BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

LEANN WALTON Petitioner,	)	SEAC ISSUED MAR 01 2018
	) SEAC No. 11-16-054	
vs.	)	
INDIANA DEPARTMENT OF HOMELAND SECURITY Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On November 27, 2017, Respondent, Indiana Department of Homeland Security ("IDHS") ("Respondent"), by counsel, filed a Motion for Summary Judgment under Indiana Trial Rule 56 ("T.R. 56") seeking to dismiss Petitioner's Complaint ("Motion"). Petitioner did not submit a reply brief to Respondent's Motion after the ALJ granted Petitioner several extensions of time in which to do so.[1]

This case considers Petitioner's termination when she exhibited poor judgment and lack of candor as it related to the hiring and supervision of Petitioner's relatives. Under I.C. § 4-15-2.2-42, 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 is the Complaint originally received on November 4, 2016, and Respondent's Motion. 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 Judgement is hereby GRANTED. The following additional findings of fact, conclusions of law, and order are entered.

[1] Where a brief is permitted as a matter of right, a party must file it or risk waiver of any arguments it has neglected to raise. *See Ennin v. CNH Indus. Am., LLC*, 878 F.3d 590 (7th Cir. 2017).

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 her employment with Respondent on August 6, 2012. (Resp't. Ex. A).

2. While Petitioner was an unclassified, at-will employee at all times, she was originally hired as Respondent's Chief Financial Officer, but in June, 2016, Petitioner's title was changed to Chief Administrative Officer in conjunction with a pay raise. (Resp't. Ex. A).

3. Petitioner was the highest level employee within Respondent's Office of Administration and Finance ("OAF"). (Resp't. Ex. F).

4. In March 2016, OAF had a vacant receptionist position. (Resp't. Ex. F).

5. To fill the position, the State contracted with Knowledge Services ("KS"). (Resp't. Ex. F).

6. The State's contract with KS enables state agencies to select candidates for temporary positions within the agency by one of two methods-selecting from a list of qualified individuals provided to the agency by KS, or by the agency pre-selecting a candidate themselves and informing KS. (Resp't. Ex. F).

7. On April 18, 2016, OAF hired Petitioner's Aunt, Patricia Burdine[2] ("Burdine"), via KS, as a temporary Secretary. (Resp't. Ex. A; Resp't. Ex. E; Resp't. Ex. F). Petitioner recommended Burdine for the position, selected her pay rate, and approved the hire. (Resp't. Ex. F).

8. Petitioner did not inform either KS, or the OAF Grants Manager, Kimberly Snyder ("Snyder"), that Burdine was related to Petitioner. Snyder was Burdine's direct supervisor. (Resp't. Ex. E).

9. Beth Hampshire ("Hampshire"), Respondent's Controller, directly supervised Snyder and Petitioner supervised Hampshire, thus placing Burdine in Petitioner's direct line of supervision. (Resp't. Ex. A; Resp't. Ex. A-1; Resp't. Ex. E; Resp't. Ex. F).

10. On April 18, 2016, Petitioner informed KS that Lisa Hunt ("Hunt"), Petitioner's sister, would replace a departing OAF employee, but failed to disclose her relationship to Hunt to them. Petitioner hired Hunt and approved her pay rate. (Resp't. Ex. F).

11. Hunt began working for Respondent on April 29, 2016. (Ex. A).

12. Hunt was directly supervised by Amanda McAllister ("McAllister") who was directly supervised by Hampshire. (Resp't. Ex. F). As noted above, Petitioner supervised Hampshire, thus placing McAllister in Petitioner's direct line of supervision. (Resp't. Ex. A-1).

13. On July 16, and 18, 2016, Respondent's Executive Director, David Kane ("Kane"), spoke to Petitioner regarding the relationship of Petitioner to Burdine, Hunt and Walton, but Petitioner did not disclose her relationship with the aforementioned individuals. Kane expressed his displeasure with Petitioner's actions during each meeting. (Resp't. Exs. D, F). Relying on Petitioner's mistaken belief that Hunt could be in Petitioner's direct line of supervision (and that Petitioner told Kane she now knew was wrong), Kane afforded Petitioner the benefit of the doubt and had Hunt removed from Petitioner's direct line of supervision. (Resp't. Ex. D).

