BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

DALE MUZIK Petitioner,	)	
	)	SEAC No. 03-19-026
vs.	)	
INDIANA STATE PRISON BY INDIANA DEPARTMENT OF CORRECTION Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction and Summary

In 1977, Jimmy Buffett first lamented how he hurt his foot when he "Stepped on a pop top" in his ubiquitous song "Margaritaville". Flash forward to 2019 and the troubadour's lyrics again resonate in this case involving not margaritas, but cans of soup. On August 7, 2019, the Indiana State Prison, a part of the Indiana Department of Correction ("Respondent") by counsel, filed a Motion ("Motion") for Summary Judgment under Ind. T.R. 56, seeking to dismiss Petitioner Dale Muzik's ("Petitioner") Complaint ("Complaint"). On September 10, 2019, Petitioner, pro se, filed a Reply to Respondent's Motion. Thereafter, on September 20, 2019, Respondent filed its surreply.[1] This case considers Petitioner's Written Reprimand for failing to follow Respondent's policy related to sick time usage. Petitioner contends that the discipline given to him was unfair, given that the reason for his disobedience was because Respondent failed to follow its policy concerning what items could be brought into its facility.

After review of the pertinent pleadings noted above, the ALJ finds Respondent's Motion meritorious and hereby **Grants** it. Petitioner's Complaint, with its factual allegations accepted as true, fails to state a material issue of fact, which could cause SEAC to retain jurisdiction over this matter. Respondent must show that as a classified employee under I.C. § 4-15-2.2-23, Petitioner's discipline was issued for just cause under I.C. § 4-15-2.2-42(g), which it has done. Thus, this case must be dismissed. The following additional findings of fact, conclusions of law, and final order of dismissal for lack of jurisdiction are entered.

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[1] Commission proceedings are governed by the Administrative Orders and Procedures Act (AOPA), I.C. § 4-21.5 *et seq.* *See* I.C. § 4-15-1.5-6(1). Accordingly the Commission has delegated to its Administrative Law Judges pursuant to I.C. § 4-21.5-3-28 of AOPA, the authority to issue final orders in this class of proceedings

II. 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).

I. Findings of Fact

The facts relevant to the instant Motion's resolution, as construed in favor of the non-movant Petitioner, are as follows:

1. At all relevant times, Petitioner was a Correctional Officer for Respondent (Pet'r Compl.).

2. On January 12, 2019, Petitioner was not feeling well, but decided to go to work (Pet'r Compl.).

3. Petitioner arrived at the entrance to Respondent's facility at 5:05 A.M. for his shift, which began at 5:45 A.M. (Resp't Motion, Ex. D.).

4. Since he was not feeling well, Petitioner brought with him two (2) cans of unopened, commercially purchased soup, which he presented for inspection (Pet'r Compl.).

5. Upon inspection, it was determined that since the soup cans were not fitted with a self-opening or "pop top" lid, they could not be brought inside the facility (Pet'r Compl.).

6. Petitioner attempted to explain that since the cans were sealed, there was no danger to the facility. However, he was again told the soup cans could not be brought inside (Pet'r Compl.).

7. Petitioner's supervisor was then called, in order to see whether the soup cans could be brought into the facility, who informed Petitioner that the soup cans could not be brought inside (Pet'r Compl.).

8. Petitioner then left his lunch bag (containing the cans) at the facility entrance and went inside to ask another of his supervisors if he could bring the soup cans inside, but was again told he could not. (Pet'r Compl.).

9. Petitioner then informed his supervisor that since the soup cans could not be brought inside, he was going home sick to recover (Pet'r Compl.).

10. Before leaving, Petitioner's supervisor told him that in doing so, he would accrue unauthorized leave. Petitioner then left the facility (Pet'r Compl.)

11. Following his return on January 16, 2019, Petitioner had a discussion with Respondent about his actions on January 12, 2019. After deliberation, Respondent issued a Written Reprimand to Petitioner on January 17, 2019 (Resp't Motion, Ex. B-1).

II. 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." I.C. § 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); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

4. "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,* 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 a termination was arbitrary or unfair does not state an at-will exception allowing SEAC jurisdiction. Nor does such an assertion state a claim for which relief can be granted in an unclassified—at-will—Civil Service System case. *Meyers,* 861 N.E.2d at 704; I.C. § 4-15-2.2-42. A viable public policy exception must be present for the Complaint to survive.

5. Petitioner's main contention is that he believes Respondent's policy regarding what can be brought into the facility allowed him to bring the soup cans into his workspace inside the facility.[2] Petitioner also contends he was treated differently from a co-worker, who was allowed to bring soup into the facility.

6. In support, Petitioner provides an excerpt from what he terms Respondent's "[a]llowable personal property policy", which states in relevant part that commercially purchased food must be in a sealed package that staff can inspect to ensure the wrapping has not been broken (Pet'r Compl.). However, Petitioner does not provide further direction as to where this policy was obtained, or whether it still is in effect.

7. Conversely, Respondent points to its Policy No. 02-03-103, entitled "Facility Entrance and Exit Standards" ("Respondent Policy") (Respt. Motion, Ex. B-2).

8. While the language is similar in relevant part to Petitioner's excerpt, there is a notable difference.

9. Crucially, there exists in Respondent's Policy an additional phrase concerning sealed cans.

10. According to Respondent's Policy, sealed cans "must have self-opening lids that do not require a can opener" (Resp't Motion, Ex. B-2).

11. Since Respondent's Policy was enacted in January, 2016, the ALJ is unsure as to whether Petitioner's excerpt pre or post-dates Respondent's Policy.

