BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

RALPH DAUGHERTY Petitioner,	))	
	) SEAC No. 01-18-007	
vs.	))	
PUTNAMVILLE CORRECTIONAL FACILITY BY INDIANA DEPARTMENT OF CORRECTION Respondent.	))))	

SEAC ISSUED
AUG 10 2018

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On June 1, 2018, Respondent, Putnamville Correctional Facility, a part of the Indiana Department of Correction ("Respondent"), by counsel, filed a Motion for Summary Judgment under Indiana Trial Rule 56 ("T.R. 56") ("Motion") seeking to dismiss Petitioner Ralph Daugherty's ("Petitioner") Complaint. Petitioner by counsel, responded to the Motion on July 2, 2018. Thereafter on July 26, 2018, Respondent filed its surreply to the Motion.

This case considers Petitioner's termination for violation of Respondent's policies. Under Ind. Code § 4-15-2.2-42(f), an unclassified employee's complaint must demonstrate a violation of a law, rule or public policy to oppose the challenged employment decision. The controlling pleadings for purposes of this decision are the Complaint originally received on January 23, 2018, Respondent's Motion, Petitioner's reply to the Motion, and Respondent's surreply. In order to survive a T.R. 56 Motion, material issues of fact must exist such that judgment as a matter of law for the moving party would be inappropriate.

The ALJ finds that no material issue of fact exists with regard to Petitioner's claims. Therefore, Respondent's Motion for Summary Judgment is hereby GRANTED. The following additional findings of fact, conclusions of law, and order are entered.

I. Summary Judgment Standard

Summary Judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Simon Prop. Grp., L.P. v. Acton Enterprises, Inc.*, 827 N.E.2d 1235, 1238 (Ind. Ct. App. 2005). A party seeking summary judgment bears the burden to make a prima facie case showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. *Id. See also Am. Mgmt., Inc. v. MIF Realty L.P.,* 666 N.E.2d 424, 428 (Ind. Ct. App. 1996). Once the moving party satisfies this burden through evidence designated to the trial court pursuant to T.R. 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. *Simon Prop. Grp., L.P.*, 827 N.E.2d at 1238*; Am. Mgmt., Inc*, 666 N.E.2d at 428.

The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. *Simon Prop. Grp., L.P.* at 1238; *Shambaugh & Son, Inc. v. Carlisle,* 763 N.E.2d 459, 461 (Ind. 2002). 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. *Celebration Worship Ctr., Inc. v. Tucker*, 35 N.E.3d 251, 253 (Ind. 2015).

II. Findings of Fact

The following facts are taken from the filings by both parties, as construed in the light most favorable to Petitioner.

1. Petitioner began employment with Respondent in 2002, as a Custody Officer at Respondent's facility. (Pet'r Reply).
2. Thereafter, in 2004, Petitioner became a Canine Handler for Respondent. (Pet'r Reply).
3. In 2011, Petitioner became a Maintenance Foreman for Respondent. (Pet'r Reply).
4. In 2015, Petitioner became a Powerhouse Operator for Respondent, where he was in charge of making sure the facility had hot water at all times. (Pet'r Reply).
5. In August of 2017, Respondent was made aware of illegal activity involving another of the facility's employees, Dallas Strother ("Strother"). (Pet'r Reply; Resp't Motion, Ex. B-2).
6. Respondent investigated and subsequently determined that Strother was stealing state-owned building materials out of Respondent's facility in his truck. (Pet'r Reply; Resp't Motion, Ex. B-2).

7. During its investigation, Respondent found that while Strother was supposed to be on duty, he was taking the building materials to a state-owned house on the facility grounds being leased by Petitioner. The materials were kept in the open without any attempt made to conceal them. (Resp't Motion, Ex. B-1).

8. Later, after his shift, Strother would return to Petitioner's house to retrieve the materials for transport to Strother's personal residence. (Pet'r Reply.)

9. While Petitioner was leaving his house on August 21, 2017, Strother pulled up in his truck and the two spoke for a few minutes at the entrance to Petitioner's driveway. Petitioner left his residence, after which Strother loaded the stolen materials from Petitioner's house into his truck and left. (Resp't Motion, Exs. B-1, C.)