14. Petitioner failed to disclose to Kane at any time that Burdine was Petitioner's aunt (Resp't. Ex. D). Kane discovered this fact after the Indiana State Personnel Department ("SPD") conducted an investigation in to the situation, as described below. (Resp't. Ex. D).

---

[2] While Petitioner attempted to feign ignorance of her relationships to Burdine, Lisa Hunt and Ashley Walton during discovery, she stipulated to the Indiana Ethics Commission in those proceedings that the aforementioned were her aunt, sister and step-daughter respectively. (Resp't. Ex. F). For purposes of this opinion, the ALJ notes that Ashley Walton was subsequently hired into a position outside of Petitioner's line of supervision and that Petitioner, while recommending Walton for the position, played no further role in her step-daughter's hiring. (Resp't. Ex. C-1). Therefore, only Burdine and Hunt's positions, as they relate to Petitioner, are applicable here.

15. On July 19, 2016, an employee of Respondent filed a harassment complaint against one of her co-workers with SPD, but also mentioned in the same complaint that she had knowledge of Petitioner hiring two or more of Petitioner's relatives into positions with Respondent which reported to Petitioner either directly or indirectly. (Resp't. Ex. C).

16. On July 19, 2016, SPD began an investigation of the complaint. (Resp't. C).

17. SPD's investigation included interviewing, among others, Petitioner, Hampshire, and Snyder. (Resp't. Ex. C; Resp't. Ex. E).

18. Snyder informed SPD that she hired Burdine largely in part because Petitioner recommended her for the position. (Resp't. Ex. E).

19. Petitioner admitted during the investigation that she submitted resumes for Hunt and Burdine, but otherwise denied further participation in the hiring process. (Resp't. Ex. C).

20. On August 4, 2016, SPD determined that Petitioner had suggested or participated in the hiring of and supervision of her sister, Hunt, and her aunt, Burdine and recommended termination for Petitioner as a result. (Resp't. Ex. C).

21. On August 8, 2016, Respondent terminated Petitioner's employment. (Pet'r Compl.).

22. On October 13, 2016, The Indiana Office of the Inspector General ("OIG"), (which is statutorily charged with addressing fraud, waste, and wrongdoing in state government) following notice from Respondent's General Counsel, Jonathan Witham, in June-July of 2016, that Petitioner had hired her relatives to work at Respondent, filed a complaint against Petitioner alleging violations of I.C. § 4-2-6-16(c) when she hired family members and § I.C. 4-2-6-16(f) when Petitioner's aunt and sister were placed in her direct line of supervision. (I.C. § 4-2-7); (https://www.in.gov/ig/2784.htm); (Resp't. Ex. F). As a result, the OIG referred this Complaint to the State Ethics Commission ("SEC").

23. The SEC is an independent Commission which issues the ultimate decisions on interpretations of the Indiana Code of Ethics. The SEC also controls ethics complaint litigation brought by the Inspector General. (I.C. § 4-2-6-2); (https://faqs.in.gov/hc/en-us/articles/115005229008-What-is-the-relation-of-the-SEC-to-the-OIG-.)

24. The SEC has authority over, among others, a current, or former state employee and is the ultimate authority concerning violations of the Indiana Ethics Code. I.C. § 4-2-6-2.5; I.C. § 4-2-6-4.

25. On August 10, 2017, the SEC held a hearing on the OIG's Complaint involving Petitioner.

26. On September 14, 2017, the SEC found Petitioner violated I.C. § 4-2-6-16(c) and (f). (Resp't. Ex. F).

27. In its decision, the SEC barred Petitioner from future employment with the State of Indiana. (Resp't. Ex. F).

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. At the outset, the ALJ notes that, due to the decision rendered by the SEC, Petitioner's only remaining remedy is an award of back pay, along with payment for any vacation days she had in balance at the time of her termination. However, due to the ALJ's decision in this matter, such award is rendered moot.

