supervisor of Petitioner's alcohol

problem. Petitioner was "seeking guidance and direction from my supervisor to help me overcome my illness and assist me in getting the help I needed to overcome my addiction." Petitioner then approached the Respondent's Assistant Superintendent on the same subject on September 14, 2011. No guidance or meaningful response was provided by Respondent. (See, Croan Aff.; Complaint, p.3; and Respondent's MSJ Brief, p. 3)

7. Petitioner intended, before September 29, 2011, to invoke the state's Safe Harbor policy, which is contained in the State's Drug and Alcohol Testing Policy (the "Safe Harbor Policy") applicable at the relevant times (quoted/discussed below; the policy is Respondent's Exhibit A(1)). Petitioner believed the Safe Harbor Policy fully applied to alcohol, and protected him. (Croan Aff. ¶¶2-4.) This is a major thrust of Petitioner's promissory estoppel claim.

As further discussed below, based on the plain terms and conditions of the Safe Harbor Policy, Petitioner could not prevail at an evidentiary hearing on an at-will exception to employment under promissory estoppel or otherwise. The plain terms of the Policy require a judgment as a matter of law for Respondent for multiple reasons. Petitioner's claimed reliance was unreasonable as a matter of law given the Policy's text. There is also no viable disability claim in this context. A state employer may adopt and enforce a Policy refusing alcohol use or impairment in the workplace.

8. Petitioner's termination was at-will, and not by progressive just-cause discipline in light of service record. Petitioner asserts he could rely on progressive just-cause discipline based on the history of Respondent's practices (or older internal policies). In sum, Petitioner alternatively contends he was not an at-will employee at the time of termination. (Croan Response and Aff. ¶¶5-6.) This argument is foreclosed by the Civil Service System and precedent, as further discussed below.

9. The Respondent's Safe Harbor Policy, applicable at all relevant times in the Department of Correction and its facilities including PCF states, in pertinent part:

> "3. **No [state] employee shall use or be under the influence of alcohol while in the course and scope of [state] employment**."
>
> 4. **No employee shall report for duty** or operate a state vehicle **while having any measurable amount of alcohol in his/her system** (which for enforcement purposes is defined as .02[1])
>
> 8. **A safe harbor may be available to an employee who**:
> (a) voluntarily identifies him/herself as a former user of illegal drugs, prior to being identified through other means;

[1] Petitioner's BAC was not measured, at least not in the designated record. However, as admitted to by Petitioner, multiple alcoholic beverages would almost certainly leave Petitioner with a BAC of over .02, the enforcement limit in Section 4 of the Safe Harbor Policy. Moreover, Section 3 of the Safe Harbor Policy does not have a .02 BAC floor. The exact BAC is irrelevant to the motion's resolution.

(b) has obtained counseling or is engaged in rehabilitation through an Employee Assistance Program or Substance Abuse Professional (SAP); and
(c) is **abstaining** from the illegal use of drugs."

Drug & Alcohol Testing Policy, effective July 1, 2008 with emphasis added (See, Respondent's Exhibits A(1)(the Safe Harbor Policy) and A(2)(Affidavit of John Bayse, who is DOC's Human Resource Director).

10. Although the analysis focuses solely on the text of the Policy itself in order to give Petitioner any benefit of factual doubt, it is notable that Mr. Bayse testifies by affidavit as follows[2]:

"Paragraph number 8 [the Safe Harbor Policy] is not intended to allow employees to attend work functions while under the influence of alcohol. Paragraph number 8 is intended to allow illegal drugs to be processed out of the body of someone that is no longer using drugs and is currently engaged in a licensed substance abuse rehabilitation program. Due to the short time it takes the body to process alcohol, this paragraph was never intended to include alcohol testing."

11. Petitioner did not comply with, or fall under, the plain and unambiguous terms of the Respondent's Safe Harbor Policy. Sections 3 and 4 of the Policy prohibit being under the influence of alcohol in the Respondent's workplace. Petitioner freely admits he had used alcohol previously that day, even if not 'intoxicated', and was under the influence when he attended the workplace meeting. Petitioner did not comply with, or qualify under, Sections 3 and 4 of the Policy. Even assuming alcohol was a covered drug, Petitioner was not abstaining from alcohol use as required when he attended the workplace meeting. This violates Section 8(c) of the Policy.

12. The ALJ takes official notice of the State Employee Handbook ("Handbook").[3] See Conclusions of Law Nos. 5-7. 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 – including the Safe Harbor Policy – as limiting the at-will employment power of the state employer.

