BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

TASHA E. JOHNSON Petitioner,	)
	) SEAC NO. 05-13-034
vs.	)
INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT Respondent.	)

NOTICE AND FINAL ORDER
OF THE STATE EMPLOYEES' APPEALS COMMISSION

On February 25, 2014 the ALJ issued notice and a copy of "Findings of Fact and Conclusions of Law with Non-Final Order of Administrative Law Judge" ("ALJ's Order"), which is incorporated by reference herein, and provided judgment to Respondent DWD. No objections were received by either party within the statutory time of March 17, 2014 provided. The only filing received by SEAC after February 25, 2014, was an emailed change of address from Petitioner on April 2, 2014, occurring after the objection deadline had closed.

On April 10, 2014, court staff noted to this ALJ that a piece of older mail for Ms. Johnson had been returned the day before. That mailing had used the correct prior address, and was re-mailed to Petitioner's new address on or about April 9, 2014. More this eighteen (18) days has also passed since this re-mailing date. Regardless of the counting method, the objection period has elapsed by statute. It was also Petitioner's obligation to keep her service address current with SEAC. See, I.C. 4-21.5-3-1 to 4 et seq., 27-29 (AOPA).

Accordingly, the ALJ's Order, in its entirety, is hereby the Findings of Fact, Conclusions of Law and Final Order of the Commission pursuant to statute and Commission delegation. I.C. 4-21.5-3-27 to 29.

The Commission is the ultimate authority, and the action is its Final Order and determination in this matter. A person who wishes to seek judicial review must file a petition with an appropriate court within thirty (30) days and must otherwise comply with I.C. 4-21.5-5.

DATED: May 7, 2014

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm N501
100 N. Senate Avenue

Indianapolis, IN 46204
(317) 232-3137
Email: araff@seac.in.gov

A copy of the foregoing was sent to the following:

Tasha E. Johnson
Petitioner
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Legal Department SE E012
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SEAC Commission Chair

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FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER OF THE ADMINISTRATIVE LAW JUDGE

The operative pleading is Petitioner Tasha Johnson's Amended Complaint filed June 12, 2013,[1] with the State Employees' Appeals Commission ("SEAC" or the "Commission") against the Respondent Indiana Department of Workforce Development ("DWD"). This administrative review is conducted pursuant to I.C. 4-15-2.2 (the Civil Service System's classified provisions).[2]

Petitioner Johnson is a classified employee, a manager,[3] for Respondent DWD. The main issue before SEAC is: whether Respondent DWD had just cause, by a preponderance of the credible evidence, to suspend Petitioner Johnson's state employment for thirty days without pay (the "suspension"). This suspension occurred on May 20, 2013, following a pre-deprivation meeting. Additionally, Petitioner challenges DWD's action as the product of gender[4] discrimination or harassment, her year 2012 Performance Evaluation, a linked Work Improvement Plan, a subsequent transfer, and her wages or compensation.[5]

An evidentiary hearing in this matter was held November 25, 2013, before the undersigned Chief Administrative Law Judge (the "ALJ") at SEAC's main conference

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[1] On March 8, 2013, Petitioner Johnson timely filed her original, classified Civil Service Complaint.
[2] The proceedings are also under the Administrative Orders and Procedures Act ("AOPA"). I.C. 4-21.5-3.
[3] Exact job titles and positions of the various witnesses discussed below.
[4] Petitioner Johnson, an African American female, never specified in her complaints what kind of discrimination she alleged or what protected class she relied upon. The hearing revealed that Petitioner's discovery responses argued gender discrimination or harassment had occurred. The ALJ construes the primary claim in that manner, but also discusses race. The evidence was the same.
[5] Petitioner further attempted to assert some claims in the Amended Complaint on behalf of co-employees.

room in Indianapolis, Indiana. Petitioner Johnson appeared pro se. Respondent DWD appeared by counsel, Ms. Cynthia Lee and Mr. John Gannon. Having reviewed the arguments, witness testimony, admitted evidence, the applicable law, and proposals,[6] and being duly advised, the ALJ makes the following Findings of Fact, Conclusions of Law, and Non-Final Order. Judgment for Respondent.

First, Respondent DWD proved by a preponderance of the credible evidence that just cause supported the suspension and other challenged employment actions. Second, the preponderance of the credible evidence shows that Respondent DWD's employment actions were lawful, and not based on discrimination or harassment. Third, Petitioner's non-suspension claims also fail as a matter of law, as discussed.

I. Legal Standards and Doctrines

I.1. Just Cause

This is a classified (just cause) case under the Civil Service System. A state agency may only suspend or take material, adverse employment action against a classified state employee for just cause. I.C. 4-15-2.2-23. In a disciplinary case involving a classified employee, the state agency, here Respondent DWD, has the initial and ultimate burden of proving by a preponderance of the credible evidence that there was just cause for imposing the adverse employment action. I.C. 4-15-2.2-42(g); see *Non-Final and Final Orders in Miller v. FSSA*, SEAC No. 05-12-060 (2012); *Non-Final and Final Orders in Cole v. DWD*, SEAC No. 02-12-019 (2013). Therefore, if just cause is not established by the state, the challenged adverse employment action is invalid.