6. Petitioner contends that she played no part in either the hiring of, or the supervision of the employees mentioned above and also alleges that Respondent sexually harassed and retaliated against her after Petitioner attempted, but ultimately failed to file a sexual harassment complaint against Respondent. (Pet'r Compl.).[3]

7. The ALJ will first address Petitioner's allegations that she played no role in the hiring or supervision of Burdine and Hunt.

8. Prior to 2012, the nepotism restrictions, 42 IAC 1-5-15, found at I.C. § 4-15-7-1, stated in relevant part that, "No person being related to any member of any state board or commission, or to the head of any state office or department or institution, as...sister...aunt...daughter-in-law, niece or nephew, shall be eligible to any position in any such state board, commission, office, or department or institution." This section also stated that no employee as related above could be placed in a direct supervisory-subordinate position.

9. P.L. 105-212, passed by the Indiana Legislature in 2012, repealed I.C. § 4-15-7-1 and created the relevant sections of the ethics code at issue here. In particular, the law established a definition for direct line of supervision, defined what a relative is for purposes of the code, and stated that an employee cannot hire a relative, except under limited circumstances as described below.[4]

10. The Indiana Ethics Code ("Code") states that a state employee may not hire a relative, nor may they place a related employee in their direct line of supervision. I.C. § 4-2-6-16(d), (f).[5]

11. For purposes of the Code, relative is defined as, among other things, a sister and an aunt. I.C. § 4-2-6-1(16)(D), (F).[6]

12. I.C. § 4-2-6-1(a)(8) defines direct line of supervision as the chain of command in which the superior affects, or has the authority to affect, the terms and conditions of the subordinate's employment.

13. There is an exception to the statute: if the relative hired has been an employee for twelve (12) consecutive months prior to the date the individual's relative becomes the appointing authority. I.C. § 4-2-6-16(e).

---

[3] Petitioner stated that she desired to file a sexual harassment complaint against Respondent, for actions involving pay disparity and sexual harassment, which were discussed off and on with SPD. Despite these conversations, Petitioner never filed a complaint, but the ALJ notes that in June, 2016, Petitioner received an 8% pay raise contemporaneously with her position being renamed to Chief Administrative Officer (Resp't. Ex. A-1).

[4] In 2013, 42 IAC 1-5-15 was amended to reflect the language used in P.L. 105-2012.

[5] *See also* 42 IAC 1-5-15(c) and (f).

[6] *See also* 42 IAC 1-3-20 (6) and (10).

14. Petitioner does not qualify for the exception listed in I.C. § 4-15-6-16(e) because neither Hunt nor Burdine were employed for 12 consecutive months prior to Petitioner becoming the appointing authority, which is defined by I.C. § 4-2-6-1(3)(B)(ii) as the chief administrative officer of an agency. Petitioner became the appointing authority in July, 2016, when she received a pay raise and her title was changed to Chief Administrative Officer, but Burdine and Hunt were hired in March and April of 2016, respectively.

15. Petitioner, in a series of emails from March, 2016, alerted KS that Burdine was Petitioner's choice for a vacant position in Respondent's agency. (Resp't. Ex. F).

16. Additionally, in April, 2016, Petitioner again alerted KS that Hunt was to be hired for a separate position in Respondent's agency. (Resp't. Ex. F).

17. By hiring the above-named individuals, Petitioner was in clear violation of I.C. § 4-2-6-16(c).

18. Respondent also has shown that both Burdine and Hunt were in Petitioner's direct line of supervision, per Petitioner's directives. (Resp't. Ex. A-1). Thus, Petitioner was also in violation of I.C. § 4-2-6-16(f).

19. Additionally, Respondent submitted evidence that Petitioner participated in and completed both online ethics training from the Office of the Inspector General, as well as computer-based training on the hiring of employees. (Resp't. Ex. B-1).

