

SEP 24 2014

**BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION**

IN THE MATTER OF:

BRENDA LOUTHAIN)

Petitioner,)

)SEAC NO. 12-13-110

vs.)

INDIANA DEPARTMENT)
OF NATURAL RESOURCES)

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" 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 **October 14, 2014**:

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 struck. The objections may include a brief addressing the applicable law being relied upon by the party.

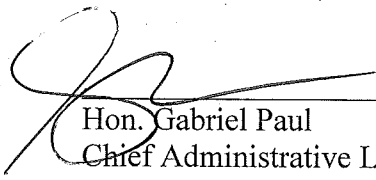
If objections are filed within the time specified, the State Employees' Appeals Commission (SEAC) will hear the objections at a regularly scheduled meeting. Prior to that meeting any motions filed regarding the objections will be dealt with by the Administrative Law Judge.

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 the SEAC as outlined above.

DATED: September 24, 2014



Hon. Gabriel Paul
Chief Administrative Law Judge
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SEAC Commissioners

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

I. Introduction and Summary of Decision

Petitioner Brenda Louthain (“Petitioner”) timely filed a classified Civil Service complaint with the State Employees’ Appeals Commission (“SEAC” or the “Commission”) against the Indiana Department of Natural Resources (“Respondent”). Petitioner is an at-will employee with Respondent. However, as a conservation officer, Petitioner is granted the statutory right of a “for cause” employment standard pursuant to I.C. 14-9-8-14 and I.C. 4-15-2.2.¹ The issue before SEAC is whether Respondent had just cause, by a preponderance of the evidence, to impose a three (3) day suspension on Petitioner’s state employment.

A full day evidentiary hearing in this matter was held on July 8, 2014 before the previous Chief Administrative Law Judge (“ALJ”) at SEAC’s main conference room. On August 1, 2014, the parties waived any further proceedings by this ALJ via a Docket Entry issued by the previous ALJ, which allowed this successor ALJ to listen to the entire audio recording, read the complete exhibits and record and issue a Non-Final Order. This ALJ also duly reviewed the parties’ briefs filed by the Petitioner on August 11, 2014 and the Respondent on September 4, 2014. Having reviewed the audio recording of the hearing, admitted evidence, the applicable law and proposals, and being duly advised, this ALJ makes the following Findings of Fact, Conclusions of Law and Non-Final Order.

¹ See prior standard of review order in this case.

The proceedings are also under the Administrative Orders and Procedures Act (“AOPA”). I.C. 4-21.5-3

Respondent had just cause to suspend Petitioner's employment for three (3) days on the grounds that she was acting in a rude and inappropriate manner during the incident in question. Judgment is hereby rendered in favor of Respondent.

II. Findings of Fact

1. Petitioner is a sworn Master/Senior Conservation Officer for Respondent. Petitioner began working for Respondent on July 1, 1982.
2. Petitioner has worked in Cass County, Indiana, which is located in Respondent's District 3, since 1989.
3. Petitioner has received generally good marks on her annual performance appraisal reports prior to the incident in question and has received various awards throughout her employment (Pet'r Exs. 5-6).
4. In 2010, 2012 and 2013, Petitioner received a "Does Not Meet Expectations" rating on a relevant portion of her annual performance reviews (Pet'r Ex. 6).
5. These ratings were in the area of "Service and Public/Professional Relations" which cited Petitioner's ongoing problems with rudeness. At the end of her 2012 review, it was noted that Petitioner needed to improve her public and professional relations and that an overbearing demeanor would not be tolerated. It was also recommended that Petitioner take extra time to evaluate her response during conflict and to consider the impact of her reactions. At the end of Petitioner's 2013 review (following the suspension), it was noted that Petitioner again needed to maintain a professional demeanor, even though improvement in those areas was noted from 2012 (Pet'r Ex. 6).
6. In 2012, Petitioner received both a written reprimand and a two (2) day suspension for the same rudeness problems which led to her current suspension (Pet'r Ex. 6).
7. On October 24, 2013 Petitioner was suspended without pay for three (3) working days for being rude and overbearing while interacting with the public on April 20, 2013 (Resp't Ex. J).
8. The Respondent Rules of Conduct specifically list "overbearing" behavior as "conduct unbecoming an officer" under its written Procedure 4(2)(b) (Resp't Ex. M).
9. Before the suspension was handed down, Respondent went through a series of internal (to Respondent) disciplinary proceedings regarding the Petitioner's behavior on the day in question (Resp't Ex. J).