12. After comparing the two, the ALJ finds the language in Respondent's Policy is much more specific in terms of its direction; therefore, he surmises that Respondent's Policy came after Petitioner's excerpt, likely because Respondent reevaluated how it wished cans of food to be brought in to the facility.

13. As an example, the ALJ theorizes that Respondent likely changed the language in its Policy after its employees were bringing cans of food inside which required the use of a can opener, which could ostensibly be used as a potential weapon if an offender obtained it.

14. Therefore, in order to prevent such opportunities, Respondent perhaps decided that cans featuring self-opening (or pop top) lids were safer and thus changed the language. Since Petitioner failed to show how his except preempted Respondent's Policy, the ALJ finds that Respondent's Policy controls.

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[2] Petitioner does not allege any type of discrimination or harassment as contemplated by Title VII of the Civil Rights Act (Resp't Motion, Ex. F).

15. Having so found, the ALJ now turns to the State's Policy regarding sick time ("Sick Leave Policy"), which Respondent follows (Resp't Motion, Ex. H).

16. The Sick Leave Policy states in relevant part that those employees who are in seven (7) day, twenty-four (24) hour shifts must provide one (1) hours' notice in advance of their shift's start time in order to use accrued sick time. *Id.*

17. Petitioner's position is one to which the above language applies (Resp't Motion, Ex. G).

18. Further, Petitioner understood the Sick Leave Policy, since he has been employed by Respondent since 1992 (Resp't Motion, Exs. B, G). Petitioner further demonstrated his knowledge of the Sick Time Policy when, after he was told that going home sick without proper notice would be a violation of it, Petitioner told his supervisor to "[d]o what you have to" (Pet'r Compl.)

19. Since Petitioner's shift on January 12, 2019 began at 5:45 A.M., Petitioner was required to call in sick no later than 4:45 A.M. Given that Petitioner arrived at Respondent's facility at 5:05 A.M. that day, he was already past the time described in the Sick Leave Policy to call in sick. Therefore, Petitioner violated the Sick Leave Policy.

20. Finally, the Sick Leave Policy provides that those in violation of it are subject to, among other things, a designation of being on unauthorized leave and discipline (Resp't Motion, Ex. H).

21. Therefore, Respondent was within its rights to issue a Written Reprimand to Petitioner based on his violation of the Sick Leave Policy.

22. The ALJ next turns to Petitioner's contention that another employee was allowed to bring a sealed can of food into Respondent's facility on a separate occasion.[3] The ALJ thus construes this as a claim for disparate treatment.

23. "All things being equal, if an employer takes an action against one employee in a protected class but not another outside that class, one can infer discrimination." *Filar v. Bd. of Educ. of City of Chi.*, 526 F.3d 1054, 1061 (7th Cir. 2008) (internal citation omitted). In presenting a similarly-situated employee, "the comparator must . . . be similar enough 'to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, [so as to] isolate the critical independent variable: complaints about discrimination.'" *Id.*

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[3] In his answers to Respondent's Requests For Admissions and Interrogatories, Petitioner makes fleeing references to other employees who allegedly were not disciplined for accruing unauthorized leave, or who engaged in various acts which Petitioner alleged violated an unnamed Policy Respondent followed. However, lacking further proof, the ALJ declines to review these contentions.

24. In the present matter, the comparator cited by Petitioner (a fellow Correctional Officer) was allowed to bring his can of food inside the facility (which Petitioner states was one to two months before the date in question) because it featured a self-opening ("pop-top") lid (Resp't Motion, Exs. A, G). Therefore, the can met the standards described in Respondent's Policy.

25. Respondent did not, therefore, treat Petitioner differently from the individual Petitioner holds out as a comparator. Thus, the ALJ concludes that Petitioner was not the victim of disparate treatment.

26. The ALJ echoes Respondent when he concludes that Petitioner was not disciplined for bringing unauthorized soup cans into Respondent's facility. The facts are clear that at no time did Petitioner bring the cans in after he was told they were unallowable. Rather, Petitioner was disciplined because he violated the Sick Leave Policy. If Petitioner had begun his shift and still did not feel well after some time, he could have asked his supervisor at that point to go home sick for the duration of the day, which Respondent could have granted in its discretion.[4] Instead, Petitioner, seemingly upset that he was not allowed to bring the soup cans inside, unilaterally stated that he was going home sick, knowing that by doing so he was violating the Sick Leave Policy. Therefore, Respondent's Motion must be granted.

In conclusion, while Mr. Buffett argued in some iterations of "Margaritaville" that "There's a woman to blame" for his mishaps, after reconsideration, he stated, "But I know, it's my own damn fault". Likewise, Petitioner's actions here are of his own making. 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.

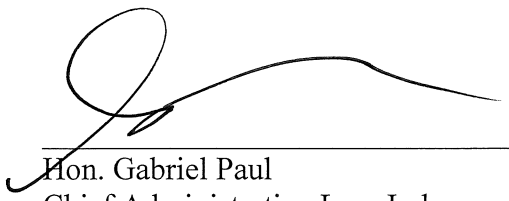
III. Final Order of Dismissal

Respondent's Motion for Summary Judgment is GRANTED. This action is hereby dismissed with prejudice. All case management deadlines are vacated.

This is the final order of the Commission. A person who wishes to seek judicial review must file a petition in an appropriate court within thirty (30) days of this order and must otherwise comply with Ind. Code § 4-21.5-5.

[4] The ALJ assumes that Petitioner had sick time to use, since it was not raised as an issue.

DATED: September 30, 2019



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