20. While Petitioner maintains that she had no knowledge of the provisions involving the hiring and supervision of her relatives, the ALJ finds that, having completed both of these courses, along with being in a position of high authority within Respondent, Petitioner should have been familiar with the provisions of I.C. § 4-2-6-16, such that she should not have hired either Burdine or Hunt.

21. Petitioner also admitted during SPD's investigation that she had completed the annual state-mandated ethics training (required by 42 IAC 1-4-1) multiple times, thus proving that she knew, or should have known, about the prohibitions on hiring and supervising one's relatives. (Resp't. Ex B; Resp't. Ex. C-1). While Petitioner stated to SPD that her understanding of the rule was that it did not apply to temporary or contractual employees, the ALJ finds otherwise.

22. Petitioner, if she were unsure about the ethics rules, was given clear and unequivocal clarity on them in July, 2016 when she met with Kane. Kane told Petitioner of the rules and gave Petitioner the benefit of the doubt by removing Hunt from Petitioner's line of supervision. At that point, Petitioner could have disclosed to Kane that she was also in violation of the rules by having Burdine in Petitioner's direct line of supervision. However, she did not.

23. In this case, for reasons known only to Petitioner, she chose not to disclose to anyone neither Hunt nor Burdine's relationship to her at any point either during the hiring process, or once both were officially hired and working for Respondent. These decisions convince the ALJ that Petitioner was in blatant violation of the ethics rules.

24. Taken together, the ALJ finds that Respondent has successfully shown that Petitioner violated both I.C. § 4-2-6-16(d) by hiring Burdine and Hunt, and I.C. § 4-2-6-16(f) by placing both Burdine and Hunt into Petitioner's line of supervision. The ALJ therefore finds no material issue of fact with regards to Petitioner's violation of the Code such that her case should continue based on a theory of ignorance.

25. The ALJ will next turn to Petitioner's harassment allegation.

26. In order to prove harassment, Petitioner must show that Respondent was in violation of the tenants laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny.

27. There are three steps to this analysis. First, the petitioner-employee "has the initial burden of establishing a prima facie case of discrimination" through either direct or indirect evidence. *Ind. Civil Rights Comm'n v. S. Ind. Gas & Elec. Co.*, 648 N.E.2d 674 (Ind. Ct. App. 1995). While indirect evidence is merely circumstantial, direct evidence "establishes [discrimination] without resort to inferences from circumstantial evidence." *Pantoja v. American NTN Bear. Manuf. Corp.*, 495 F.3d 840, 845 (7th Cir 2007).

28. Second, if the petitioner-employee establishes a prima facie case of discrimination, the burden shifts to the respondent-agency to show a legitimate, nondiscriminatory reason for the adverse employment action(s). *Id.* Third, once the respondent-agency shows such reason, the burden shifts back to the petitioner-employee to "present evidence that the stated reason was just a 'pretext' which in turn permits an inference of unlawful discrimination." *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012) (citing *McDonnell Douglas*, 411 U.S. 804). "Evidence is evidence," and are means to consider whether one fact…caused another…) and therefore are not "elements" of any claim." *Id.* at 763. The legal standard is merely "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action." *Id.* at 765.

29. "The plaintiff in such a case must first establish a 'prima facie' case of discrimination." *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009). "Once the plaintiff has established a prima facie case, unlawful discrimination is presumed." *Id.* at 840. The defendant-employer can rebut this presumption by producing evidence that the adverse employment action was taken "for a legitimate, nondiscriminatory reason." *Id.* (internal citations omitted). "Should the defendant-employer carry this burden, the plaintiff must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant-employer are but a pretext for discrimination." *Id.*

30. While the *McDonell Douglas* analysis is still employed, under the doctrine first laid out under *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016), using the *McDonnell Douglas* direct v. indirect analysis on various piles of evidence is too cumbersome. *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 763 (7th Cir. 2016). Instead, 7th circuit courts are now directed to look at the evidence as a whole when analyzing claims of discrimination under *McDonnell Douglas*. *Id.* at 764. "Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself- or whether just the "direct" evidence does so, or the "indirect" evidence." *Ortiz*, 834 F.3d at 763. While the decision does not specifically extend to administrative bodies such as SEAC, the ALJ nevertheless finds that the *Ortiz* decision should be followed in this case.