A. The April 20, 2013 John's Guns Incident.

10. On the weekend of April 20, 2013, Petitioner took a vacation for the weekend to assist as a guide and mentor for the Freedom Hunt ("Hunt") in Jennings County, Indiana. At the onset of the Hunt, Petitioner was not on duty, was not in a marked vehicle belonging to Respondent and was not otherwise in an official working capacity for Respondent. The Hunt is designed for mentors to be paired with special needs youth to teach them hunting skills.
11. On the morning of April 20, 2013, Petitioner was helping with the Hunt as a mentor.
12. At some point during the morning of April 20, 2013, Petitioner was approached by J.D. Mills ("Mills"), who recognized her as a conservation officer from seeing her and being in a bird stand with her at a past Hunt.
13. Mills explained that his son had shot and killed a turkey but could not find his hunting license.
14. Petitioner was not present when the son shot the turkey. However, Petitioner was informed that the turkey was shot, had been tagged and checked in.
15. Petitioner agreed to go with Mills and his son to John's Guns and Tackle ("John's Guns"), a gun store in North Vernon, Indiana. Petitioner's goal was to see if his son had a hunting license.
16. When the Petitioner, Mills and his son arrived at John's Guns, employee Stephanie Shook ("Shook") was at the desk and computer area located near the front of the store.
17. After explaining that Mills' son had shot a turkey and could not find his hunting license, Petitioner asked Shook to use the store's computer to look up whether the son already had a hunting license. At this point, she identified herself as a conservation officer of the Respondent (Pet'r testimony).
18. After several minutes, Shook was unable to locate the license on the computer because she was lacking some necessary information. Petitioner stated that Shook had become visibly upset or frustrated (Pet'r testimony).

19. Petitioner then asked Shook to return to the home page of the licensure website so that Petitioner could use Respondent's system to look up the son's information².
20. Soon thereafter but before Petitioner could obtain the proper approval to use the store computer, Petitioner stepped behind the desk and toward the computer, brushing aside Shook in the process. Shook complied, but expressed frustration and embarrassment in doing so (Shook testimony).
21. Petitioner then proceeded to enter her login information on the computer.
22. Shook went back to the store's office area and did not return to the computer area until after Petitioner left the store. Petitioner continued to use the computer to look up the son's information while Shook remained in the office.
23. Shook remained in the office area to "cool off" because she was angry and upset. Shook felt that Petitioner was being "rude" and made her feel "stupid" or belittled (Shook testimony).
24. A few minutes later John Durham ("Durham"), the owner of John's Guns, came over to the computer area and asked, "Who is that at the computer?" (Durham testimony). Durham did not witness the interaction between Petitioner and Shook. Petitioner then identified herself as an employee of Respondent.
25. Petitioner could not find the son's license, so she told Durham that the "bad news" was that the son shot a turkey without a license (raising the possibility that the bird was shot illegally or poached), and the "good news" was that Durham would get to sell a license to Mills' son (Pet'r testimony).
26. While the Petitioner was originally off-duty at the time of the incident, she brought herself into the scope of her employment by identifying herself as a conservation officer and invoking her law enforcement status when first asking to use Shook's computer but ultimately using it without permission.
27. Petitioner never sought Shook's permission to use the computer, but instead relied on her status as a conservation officer and her rude demeanor to intimidate Shook into abandoning the computer area. Petitioner stated during her testimony that in response to Shook's inability to retrieve the license, she stated "You're going to have to let me type in the password because it's super secret." (Pet'r testimony). Shook then left the area so

² Petitioner testified that Respondent's system allowed access to areas of the website that Shook did not possess the clearance to see.