10. Strother eventually was arrested, taken to jail and prosecuted by Respondent for theft on September 22, 2017. (Resp't Motion, Ex. B-2, Pet'r Reply).

11. During his interrogation, Strother at first denied any involvement by either himself or Petitioner, but later recanted and told Respondent that he was not only responsible for the thefts, but that Petitioner knew about the illegal activity and allowed Strother the use of Petitioner's state-owned house for storage of the stolen materials. (Resp't Motion, Ex. B-1, B-2).

12. Respondent thereafter concluded that Strother's statements were credible, since he implicated himself in a crime and had nothing to gain by identifying Petitioner. (Resp't Motion, Ex. B).

13. On September 27, 2017, Respondent presented Petitioner with an Administrative Investigation Notice and proceeded to interview him about the incidents involving Strother. During the meeting, Respondent mentioned that the matter could be referred to the prosecutor and that Petitioner could be arrested. Petitioner was further told that if he refused to answer Respondent's questions, he could be subject to discipline, but that whatever he told Respondent would not otherwise be used against him should the matter be referred for prosecution. (Resp't Motion, Ex. B-1, B-4; Pet'r Reply).

14. Petitioner then stated that while he and Strother were friends, Petitioner denied knowing anything about the stolen materials being stored at his house. (Resp't Motion Ex. B-1, B-4; Pet'r Reply).

15. Thereafter, Respondent interviewed several other employees regarding the incident and determined on October 11, 2017, that Petitioner was complicit in the storage of the stolen goods and that he should be terminated, along with Strother and two other employees, as a result of the incident. (Resp't Motion, Ex. B-2).

16. Respondent met again with Petitioner on October 18, 2017, where he was told that he was not being prosecuted. Thereafter, Respondent proceeded to read Petitioner the results of its investigation, which showed that Petitioner knowingly allowed Strother to store Respondent's building materials at Petitioner's state-owned residence and on one occasion was even seen conversing with Strother at the entrance to Petitioner's house, after which he allowed Strother to proceed to the house and load the materials onto his truck. (Resp't Motion, Ex. C).

17. During the course of the meeting, Petitioner refused to answer any further questions and demanded to speak with an attorney. After a few minutes, Petitioner was excused. (Pet'r Reply).

18. After Petitioner was called back into the meeting, Petitioner was told that he was not being charged with a crime, so Respondent was under no obligation to allow him to speak with an attorney. Thereafter, Respondent presented Petitioner with his letter of termination (Pet'r Compl, Pet'r Reply).

19. Respondent then closed its investigation and determined that it would not press charges against Petitioner for his involvement in Strother's illegal activities. (Resp't Motion, Ex. A).

III. Conclusions of Law

1. SEAC is a creature of statute, charged with fairly and impartially administering Civil Service System appeals. Ind. Code § 4-15-2.2 et seq. SEAC's jurisdiction over such appeals is divided into classified (just cause claims) and unclassified (at-will claims). Ind. Code § 4-15-2.2-23, 24. Petitioner was an unclassified employee at all relevant times.

2. 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." Ind. Code § 4-15-2.2-24(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).

3. 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 personal criminal liability. Put another way, the courts ask whether the termination in question was illegal in light of applicable statutory law. A merely foolish or arbitrary choice by an employer to terminate or discipline does not invoke an exception. *See Baker v. Tremco Inc.*, 917 N.E.2d 650, 653-655 (Ind. 2009); *Meyers v. Meyers Construction*, 861 N.E.2d 704, 706-707 (Ind. 2007); *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); *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

4. "Indiana generally follows the employment at will doctrine, which permits the employer to discipline the employment at any time for a 'good reason, bad reason, or no reason at all.'" *See Meyers*, 861 N.E.2d at 706 (Ind. 2007) (quoting *Montgomery v. Bd. of Trustees of Purdue Univ.,* 849 N.E.2d 1120, 1128 (Ind. 2006); *Cantrell v. Morris*, 849 N.E.2d 488, 494 (Ind. 2006); *Sample v. Kinser Ins. Agency*, 700 N.E.2d 802, 805 (Ind. Ct. App. 1998), *trans. not sought*. Correspondingly, a claim that the discipline was arbitrary or unfair does not state an at-will exception allowing SEAC jurisdiction. A viable public policy exception must be present for the Controlling Complaint to survive.