31. In support of this argument, Petitioner merely alleged that she had conversations off and on with SPD over the last few years preceding her termination about alleged harassment and/or pay disparity, but Petitioner ultimately took no action. (Resp't. Ex. G). However, Petitioner, in answering Respondent's discovery, stated that her conversations with SPD focused more on the nepotism statute. (Resp't. Ex. G).

32. Petitioner's desire to file a complaint does not, in and of itself, constitute harassment. *See Cole v. Bd. of Trs.*, 838 F.3d at 901 (7th Cir. 2016). When an employee is not complaining of pervasive harassment, an employer does not have a duty to investigate and remedy the situation "until the employee complains of sexual harassment or information about the harassment comes to the employer's attention from some other quarter." *Zimmerman v. Cook Co. Sheriff's Dep't.*, 96 F.3d 1017 (7th Cir. 1996); *see also Slentz v. Emmis Operating Co.*, 2018 U.S. Dist. Lexis 18300 (Indiana Southern District Court, February 5, 2018). "An employer can be held responsible for the conduct of coworkers ... only if it 'knew or should have known' about the harassment and failed to take reasonable steps to remedy the harassment once it was on notice." *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965 (7th Cir. 2004) (citing *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811 (7th Cir. 2001))

33. Since Petitioner failed to complain about her alleged harassment, Respondent could not have been in a position to know, much less retaliate against Petitioner for any alleged discriminatory acts. To prove discriminatory intent requires more than simply a complaint about some situation at work, no matter how valid the complaint might be. To be protected under Title VII, Petitioner must have indicated "the discrimination occurred because of sex, race, national origin, or some other protected class. ... Merely complaining in general terms of discrimination or harassment, without indicating a connection to a protected class or providing facts sufficient to create that inference, is insufficient." *See Cole v. Bd. of Trs.*

34. Petitioner has not shown any evidence, either direct, indirect, or as a whole, that would cause the ALJ to deny summary judgment to Respondent. Petitioner "has the burden to respond to a proper motion for summary judgment by offering enough evidence to allow a reasonable jury to find in his favor on the issues raised." *Id.*

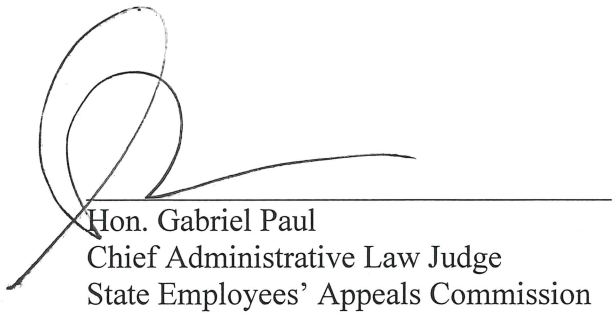
35. Respondent has successfully shown that no material issues of fact exist that would warrant further proceedings. Petitioner failed to follow Respondent's workplace standards as evidenced above and has failed to show that there are any issues of material fact such that would compel this case to continue. 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: March 1, 2018



Hon. Gabriel Paul
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm. N103
100 N. Senate Avenue
Indianapolis, IN 46204
Phone: (317) 232-3137
Fax: (317) 972-3109
Email: gapaul@seac.in.gov

A copy of the foregoing was sent via email to the following:

Steven Fulk
Fulk & Associates
320 Massachusetts Avenue
Indianapolis, Indiana 46204
steve.fulk@yahoo.com
fulk.assoc@yahoo.com

David Fleischhacker
Counsel
Indiana Department of Homeland Security c/o
State Personnel Department
402 W. Washington St.
Room W161
Indianapolis, Indiana 46204
dfleischhacker1@spd.in.gov