Petitioner could presumably type in the password, which she did. Once the password was entered, Petitioner should have allowed Shook to look up the license, or at least had Shook present when she tried to look it up of her own volition. She did neither, instead allowing Shook to remain back in the office.

28. The computer was located behind the store counter, which should reasonably have indicated to Petitioner that it was meant to be used by store employees only. Petitioner was not authorized to use the computer without express and clear permission from Durham or Shook, which she did not receive.
29. Instead, Petitioner acted in a rude and overbearing manner when she invoked her status as a conservation officer in order to obtain access to a computer she would not otherwise have been allowed to use. Once Petitioner saw that Shook was visibly upset at this, she should have recognized that her behavior was rude and overbearing and taken action to curtail the behavior. Petitioner should have known from the feedback given to her on her 2012 performance review that this type of behavior was unacceptable.
30. Petitioner rudely dictated to Durham what he should do in this instance when she told Durham that he was to sell a license to Mills' son instead of telling him the options available given the circumstances³.
31. Petitioner stated that a store such as John's Guns, which sells hunting licenses and logs animals among other things, would have no legal ramifications for knowing about a poached animal that was logged in, and stores are not required to report poached animals to Respondent (Pet'r testimony).
32. Nevertheless, stores such as John's Guns can use their discretion in deciding whether or not to sell a hunting license.
33. John's Guns ultimately sold a hunting license to Mills' son, along with other merchandise to Mills.
34. Durham stated that it is important for a store such as John's Guns to have a good relationship with Respondent (Durham testimony). Durham and Shook reasonably felt some pressure to accommodate Petitioner, who had identified herself as a conservation officer, in order to maintain this good relationship.

³ Although hunting without a license and subsequently killing the bird was illegal and constituted poaching, the fact that there was confusion as to whether or not the son had a license, coupled with the fact that the killing took place during an event intended to help special needs children learn to hunt, led Respondent to state that it was not surprising that no legal action was taken (Pet'r Ex.4).

35. Shook and Durham did not make written complaints to Respondent at the time or before the present hearing, but Durham called local District 9 conservation officers Bill Beville and Zach Walker to complain verbally about Petitioner.
36. Eventually, Durham's wife Cora Durham made a written complaint about the incident, sparking the resulting discipline.
37. While Petitioner was trying to be helpful, as indicated in her testimony, her actions came across as rude and overbearing, which turned a potentially helpful situation into a stressful one. Despite Petitioner's testimony that she was on vacation and wanted to recuse herself from the incident, her actions on April 20, 2013 caused her to relinquish her off duty status and bring herself into the scope of employment.

B. Internal Discipline Procedures that DNR Followed.

38. Petitioner also argues that Respondent erred in disciplining her over a complaint that was not made in writing. According to the Respondent Standard Operating Procedures, complaints may be received in person, over the telephone, or in writing. (Pet'r Ex. 1).
39. Lieutenant Colonel Hyndman ("Hyndman"), the Chair of Petitioner's Disciplinary Action Board ("DAB"), has processed purely verbal complaints before, including inappropriate behavior complaints, with some even resulting in the possibility of termination (Hyndman testimony). Therefore, there was no harm in basing Petitioner's discipline in part upon an oral complaint.
40. Because John's Guns is located in District 9, the original complaint about Petitioner was made to a Lieutenant from that district. The complaint ultimately ended up with Lieutenant Daniel Dulin ("Dulin"), Petitioner's actual supervisor in District 3. He has been the Lieutenant of District 3 where Petitioner works since 2006.
41. Dulin and Detective Sergeant Wolsiefer ("Wolsiefer") investigated the April 20 John's Guns incident. Dulin spoke with Durham and Wolsiefer interviewed Shook.
42. Mills was not interviewed by Dulin or Wolsiefer.
43. After concluding the investigation and considering Wolsiefer's report, Dulin made a written charge and non-binding recommendation of a three (3) day suspension of Petitioner. He also recommended that training be considered.

