

**STATE OF INDIANA
BEFORE THE FIRE PREVENTION AND
BUILDING SAFETY COMMISSION**

IN THE MATTER OF:

GATTITOWN

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CAUSE NO.: DHS-1925-FPBSC-025

**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED ORDER
GRANTING SUMMARY JUDGMENT**

This matter came before Nicole M. Schuster, Administrative Law Judge (“ALJ”) for the Indiana Department of Homeland Security (“Respondent”), on a petition filed by Gattitown (“Petitioner”) requesting a review of Respondent’s Petition for Administrative Review – IDHS Civil Penalty Order No. BU29193-12032019 – Gattitown (“Civil Penalty”), dated December 20, 2019.

On January 28, 2020, Respondent filed its Motion for Summary Judgment, Memorandum of Law in Support, and Designation of Evidence. On March 20, 2020, Petitioner filed its Response. Petitioner did not submit any designation of evidence or exhibits. The ALJ, having considered Respondent’s Motion for Summary Judgment with supporting documents, as well as Petitioner’s Response, hereby makes the following findings of fact, conclusions of law, and recommended order.

FINDINGS OF FACT

1. On October 28, 2019, Respondent performed an inspection of a Class I structure located at 316 North Green River Road, Evansville, IN 47715 (the “Structure”). See Exhibit 1, Affidavit of Mathew Hulsey.

2. During the inspection, Respondent found three (3) violations of Indiana’s building and fire safety laws and served Petitioner with an inspection report order that required these violations be corrected by November 28, 2019. See Exhibit 1, Affidavit of Mathew Hulsey; and Exhibit 2, October 28, 2019 Inspection Report Order.

3. Violation one (1) of the October 28, 2019 inspection report order required compliance with section 703.1 of the 2014 Indiana Fire Code by: (1) repairing or replacing the damaged or missing ceiling tiles; and (2) replacing the missing escutcheon rings. *See* Exhibit 1, Affidavit of Mathew Hulsey; and Violation Number 1 of Exhibit 2, the October 28, 2019 Inspection Report Order.

4. Violation three (3) of the October 28, 2019 inspection report order required compliance with section 605.5 of the 2014 Indiana Fire Code by removing the flexible cords that were passing through the ceiling. *See* Exhibit 1, Affidavit of Mathew Hulsey; and Violation number 3 of Exhibit 2, the October 28, 2019 Inspection Report Order.

5. No requests for administrative review of the October 28, 2019 inspection report order were filed, and the order became final. Exhibit 3, Affidavit of Douglas Boyle.

6. On December 03, 2019, Respondent performed a re-inspection of the Structure to determine if the violations found on October 28, 2019 had been corrected, and Respondent found that violation numbers one (1) and three (3) of the October 28, 2019 inspection report order had not been corrected by the date of compliance (November 28, 2019). *See* Exhibit 1, Affidavit of Mathew Hulsey.

7. On December 03, 2019, Respondent issued Petitioner a \$500 civil penalty for failure to comply with the October 28, 2019, inspection report order, specifically for failure to correct violation numbers one (1) and three (3). *See* Exhibit 1, Affidavit of Mathew Hulsey, and *see* Exhibit 4, December 03, 2019 Civil Penalty.

8. Respondent is charged with adopting and enforcing a statewide code of fire safety laws and building laws.

9. Any findings of fact that may be construed as conclusions of law, and any conclusions of law that may be construed as findings of fact, are so deemed.

CONCLUSIONS OF LAW

1. Indiana Code section 4-21.5-3-23 provides that “a party may . . . move for a summary judgment in the party’s favor as to all or part of the issues in a proceeding . . . an administrative law judge shall consider a motion filed under subsection (a) as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.”

2. Indiana Trial Rule 56(C) provides that summary judgment shall be granted if “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” “A fact is ‘material’ if its resolution would affect the outcome of the case, and an issue is ‘genuine’ if a trier of fact is required to resolve the parties differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences.” *Hugh v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014).

3. Indiana Trial Rule 56(C) also provides that each party to a summary judgment motion “designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion.” *See Rickels v. Herr*, 638 N.E.2d 1280, 1283 (Ind. Ct. App. 1994). “Moreover, the opposing party to the motion must designate ‘each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto.’” *Id.* (quoting T.R. 56(C)).

4. “When a motion of summary judgment is made and supported by the materials contemplated by Indiana Trial Rule 56, the opposing party may not rest on its pleading but must set forth specific facts using supporting materials contemplated by this rule.” *Id.* “If the opposing party fails to meet this burden, then summary judgment may be granted.” *Id.*

5. Indiana Code section 22-13-2-2(a) provides that the Fire Prevention and Building Safety Commission (“Commission”) is required to “adopt a statewide code of fire safety laws and building laws.”

6. In exercising its authority to adopt a statewide code of fire safety and building laws, the Commission adopted the 2014 Indiana Fire Code in 675 Ind. Admin. Code 22-2.5.

7. Under Indiana Code section 22-14-2-10(a) and Indiana Code section 22-15-2-7(1), the Division of Fire and Building Safety (a Division within the Indiana Department of Homeland Security and

hereafter referred to as the “Division”) is charged with, among other things, enforcement of all fire safety and building laws related to Class 1 structures.