[2] Petitioner does not contest what Respondent intended by its own policy. However, Petitioner argues the Safe Harbor potentially covered alcohol under Respondent's actual custom or practice. The ALJ avoids this sub-issue entirely by focusing the conclusions of law below on the plain terms of the Safe Harbor Policy text. No genuine question of material fact is present. The Safe Harbor Policy is clear that a state employee is subject to discipline for being under the influence of alcohol at work (as Petitioner repeatedly admits he was). Additionally, the Safe Harbor Policy only applies to illegal drugs, not alcohol, and the drug usage must be in the past tense. Petitioner's alcohol usage was not past tense, but occurred at a workplace meeting. He was not "abstaining" from alcohol use. The fact that he prior reported his alcohol problem at best satisfies only parts of Safe Harbor (Paragraph 8) subsections (a) and (b).

[3] 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).

13. Petitioner did not abide by and could not rely on the Safe Harbor Policy.

14. The Civil Service System became effective by operation of law on July 1, 2011. Petitioner had actual or constructive notice of the law. After June 30, 2011, Petitioner, as a unclassified (at-will) employee under the Civil Service System could not reasonably rely on being a just cause employee or prior (pre-Civil Service System) progressive discipline practices.

15. Petitioner Croan timely appealed his termination reaching Step 3 of the Civil Service Complaint process, SEAC, on December 21, 2011.

16. Respondent PCF filed its Motions to Dismiss and for Summary Judgment on June 8, 2012. Petitioner responded on July 11, 2012, and Respondent then replied on July 30, 2012. The Motion is ripe for ruling and is properly viewed as a consolidated summary judgment motion.

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). The presumption of at-will employment is strong. Ill-defined exceptions that go beyond express statutory rights given by the General Assembly are disfavored. *Baker v. Tremco*, 917 N.E.2d 650, 653 (Ind. 2009) (citing *Orr. v. Westminster Village N., Inc*. 689 N.E.2d 712, 717 (Ind. 1997)).

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).

[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.

3. To have possible relief before SEAC, an unclassified employee's claim must correspondingly demonstrate a public policy challenge to the state employer's action. *Meyers and authorities, supra;* I.C. 4-15-2.2-42.

4. As to the application of the Respondent's Safe Harbor policy, the Complaint does not survive summary judgment. The ALJ shall start from the assumption that the Safe Harbor Policy could provide an exception to at-will employment under certain circumstances. However, Petitioner did not comply with, or fall under, the plain and unambiguous terms of the Respondent's Safe Harbor Policy. Sections 3 and 4 of the Policy prohibit being under the influence of alcohol in the Respondent's workplace. Petitioner freely admits he had used alcohol previously that day, even if not 'intoxicated', and was under the influence when he attended the workplace meeting. Petitioner did not comply with, or qualify under, Sections 3 and 4 of the Policy. Even assuming alcohol was a covered drug, Petitioner was not abstaining from alcohol use as required when he attended the workplace meeting. This violates Section 8(c) of the Policy.

5. Promissory estoppel is the next of Petitioner's arguments. He argues either that the state's past practice or policy (before the Civil Service System was passed) gave him reasonable reliance on progressive discipline. Or, Petitioner asserts that the Safe Harbor Policy can be relied upon as an antidote to at-will termination here. As discussed in Conclusion of Law Nos. 1-3, the Civil Service System statutory text recognizes only the public policy exception as to unclassified state employment. However, Indiana courts, as applied to private employment, have recognized three exceptions to the employment-at-will doctrine, of which public policy is the second portion:

1) Adequate independent consideration supporting an employment contract (not applicable at all in this case)
2) Public Policy (recognized by Section 42)
3) Promissory Estoppel (of questionable application here).

See, *Frampton, Meyers, Baker* and *Orr, supra*.

However, Petitioner Croan's promissory estoppel argument is unavailing as a matter of law for two reasons. Petitioner Croan did not follow the Safe Harbor Policy, and so did not qualify for the Policy's protection. Therefore, he could not reasonably rely upon the Safe Harbor Policy even if it applies. Second, the Civil Service System makes promissory estoppel a dead theory as applied to this particular record.[5]

6. A theory of promissory estoppel is an uphill battle in the first instance when applied to the government. Several elements must be shown, including reasonable reliance on the definite promise of the government's action or omission. *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 581 (Ind. 2007)(According to the *Biddle* opinion, for promissory estoppel to apply to the state there would need to be a showing by the

[5] SEAC does not by this opinion foreclose the outside possibility of promissory estoppel in all at-will, unclassified Civil Service contexts, but observes herein that it is a difficult argument for a petitioner. Under these facts it is an impossible one under the law.

