BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

ALEX LESNIAK Petitioner,	)	
	)	SEAC No. 08-18-058
vs.	)	
INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On November 22, 2019, Respondent Indiana Department of Workforce Development ("Respondent"), by counsel, filed a Motion for Summary Judgment under Indiana Trial Rule 56 ("T.R. 56") ("Motion") seeking to dismiss Petitioner Alex Lesniak's ("Petitioner") Complaint. Petitioner, pro se, responded to the Motion on January 3, 2020. Respondent thereafter filed a surreply on January 22, 2020.

This case considers Petitioner's termination for failing to perform up to Respondent's expectations; specifically, Petitioner was terminated after he failed to pass a required training administered by Respondent as part of Petitioner's job duties after four (4) attempts. Under Ind. Code § 4-15-2.2-42(g), the agency (here, Respondent) must show that it had just cause to issue the discipline. The controlling pleadings for purposes of this decision are the Complaint originally received on April 22, 2019, Respondent's Motion, Petitioner's Reply to the Motion and Respondent's surreply[1]. 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 issues of material fact exist with regard to Petitioner's claims such that this matter should continue. Therefore, Respondent's Motion for Summary Judgment is hereby GRANTED. The following additional findings of fact, conclusions of law, and order are entered.

[1] Respondent, in its surreply, makes an argument that the exhibits submitted with Petitioner's Reply are structurally deficient under Indiana Trial Rule 56 and thus, should not be considered. Since the ALJ finds that Respondent is entitled to Summary Judgment on the merits, he need not address this issue.

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) (citations omitted).

II. Findings of Fact

1. Petitioner was hired by Respondent in April, 2017 (Resp't Motion, Ex. A).[2]

2. Petitioner was originally hired as an Audit Examiner III (Resp't Motion, Ex. A)

3. In May, 2017, Petitioner completed the theory-based portion of the Successorship Training Class, which he was required to take as part of his job duties ("Class") (Resp't Motion. Exs. B-C).

4. At the time, completion of the Class did not require study of any applied learning (Resp't Motion, Ex. B).

5. In July, 2017, upon completion of other required training courses, Petitioner was released to begin working on cases (Resp't Motion, Ex. B).

6. In October, 2017, Respondent underwent some organizational changes, which resulted in Petitioner having his job reclassified to an Unemployment Insurance Auditor II. Thereafter, Respondent increased Petitioner's salary by 30% (Resp't Motion, Exs. A, C-D).

[2] Many of Respondent's Exhibits coincide with the ones Petitioner submitted. Therefore, for ease of use, the ALJ will refer to Respondent's Exhibits throughout the course of this opinion where doing so is appropriate.

7. Also in October, 2017, Respondent determined that Petitioner, along with all other employees in Petitioner's section, needed to complete the applied learning portion of the Class (Resp't Motion, Ex. B).

8. On November 1, 2017, Petitioner was informed by Respondent that he was now required to complete the applied learning portion of the Class with an accuracy rate of 90% (Resp't Motion, Ex. J).

9. In December, 2017, Petitioner took the applied learning portion of the Class, but only obtained an accuracy score of 40% (Resp't Motion Exs. B-2, C). Respondent thereafter instructed Petitioner to retake the Class. *Id.*

10. In February, 2018, after receiving some remedial training related to the Class, Petitioner retook it, but only obtained an accuracy score of 20%. (Resp't Motion Exs. B-3, C). Respondent then informed Petitioner that he could retake the Class a third time. *Id.*

11. On March 5, 2018, Respondent first met with Petitioner to discuss his 2018 Work Profile ("Profile") and again on March 8, 2018, when Petitioner was presented with and signed the final version of his 2018 Profile (Resp't Motion Ex. A-5).

12. Petitioner's Profile stated that Petitioner was required to pass the Class within three (3) attempts. Failure to do so would result in Petitioner being placed on a Work Improvement Plan ("WIP") (Resp't Motion, Ex. O).

13. This requirement was added to all of Respondent's employee Profiles for 2018 who worked in the same position as Petitioner (Resp't Motion, Exs. A, A-6).

14. Following the finalization of Petitioner's 2018 Profile, Petitioner again received training and took the Class for a third time. However, Respondent verbally informed Petitioner on March 19, 2018 that Petitioner only scored a 70% and thus failed to pass (Resp't Motion, Exs. A-7, D).

15. On March 19, 2018, Petitioner was placed on a thirty (30) day WIP for failing to pass the Class (Resp't Motion Ex. R).

16. In relevant part, Petitioner's WIP stated that he would be given one final chance to pass the Class, after which Petitioner would be subject to further discipline, including termination if he failed to pass (Resp't Motion, Ex. A-7).