5. Petitioner's main contention is that he was terminated not because of his involvement in Strother's theft, but because Petitioner attempted to assert his rights under the Fifth Amendment to the U.S. Constitution, which protects against self-incrimination (Pet'r. Reply).

6. The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." This privilege extends to the States through the Fourteenth Amendment. *Withrow v. Williams*, 507 U.S. 680, 689, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993). *See also Nichols v. State*, 974 N.E.2d 531 (Ind. Ct. App. 2012).

7. The Fifth Amendment privilege against compulsory self-incrimination is violated when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence. *Boatright v. State*, 759 N.E.2d 1038, 1043 (Ind. 2001). *See also Nichols v.* State, 974 N.E.2d at 535. The defendant bears the burden of showing that a comment improperly penalized the exercise of the right to remain silent. *Id.*

8. In the civil context, in *Garrity v. N.J.*, the United States Supreme Court held that a person's statements cannot be held against him in a subsequent criminal proceeding. *See Garrity v. N.J.*, 385 U.S. 493 (1967).

9. However, the Supreme Court subsequently clarified this holding when it held that it does not violate *Garrity* when, after proper proceedings, public employees are subjected to dismissal for refusing to account for their performance of their official duties so long as the proceedings did not involve an attempt to coerce the public employees to relinquish their constitutional rights against self-incrimination in potential future criminal proceedings. *See Uniformed Sanitation Men Ass'n v.Comm'r of Sanitation*, 392 U.S. 280 (1967).

10. It does not, therefore, violate *Garrity* if public employees are subjected to dismissal for refusing to account for their performance so long as the public employees are not required to waive their immunity with respect to the use of their answers or the fruits thereof in a future criminal prosecution. *See Criswell v. State*, 45 N.E.3d 46 (Ind. Ct. App. 2015).

11. Similarly, in the criminal context, a person's *Miranda* rights are not violated when civilians not acting as agents of the police interrogate someone over a potential crime. *See D.Z. v. State*, 2018 Ind. Lexis 460 (Indiana Supreme Court, June 20, 2018) ("[w]hen police officers aren't present, a clear rule applies: students are neither in custody nor under interrogation, unless school officials are acting as agents of the police."). *See also Ritchie v. State*, 875 N.E.2d 706, 717 (Ind. 2007) ("[C]ivilians conducting their own investigation need not give Miranda warnings.").

12. Further, in the Seventh Circuit, a "government employer who wants to ask an employee potentially incriminating questions must first warn him that because of the immunity to which the cases entitle him, he may not refuse to answer the questions on the ground that the answers may incriminate him." *Id.*

13. Although the refusal to testify in a civil case cannot be used against the one asserting the privilege in a subsequent criminal proceeding, the privilege against self-incrimination does not prohibit the trier of fact in a civil case from drawing adverse inferences from a witness' refusal to testify. *See M.K. v. Ind. Dep't of Child Servs. (In re: A.G.)*, 6 N.E.3d 952 (Ind. Ct. App. 2014).

14. Taken together, the above cases hold that while the government "has every right to investigate allegations of misconduct, including criminal misconduct by its employees, and even to force them to answer questions pertinent to the investigation…if it does that it must give them immunity from criminal prosecution on the basis of their answers. *See United States v. Lindbergh*, 37 F.Supp3d 1014 (E.D. Wisconsin 2014).

15. Respondent, in response to Strother's jailhouse interview and as part of its ongoing administrative investigation into Strother's actions, decided to interview Petitioner as part of that investigation. As part of that investigation, Respondent provided Petitioner with a document on September 27, 2018, entitled "Administrative Investigation Notice" ("Notice"), which is a standard document used in all investigations. While true that the Notice does not specifically mention that Petitioner had rights under *Garrity*, there is sufficient language contained therein to alert Petitioner that he was obligated to tell Respondent what he knew about Strother's actions. (Resp't Motion, Ex. B, B-4).

16. For example, the second line of the Notice states, "I understand that I may be subject to disciplinary action for refusing to answer questions…for not answering completely and truthfully or for violating any part of this [n]otice." (Resp't Motion, Ex. B-4).