To establish just cause, the respondent-agency may refer to the petitioner-employee's work performance or service rating. I.C. 4-15-2.2-36(e). An agency's service ratings and employee performance standards "must be specific, measurable, achievable, relevant to the strategic objective of the employee's state agency or state institution, and time sensitive." *Id.* Therefore, in determining whether just cause was established, SEAC may consider the petitioner-employee's performance as compared to the respondent-agency's employee performance standards. I.C. 4-15-2.2-12, 36 and 42.

Additionally, the inquiry focuses on the reasonableness of the employer agency's workplace expectations. Employer expectations must be reasonably well communicated and consistently applied to similarly situated employees. See *Miller* and *Cole, supra.* The

[6] Both parties were also given the optional opportunity for post-hearing briefing or proposals. The ALJ also takes official notice of the docket. To the extent Petitioner's Post Hearing Brief tries to add new or amended evidence to the established record post-trial, it is stricken and not considered in this order. See Order Resolving Respondent DWD's Motion to Strike.

reasonable expectations of the respondent-agency may include its communicated employee performance standards and expected outcomes. *Id.*; I.C. 4-15-2.2. The just cause standard requires the respondent-agency to act with reasonableness, not perfection. See *Conklin v. Review Bd. of DWD*, 966 N.E.2d 761, 764 (Ind. Ct. App. 2012); *Ghosh v. Ind. State Ethics Com'n*, 930 N.E.2d 23 (Ind. 2010); *Tacket v. Delco Remy*, 959 F.2d 650 (7th Cir. 1992) (just cause standards in other contexts in Indiana similarly looks to the reasonable expectations of the employer).

Furthermore, the federal employment just cause standard is persuasive authority and concurs that the overarching inquiry is: whether the employer acted reasonably and consistently towards those similarly situated. The federal employment just cause standard is "such cause as will promote the efficiency of the service." 5 U.S.C. § 7513. See also *Free Enterprise Fund v. PCAOB*, 130 S. Ct. 3138 (US 2010) (federal system looks at factors such as inefficiency, neglect of duty, and reasons provided by the legislature); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); and *Morrison v. Olson*, 487 U.S. 654 (1988).[7]

If an agency establishes just cause, "the [C]ommission shall defer to the appointing authority's choice as to the discipline imposed. . . ." I.C. 4-15-2.2-42(g). The ALJ is not authorized to substitute his own judgment after the agency proves it had just cause to impose adverse employment action.

I.2. Discrimination and Harassment

Employment actions must be lawful to support just cause, and the claims in this case invoke additional layers of legal elements. I.C. 4-15-2.2. Title VII, 42 U.S.C. § 2000e (the Civil Rights Act of 1964, as amended), makes it unlawful under federal law for an employer to suspend (or take material adverse action) against an employee because of discrimination against that person's gender (or race), among other grounds. Indiana law contains similar, state law based, public policy prohibitions. I.C. 22-9-1 (Indiana Civil Rights Act); see also, I.C. 4-15-2.2-1-12 and -24. Furthermore, Indiana civil rights laws look to federal law for guidance. *Filter Specialists, Inc. v. Dawn Brooks et al.*, 906 N.E.2d 835, 839-842 (Ind. 2009).

The Title VII discrimination analysis is often referred to as the modified *McDonnell Douglas*[8] burden-shifting framework. *Andrews v. CBOCS West, Inc., 2014*

[7] At will is the default in Indiana. I.C. 4-15-2.2-22, 24. The General Assembly also recognized some employees were to be classified given federal regulations and laws, but did not define "just cause" in the Civil Service System. The ALJ first looks to Indiana law, but it is also helpful to regard the federal standard.

[8] *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

*U.S. App. Lexis 2842, *8-10* (7th Cir. February 14, 2014); *Adams v. City of Indianapolis*, 2014 U.S. App. Lexis 2115 (7th Cir. January 24, 2014); *Reagins v. Dominguez*, 2014 U.S. Dist. LEXIS 316, 10-14 (N.D. Ind. Jan. 2, 2014); see *Pantoja v. American NTN Bear. Manuf. Corp.*, 495 F.3d 840, 845 (7th Cir. 2007). There are three steps to this analysis. First, the petitioner-employee has the burden of establishing a *prima facie* case of discrimination through either direct or indirect evidence. *Andrews, Adams, supra*; *Coleman v. Donahoe*, 667 F. 3d 835, 845 (7th Cir. 2012).