complainant of a definite promise invoking reasonable reliance, consideration, and the avoidance of injustice). The reason is to allow government the flexibility it needs to operate, and also to adapt to ever changing conditions in service to the public. *Id*. The doctrine prevents the state, and thus state tax payers, from being burdened with misstatements or promises that are legally empty, wrong or inaccurate. Elected officials are instead accountable for any broken promises at the ballot box, or by the political process generally. *Id*. The ALJ focuses on the reasonable reliance element of *Biddle* here as it alone is dispositive.[6]

Respondent PCF demonstrates that Petitioner Croan cannot satisfy the narrow *Biddle* exception in this matter. Here, the Petitioner Croan could not have reasonably relied on (a) the Safe Harbor Policy or (b) prior pre-July, 2011 state policies (before the Civil Service System was passed). The Civil Service System, passed July, 2011, clearly distinguishes between unclassified and classified employees. I.C. 4-15-2.2-21 to 24, 42. The General Assembly has clearly decided upon at-will employment for unclassified state employees, like Petitioner.

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 Safe Harbor Policy, are subordinate to statute (I.C. 4-15.2.2), which provides for unclassified, 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. *Meyers*, 861 N.E.2d at 706-707; and *Orr*, 689 N.E.2d at 712. The classified (just cause) provisions of the Civil Service System, which might take into account Respondent's previous practices/policy or Petitioner's qualifications under the Safe Harbor policy 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.

7. Respondent's Safe Harbor 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 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 – including the Safe Harbor Policy – as limiting the at-will employment power of the state employer.

[6] For similar reasons, including both the change of law by passage of the Civil Service System and his deviation from the Safe Harbor Policy, Petitioner is hard pressed to satisfy the 'definite promise' requirement either, another *Biddle* element. These elements may very well collapse into each other as applied to the record.

An employer such as Respondent PCF 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 PCF failed to apply its internal Safe Harbor Policy or Handbook provisions to Petitioner's alcohol condition or work place conduct, 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 PCF applied its internal policies given the clear Handbook disclaimer as our Supreme Court has previously held in *Orr*. *Id*.

8. Last to consider is the application of disability protection law. Indiana has specific, statutory based, public policy protections against employment discrimination on the basis of qualified disability. I.C. 22-9-1, 5 (Indiana Civil Rights Act, of which Chapter 5 relates to 'Employment Discrimination Against Disabled Persons'. The Civil Service System refutes disability discrimination as well. I.C. 4-15-2.2-12.[7]

Petitioner Croan's claims though have no traction under the disability protections available in the law. Exceptions apply to render the discipline proper as to disability law.

> "(a) A covered entity may do the following:
> (1) **Prohibit the use of drugs and the use of alcohol at the workplace by all employees**.
> (2) Require that employees shall **not be under the influence of alcohol** or be engaging in the illegal use of drugs **at the workplace**.
> [Sections (3)-(4) are then consistent therewith]"
>
> I.C. 22-9-5-24(a)(emphasis added)

The facts are undisputed that Petitioner attended a state work meeting while under the influence of alcohol. Respondent was entitled to discipline without impairment under the disability laws. To the degree Petitioner has the condition or disease of alcoholism (and/or is disabled or regarded as disabled) he was not protected from being subject to anti-under-the-influence requirements. Respondent's argument is well taken that it is unreasonable for a state employee to attend a work function under the influence of alcohol (or illegal drugs) and expect to be protected from adverse action based on that attendance. The use or impairment of alcohol (or illegal drugs) in the workplace poses well known dangers to the state's legitimate operational needs[8], and to other employees and the public.

9. There are no genuine issues of material fact to require an evidentiary hearing.

[7] Indiana law is understood to be co-extensive to federal law's disability protections expressed in the federal Americans with Disabilities Act (ADA) to the degree relevant here.

[8] While this was a work meeting presumably in a secure area, it is certainly in the public interest not to allow at-work alcohol impairment by those guarding prisoners.

10. Respondent PCF is entitled to judgment as a matter of law against every claim of the Complaint. Respondent PCF has satisfied the movant's burden under Ind. T.R 56. Petitioner Croan has not rebutted this burden.

11. 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 PCF. There are no genuine issues of material fact to require an evidentiary hearing. 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 Croan has not rebutted this burden. The evidentiary hearing date and all pretrial deadlines are vacated. Petitioner's complaint is denied. The Respondent's termination of Petitioner Croan's state employment is upheld.

DATED: September 5, 2012

Hon. Aaron R. Raff
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