44. Petitioner internally appealed this decision (Pet'r Ex. 2, Dulin testimony).
45. As a result of Petitioner's appeal of Dulin's decision, Respondent's DAB met on June 20, 2013 to consider the charges against Petitioner. The DAB typically consists of the Major (the Chair), a North Region Captain, a South Region Captain, a North Region Lieutenant, a South Region Lieutenant, and the charging Lieutenant who presents the initial charge and recommendation, but does not decide or vote. The normal board meeting process was followed for Petitioner's DAB meeting (Hyndman and Hutchens testimony).
46. Petitioner attended the meeting and was permitted to bring a silent witness, although she did not. The DAB meeting is conducted much like an informal hearing. Petitioner was allowed to give a presentation and answer questions from board members. (*Id.*)
47. The goal of Respondent's discipline is not just to punish, but to improve and correct behavior. *Id.* Progressive discipline is often used when smaller offenses are repeated and build on one another. (Dulin testimony).
48. Petitioner had been disciplined twice within the past year for rudeness at the time of the DAB meeting. The first time resulted in a written reprimand and the second resulted in a two day suspension (Hyndman and Dulin testimony; Resp't Ex. D).
49. The DAB reviewed the investigation reports, listened to Petitioner's statements at the meeting, considered Petitioner's past discipline, and weighed Petitioner's good work ethic and commitment to charity.
50. Dulin originally recommended a three (3) day suspension. Thereafter, each member of the DAB except Dulin made an individual recommendation of discipline to Hyndman ("Hyndman"), who was the Chair. The DAB then deliberated without Dulin and came to the consensus that a three (3) day suspension was appropriate (Hyndman testimony).
51. Lieutenant Kent Hutchens ("Hutchens") served on Petitioner's DAB. Hutchens stated that Petitioner was also given advice during the meeting to help improve Petitioner's performance rather than just disciplining her. Specifically, Hutchens recommended that Petitioner use her voice recording device to review her interactions with the public and to protect herself against any false accusations (Hutchens testimony).
52. This further shows that the Respondent's purpose of the DAB process is to improve and correct behavior, rather than simply to punish.
53. Petitioner requested a review of the Major's decision because of her concern that Mills was never interviewed during the original investigation.

54. A pre-deprivation meeting was held on September 24, 2013 to review the decision. Lieutenant Colonel Steve Hunter (“Hunter”) had the authority during this meeting to amend, reverse or affirm the decision of the DAB.
55. Hunter instructed further investigation of the John’s Guns incident, including an interview of Mills. Following the interview, Hunter felt that Mills was biased and less credible than Shook, but did consider and weigh Mills’ statements. Hunter ultimately affirmed the DAB’s decision to suspend Petitioner for three (3) days without pay (Ex. H).
56. There was no material or non-harmless procedural error by Respondent by virtue of not interviewing Mills until after Petitioner’s pre-deprivation meeting.
57. Respondent proved there was just cause to believe that Petitioner was overbearing and rude with respect to Shook and the store’s computer usage.
58. Given the Petitioner’s past discipline for rudeness, Respondent correctly and fairly imposed the punishment meted out in this case.

III. Conclusions of Law

1. While the Respondent agency is a part of the state’s unclassified service under the Civil Service System, the Petitioner, by virtue of her position, is endowed with rights given to those employees of classified agencies. A state agency may only discipline a classified state employee for just cause. I.C. 4-15-2.2-23, 42(g). 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. I.C. 4-15-2.2-12, 23, 42; *Non-Final and Final Orders in Miller v. FSSA*, SEAC No. 05-12-060, and *Non-Final and Final Order in Cole v. DWD*, SEAC No. 02-12-019. 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). Overall, Respondent DNR has the burden of proving by a preponderance of the credible evidence that there was just cause for imposing the adverse employment action. I.C. 4-15-2.2-23, 42(g).
2. Respondent must have just cause to suspend Petitioner’s employment. *See*, I.C. 14-9-8-14 and I.C. 4-15-2.2. The prior Standard of Review Order in this cause is hereby incorporated by reference.
3. The overarching inquiry is that just cause requires the state to act reasonably in imposing discipline. This is an objective standard. Respondent employers should reasonably consider the specific conduct at issue, and the employee’s overall work performance