8. Indiana Code section 22-12-1-3(2) defines building laws, in pertinent part, as any law governing “construction, addition, or alteration of a Class 1 or Class 2 structure at the site where the structure will be used.”

9. Indiana Code section 22-12-1-4 defines Class 1 structures, in pertinent part, as any part of “[a] building or structure that is intended to be or is occupied or otherwise used in any part by any of the following: (1) the public, (2) three . . . or more tenants, (3) one . . . or more persons who act as the employees of another.”

10. Indiana Code section 22-12-1-13 defines fire safety laws as “any building law, equipment law, or other law safeguarding life or property from the hazards of fire or explosion.”

11. Under Indiana Code section 22-14-2-4(a) and Indiana Code section 22-15-2-6(a), the Division may, in carrying out its responsibilities, “enter and inspect any property” and “issue and enforce administrative orders under IC 22-12-7.”

12. Indiana Code section 22-12-7-7(5) permits the Indiana Department of Homeland Security to impose fines of up to \$250 per day for violations of laws that it enforces.

13. It is undisputed that Respondent performed an inspection of property to determine compliance with Indiana’s fire safety laws, found several violations of the 2014 Indiana Fire Code, and issued Petitioner an administrative order to correct these violations. The order required compliance by November 28, 2019. On December 3, 2019, Respondent performed a re-inspection to determine compliance, but found two remaining violations and issued a \$500 civil penalty under authority of Indiana Code section 22-12-7-7(5).

14. It is Respondent’s policy to impose \$500 civil penalty for any violations that are not remedied by the correction date.

15. Petitioner does not dispute that the violation was not corrected by the required date, or any other fact asserted by the Respondent.

16. Petitioner argues in its response that the \$500 fine should be waived and Petitioner be found in compliance for the following reasons:

- a. Petitioner asserts a lack of knowledge of the 2008 Fire Code;
- b. Petitioner asserts that at the time it removed and disposed of the ceiling tiles in 2013, it showed the new space to Respondent's inspector, and relied on Respondent's inspector's assurances that the facility was in compliance;
- c. Petitioner disposed of the ceiling tiles and never would have done so if told the room was out of compliance;
- d. Petitioner has operated the room in the condition in which the Respondent's inspector found it since 2013 without incident or being told that it was out of compliance. *See* Response to Motion to Dismiss.

17. Petitioner asserts in its response that,

- a. "[I] am only able to partially respond to the motion because I have received a limited respons[e] to my document request. The agency did no or would not send the records prior to 2011."
- b. "The laser tag room was installed in 2013 and we have had 6 yearly inspections thru several different inspectors and this item has never been raised. More importantly, as we were installing the decor and tiles at issue, we specifically showed our new Laser tag room to the inspector at the time and asked if removing ceiling tiles to achieve an "outer space" theme for our room was acceptable. We were assured that it was. We relied on this inspector's assurance and built out the laser tag room in the manner they approved. We have safely operated the room ever since and never has it been raised as an issue."

18. Petitioner alleged specific facts in his response pleading, but failed to use supporting materials contemplated by Trial Rule 56. "If the opposing party fails to meet this burden, then summary judgment may be granted." *Rivkels*, 638 N.E.2d at 1282.

19. "Where the opposing party sets forth no specific facts by way of affidavit, alternative documents or filings that would put into issue the otherwise undisputed facts, then the grant of summary judgment is proper." *Id.* at 1283 (Ind. Ct. App. 1994).

20. It is “the law in this jurisdiction is well settled that a litigant who proceeds *pro se* is held to the same established rules of procedure that trained counsel is bound to follow. *Id.* at 1283. *See also, Basic v. Amouri*, 58 N.E.3d 980, 983 (Ind. Ct. App. 2016) (“It is well settled that pro se litigants are held to the same legal standards as licensed attorneys.”).

21. The material facts are not in dispute, and Respondent is entitled to summary judgment in its favor.

RECOMMENDED ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The Indiana Department of Homeland Security’s Motion for Summary Judgment is **GRANTED**;
and
2. The Civil Penalty of \$500 issued to Gattitown is **AFFIRMED**.

ISSUED this 16th day of June, 2020.

Nicole M. Schuster
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CERTIFICATE OF SERVICE

I certify that on June 16, 2020, I served the foregoing Administrative Law Judge's Recommended Order Granting Summary Judgment on the following persons at the addresses shown below.

Nicole M. Schuster
Administrative Law Judge

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NOTICE OF RIGHT TO OBJECT TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED ORDER GRANTING SUMMARY JUDGMENT

Notice is hereby given that any objection to the Administrative Law Judge's Order must be filed with the Indiana Fire Prevention And Building Safety Commission ("FPABSC"), identifying the basis of the objection with reasonable particularity, no later than eighteen (18) days from the date of issuance of this order unless such date is a Saturday, a Sunday, a legal holiday under state statute or a day that the Indiana FPABSC's offices are closed during regular business hours in which case the deadline would be the first day thereafter that is not a Saturday, a Sunday, a legal holiday under state statute or a day that the FPABSC's offices are closed during regular business hours. This Administrative Law Judge's Order is not the final order of the Indiana FPABSC's in this proceeding. However, in the absence of any objection, the Indiana FPABSC will affirm the

Administrative Law Judge's order as its final order or will serve notice of its intent to review any issue related to the Administrative Law Judge's Recommended Order Granting Summary Judgment.