17. Petitioner thereafter emailed his supervisor about his dissatisfaction with both his WIP and the Class, but was told that the WIP would stand. Respondent's supervisor also explained why passing the Class was important and reminded Petitioner that Respondent would again provide additional training to help Petitioner pass the Class (Resp't Motion, Ex. A-8).

18. In April, 2018, Petitioner attended the training mentioned above (Resp't Motion, Ex. B-6).

19. On April 20, 2018, Respondent changed Petitioner's WIP from a thirty (30) to a sixty (60) day WIP, in accordance with his updated 2018 Profile because Petitioner had not yet retaken the Class (Resp't Motion, Ex. A-9).

20. Following the training, Petitioner then took the Class for a fourth time, but was informed on May 23, 2018, that he only scored 60%, a failing grade (Resp't Motion Exs. B-7, D).

21. On June 26, 2018, Respondent held a predeprivation meeting with Petitioner to discuss his inability to pass the Class, as required by his WIP (Resp't Motion, Ex. PP).

22. On June 26, 2018, Respondent informed Petitioner that he failed the WIP and thus terminated his employment, along with another employee who also had failed the Class four (4) times (Resp't Motion, Exs. A-11-13).

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 a classified employee at all relevant times.

2. As a classified employee, Respondent must show that just cause existed for its decision to reprimand Petitioner. Ind. Code § 4-15-2.2-42 (g).

3. Petitioner essentially argues that because his previous Profiles prior to March 8, 2018 failed to mention that Petitioner must pass the Class within three (3) attempts, Petitioner's first three failures should not count, and thus, Petitioner should be allowed to retake the Class up to two (2) more times before being placed on a WIP (Pet'r Compl; Pet'r Reply). Before delving into this argument, however, it is useful to address at the outset Petitioner's other sundry arguments.

4. Petitioner first asserts that his 2018 Profile acts in the same manner as a statute in that it should not be applied retroactively.

5. "The general rule is that unless there is a strong and compelling reason, statutes will not be applied retroactively." *Brown v. Bucher & Christian Consulting, Inc.*, 87 N.E.3d 22, 26 (Ind. Ct. App. 2017)

6. In this case, however, there is nothing to suggest that Petitioner's 2018 Profile was anything more than what its title infers.

7. Petitioner's 2018 Profile speaks to Respondent's Organizational Vision, Mission and Objectives, and goes on to list the types of things Petitioner should focus on in order to achieve those goals.

8. Unlike a statute, which has broad application, Petitioner's 2018 Profile was targeted only to Petitioner. Also, no evidence was submitted that would lead the ALJ to believe that the 2018 Profile is law.

9. Therefore, the ALJ finds that Petitioner's 2018 Profile was not a statute such that it could not be applied retroactively.

10. Petitioner next argues that since he continued to work on cases throughout his tenure with Respondent, it stands to reason that Respondent did not need Petitioner to pass the Class.

11. However, Respondent's supervisor, Betty Titus ("Titus"), made clear in her March 22, 2018 email to Petitioner that passing the Class was always a requirement of Petitioner's position. (Resp't Motion, Ex. A-8).

12. Titus explained that Petitioner originally passed without completing the Class because he had passed all of the other competencies, with the understanding that Petitioner would, shortly thereafter, receive the additional training needed to pass the Class. (Resp't Motion, Ex. A-8).

13. However, the person who had previously provided such training retired and his backup transferred to the Legal Department such that nobody was left at the time who could provide the training needed to pass the Class. Once Respondent's Training Department became aware of Petitioner's situation in October, 2017, Respondent took steps to provide Petitioner with the proper skills needed to pass the Class (Resp't Motion, Ex. A-8).

14. Further, Titus explained to Petitioner that he had not reached the point in any of his cases where the skills gained by passing the Class would be needed. (Resp't Motion, Ex. A-8).

15. Indeed, Titus informed Petitioner that his failures were not the result of any inability, but rather stemmed from a lack of attention to detail. (Resp't Motion, Ex. A-8).

16. Therefore, the ALJ finds that Respondent did not let Petitioner complete work assignments which required Petitioner's passage of the Class.

17. Petitioner next argues that his termination occurred outside of his WIP deadline and thus, was void. Petitioner argues that when his WIP changed, the original due date did not, thus voiding it, since Respondent took no action against Petitioner until June 26, 2018.

18. Despite these contentions, the evidence is clear that Petitioner was first put on a thirty (30) day WIP on March 19, 2018, which would make the deadline April 19, 2018. On April 20, 2018, Petitioner's WIP was changed to a sixty (60) day WIP, thus making the new deadline June 20, 2018. (Resp't Motion, Ex. A-9).[3]

19. Respondent ostensibly did so because Petitioner had not yet attempted the Class for the fourth time by the time the original WIP was set to have expired. By doing so, Respondent afforded Petitioner more time to study and retake the test.