history, both aggravators and mitigators. Respondent employer expectations must be reasonably well communicated and consistently applied to similarly situated employees. Progressive discipline is similarly part of the just cause standard. Additionally, Respondent employers must also follow applicable procedural due process requirements, including providing a pre-deprivation process. *Non-Final Orders in Holder v. DCS*, SEAC 10-13-086; *Chancellor v. DCS*, SEAC 03-13-022; and *Non-Final and Final Orders in Miller v. FSSA*, SEAC No. 05-12-060, *Non-Final and Final Orders in Cole v. DWD*, SEAC No. 02-12-019.

4. Respondent's Standard Operating Procedure 26-1F clearly states that a suspension should be imposed for misconduct considered to be serious *or part of a continuing pattern of behavior involving repeated instances of misconduct*. (See Resp't Ex. B at (C)(3)(b)(1)(a) (emphasis added). In this case, Petitioner had previously been given a two (2) day suspension as well as a letter of reprimand for the same type of behavior exhibited here. Therefore, it was reasonable for Petitioner to receive a three (3) day suspension as part of Respondent's pattern of progressive discipline. Resp't Ex. A at (C)(4). Indeed, Respondent stated that it took all facts into account before imposing punishment. Resp't Ex. J.
5. In addition, Respondent's Law Enforcement Division, by way of its Rules of Conduct, sets out the expectations of its employees. An important rule, labeled "Procedure 3: General Work Ethic" states that employees should be habitually courteous as well as civil and orderly in the exercise of their official duties. Resp't Ex. M. Employees are also required to exercise due courtesy and consideration for all persons with whom they come into contact. *Id.* Clearly Petitioner failed to abide by these rules by virtue of her actions at John's Guns on April 20, 2013.
6. Of special note here is Procedure 4 in the same rules as described above, entitled "General Rules of Conduct". Section 2 is entitled "Conduct unbecoming an officer", under which is subsection b. This subsection lists overbearing, oppressive or tyrannical conduct in the discharge of duty as behavior unbecoming of an officer. *Id.* These are conjunctive phrases, meaning failure to abide by any of them could subject someone to discipline. While the Petitioner's conduct in this case does not rise to oppressive or tyrannical levels, it does qualify as overbearing, which was sufficient for Respondent to administer the discipline it did here.
7. In the end, Respondent did not act punitively in disciplining Petitioner. Indeed, the evidence submitted indicates that Respondent, in addition to a suspension, recommended remedial training for Petitioner in the area of public relations. *Id.*

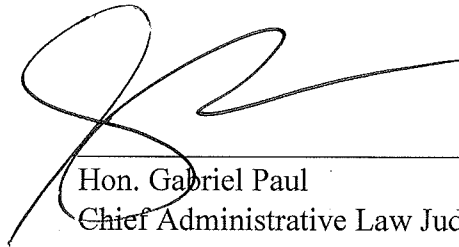
8. Respondent proved just cause for the suspension of Petitioner based on her rude and overbearing behavior. Petitioner did not satisfy the reasonable performance expectations or policies of Respondent. These expectations and policies were in writing and reasonably enforced. Respondent thus established its burden of required proof to show just cause for the suspension under the classified Civil Service provisions and AOPA. I.C. 14-9-8-14, I.C. 4-15-2.2, and I.C. 4-21.5-3.
9. All prior sections are incorporated by reference as necessary. 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. Petitioner's three (3) day suspension is hereby **UPHELD** and her complaint is **DENIED**. The parties shall bear their own fees and costs.

So ordered.

Dated: September 24, 2014



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