17. Also, the last line of the Notice simply states, "I further understand that failure to comply with this [n]otice may result in disciplinary action." (Resp't Motion, Ex. B-4).

18. Petitioner states that Respondent's threats of criminal prosecution in Petitioner's September 27, 2017 meeting with Respondent trigger a criminal proceeding such that *Garrity* should be invoked. Petitioner is mistaken.

19. At no point in time did Respondent take any steps to prosecute and/or arrest Petitioner, which Petitioner himself admits. (Resp't Motion, Ex. A).

20. Neither of the meetings Respondent had with Petitioner violated any of Petitioner's rights. Rather, Respondent rightly found that Petitioner's silence with regards to Strother's activities, combined with Petitioner's allowance of stolen materials on his property, warranted termination.

21. The ALJ therefore concludes that because Petitioner was never prosecuted, he was not entitled to protections under either the 5th Amendment or *Garrity*. Respondent reasonably concluded that Petitioner's silence and subsequent actions during his interviews were an admission of his complicity in Strother's scheme.

22. Petitioner finally alleges in passing that his termination was pretextual, because Respondent had already decided to terminate him before his final meeting with Respondent on October 18, 2017.

23. To determine whether an employer's stated reason is pretextual, "[t]he question is not whether the employer's stated reason was inaccurate or unfair, but whether the employer honestly believed the reason it has offered to explain the discharge." *Harper v. C.R. Eng.*, 687 F.3d 297 (7th Cir. 2012).

24. It is of no concern that an employer may be wrong about its employee's performance or be too hard on its employee. "Rather, the only question is whether the employer's proffered reason was pretextual, meaning that it was a lie." *Id.*

25. In order to prevail, Petitioner must identify such weaknesses, implausibilities, inconsistencies, or contradictions in Respondent's stated reason for termination such that a reasonable person could find it unworthy of credence. *See Boumehdi v. Plastic Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007).

26. Respondent proffered various legitimate reasons for Petitioner's termination. For one, Respondent contended that because Petitioner failed to report unethical behavior (namely, Strother's ongoing theft), he violated Respondent's Code of Ethics, which is contained in its Information and Standards of Conduct Policy ("Policy"). *See https://www.in.gov/idoc/files/04-03-103_Standards_of_Conduct_for_IDOC_Staff_12-1-12.pdf; see also* Resp't Motion, Exs. C, F.

27. In addition, Respondent also alleged that Petitioner violated Section IX(D) and (M) of the Policy, which impose upon an employee the duty to cooperate in any investigations and to submit reports required by Respondent in a timely manner. (Resp't Motion, Exs. C, F).

28. While the September 27, 2017 meeting between Petitioner and Respondent was more formal, the meeting on October 18, 2017 was properly classified as an interactive discussion. (Resp't Motion, Ex. C).

29. While the decision to terminate Petitioner was initially made at an internal meeting between Respondent's representatives on October 11, 2017, Respondent nevertheless afforded Petitioner an additional opportunity to exonerate himself during the October 18, 2017 meeting. (Resp't Ex. C).

30. Respondent told Petitioner at the start of the October 18, 2017 meeting that he was not being prosecuted, yet Strother still refused to answer any of Respondent's questions, violating the relevant sections of Respondent's policies stated above.

31. Respondent was therefore justified in standing by its initial decision to terminate Petitioner.

32. Thus, Respondent's termination of Petitioner was not pretextual.

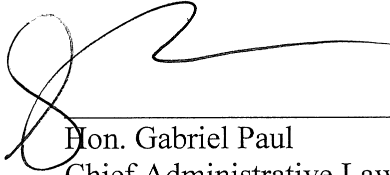
33. Respondent has successfully shown that no material issues of fact exist which would warrant further proceedings. Petitioner failed to follow Respondent's workplace standards as evidenced above. Respondent's termination of Petitioner did not violate public policy and is hereby UPHELD.

Prior sections are hereby incorporated by reference, as needed. 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.

Order

Respondent's Motion for Summary Judgment is hereby GRANTED and Petitioner's Complaint is hereby DISMISSED. This is the final order of the Commission. A person who wishes to seek judicial review must file a petitioner in an appropriate court within thirty (30) days of this order and must otherwise comply with I.C. § 4-21.5-5. So Ordered.

DATED: August 10, 2018



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