20. Also, the WIP clearly states (in capitalized letters) that Respondent was extending it to sixty (60) days as of April 20, 2018.

21. While true that Petitioner's WIP deadline had lapsed at the time of his termination, that reason in and of itself does not convince the ALJ that Petitioner's argument deserves a hall pass. More likely is the fact that Respondent took some time after learning of Petitioner's final failure to determine the appropriate course of action. Therefore, the ALJ finds this argument without merit.

22. Petitioner next argues that when signing his 2018 Profile and subsequent WIP, he did not approve of Respondent making retroactive changes to it.

23. Respondent did not retroactively make changes to Petitioner's 2018 Profile. As explained by Titus, Petitioner was not in a unique situation, as other employees in the same position were also made to take the Class. (Resp't Motion, Ex. A-8). Respondent therefore had a legitimate reason to make the changes it did.

24. Petitioner finally argues at the outset that his failure to pass the class was not addressed through the performance appraisal process.

25. According to the State's Discipline Policy, problems in job performance resulting from an inability to perform, and not related to misconduct, may be addressed through the performance appraisal process, while problems in job performance resulting from an apparent unwillingness to perform or related to misconduct may be addressed through discipline. https://www.in.gov/spd/files/discrandp.pdf.

26. However, the evidence is clear that Respondent did in fact address Petitioner's job performance through the process described above. By the time he was given his 2018 Profile, he had already failed the Class twice. As noted by Respondent in its Motion, a WIP serves two (2) purposes—it serves as notice of substandard performance and it identifies ways to correct the deficiencies.

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[3] In the alternative, the ALJ gives credence to Petitioner's contention that his WIP could have expired on May 19, 2018. Assuming *arguendo* that such is the case, the analysis above does not change.

27. The WIP also clearly states on the front page that is to be used to address and correct performance deficiencies that arise during the performance review period (Resp't Motion, Exs. A-7, A-9).

28. Therefore, it is reasonable to find that the WIP is a part of the performance appraisal process. Thus, this argument fails.

29. Having dismissed these preliminary arguments, the ALJ now turns to Petitioner's main contention—that language in his 2018 Profile allowed him more chances to pass the Class. Petitioner points specifically to language in Performance Expectation No. 5 ("Expectation"), which states that Petitioner shall have no more than five (5) errors during the rating period and that discipline shall begin on the sixth such instance (Pet'r Reply, Ex. 8).

30. However, this language must be read in conjunction with the language from the end of the same Expectation, which states that Petitioner is expected to pass the [Class] after three (3) attempts, with placement on a WIP to follow thereafter if Petitioner failed (Pet'r Reply, Ex.8).

31. While the ALJ agrees with Petitioner that the Expectation could have been worded more clearly, taken together, a reasonable reading of this Expectation leads the ALJ to find that in order to meet it, Petitioner was not allowed more than five (5) errors in other facets of his job. By contrast, the last line of the Expectation specifically references the Class that Petitioner was required to pass and states that such accomplishment must happen within three (3) attempts. Therefore, Petitioner is mistaken that this Expectation allowed him additional opportunities to pass.

32. "[A]n employer may set unrealistic goals and fire an employee for failing to meet them; an employer can force a square peg into a round hole -- force an individual who works successfully alone into a team concept -- and throw away the peg when it does not fit." *Stonesifer v. Unitech Sys.,* 1994 U.S. Dist. LEXIS 11449 (N.D. Ill. Aug. 15, 1994) (citing *Palucki v. Sears, Roebuck & Co.,* 879 F.2d 1568, 1571 (7th Cir. 1989)).

33. Petitioner was given four (4) chances to pass the Class and was provided the appropriate training in each instance to successfully accomplish this task. Despite his protestations to the contrary, the ALJ finds that Petitioner was not entitled to further opportunities. In the end, the ALJ agrees with a comment Titus made to Petitioner in her March 22, 2018 email to him when she stated, "I hope you can see from a management perspective that we cannot continue letting you take the [Class] and not pass" (Resp't Motion, Ex. A-8). The ALJ thus finds that Respondent has shown just cause for its termination of Petitioner such that its Motion should be granted.

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.

IV. Additional Conclusions of Law and Order

Respondent's Motion for Summary Judgment is hereby GRANTED. Petitioner's termination was issued with just cause and is hereby upheld. The Complaint, and this action, are hereby **DISMISSED** with prejudice. This is the Final Order of the Commission in this matter. 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 IC § 4-21.5-5. So Ordered.

DATED: February 11, 2020

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