Direct evidence "essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus." *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003); see also, *Morgan v. SVT, LLC*, 724 F.3d 990 (7th Cir. 2013). Absent the rare case where direct evidence of discrimination is available on the record, the petitioner-employee must offer indirect evidence that: (1) (s)he is a member of a protected class; (2) his/her job performance met the respondent-agency's legitimate expectations; (3) (s)he suffered an adverse employment action; and (4) another similarly situated individual, who was not in a protected class, was treated more favorably than the petitioner-employee. See *Andrews, Adams, Pantoja.* 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 is a 'pretext,' which in turn permits an inference of unlawful discrimination." *Id.*

According to the Supreme Court of Indiana, in an employment discrimination lawsuit the central question is one of causation: "What caused the adverse employment action of which the plaintiff complains?" *Filter Specialists* at 839. An adverse employment action is wrongful, unlawful and against public policy when it is motivated by (caused by) illegitimate reasons. *Id.* at 840 (quoting *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003)). A respondent-agency is held strictly/vicariously liable (as opposed to a negligence standard) for an illegally-motivated adverse employment action caused by a "supervisor". However, "supervisors" are only employees empowered by the respondent-agency to take tangible employment actions against the petitioner-employee. See *Vance v. Ball State University*, 133 S. Ct. 2434, 2441-2 (U.S. 2013).

To prove a harassment claim at an evidentiary hearing, as distinct from discrimination generally, the petitioner-employee must show intentional harassment directed to a protected characteristic (a gender or race purpose or character). *Huff v. Sheahan*, 493 F.3d 893, 902-3 (7th Cir. 2007); *Vance v. Ball State University*, 646 F.3d 461, 469-471 (7th Cir. 2011). The harassment must be severe and pervasive from an objective standpoint. *Id.* The employee's material working conditions must be altered by

the severe and pervasive harassment. *Id.* The character of the whole relevant workplace interaction is examined. *Id.* There must be a basis of employer liability such as actionable supervisor harassment or co-worker harassment where the employer negligently/unreasonably fails to control the same. *Id.*

II. Findings of Fact

1. Petitioner Johnson is an African American female who works as a classified (just cause) state managerial employee for the Respondent Department of Workforce Development ("DWD").

2. With the support of federal funding from the Department of Labor ("DOL"), Respondent DWD has administered the Reemployment Eligibility Assessment Grant Funded Program ("REA Program") for approximately sixteen (16) years. (Exhibit C).

3. As discussed below, before the May 20, 2013 suspension at issue, Petitioner Johnson was the DWD REA Manager for Region Twelve ("Region 12"), Indianapolis. Post suspension, Petitioner was laterally transferred to a different position.

4. Petitioner timely brought this Civil Service case, reaching SEAC under the operative Amended Complaint of June 12, 2013.

5. The REA Program's main goal is to locate claimants receiving Unemployment Insurance ("UI") within Indiana and aid them in finding gainful employment before their benefits are depleted. (Exhibit C; Davisson testimony).

6. Respondent is required to apply for DOL funding each year, which includes a projection of how many claimants the REA Program will serve and a description of how grant funds will be allocated. The 2012 grant application was approved for funding based upon an REA Program goal of serving twelve thousand five hundred (12,500) claimants within Indiana. (Id.).

7. The REA Program's continued funding and operations are contingent upon meeting the projected grant goals. (Davisson testimony).

8. Respondent's operations are divided into twelve (12) regions within the state of Indiana. Each region is assigned an adequate number of REA Coordinators based on the unemployment statistics within that region's area. (Id.).

9. Region 12 is the Indianapolis area. Petitioner was, at all relevant times before the suspension and transfer, the REA Manager for DWD's Region 12. (Exhibit C; Lawell and Davisson testimony).

10. Region 12 was made up of two offices: a West office and an East office. There were two (2) full time REA Coordinators at the East office and one (1) at the West office.[9] All of the other regions had a single REA Coordinator. Additionally, Region 12 was the only region with an REA manager. (Id.).

11. As the REA Manager, Petitioner's responsibilities included hiring and training staff, coordinating and planning events, managing program services, gathering other personnel to assist her region, and ensuring the REA Program goals were met. (Davisson and Lawell testimony; Exhibits C and N).

12. While Petitioner was the only REA Manager within the entire state, REA Coordinators shared similar responsibilities and job functions. (Davisson testimony).

13. The Regional Operator ("RO"), part of EmployIndy, received funding from Respondent to operate programs that aided Respondent with workflow, planning to meet REA Program goals, and supervising local office managers. While the RO was Petitioner's functional management group, the RO did not have the authority to formally discipline DWD employees. (Davisson and Linde testimony).

14. Scott Johnson ("Johnson") was the WorkOne Service Manager of the RO. (Exhibit Q; Davisson testimony).

15. Gus Linde ("Linde") has been the Senior Director of Opertions for the RO over the past four (4) years. (Linde testimony).

16. Ron Harrison ("Harrison") has been, at all relevant times, the General Manager of the RO. Harrison is African American. (Id.).

17. As the General Manager of the RO, Harrison did not have the authority to discipline Petitioner, but Petitioner was to report to and follow directions from Harrison. (Davisson testimony).

18. While Petitioner had the authority to direct and manage the REA Program for Region 12, there was an expectation that she would work closely with the RO. Petitioner was to collaborate, coordinate, and seek guidance from the RO on a regular basis. (Id.).

19. Mark Hollman ("Hollman"), as Program Director of DWD Field Operations, was Petitioner's formal supervisor in the relevant period through May, 2013. (Hollman testimony).

20. Catherine Lawell ("Lawell") has been the State Program Director, which requires her to monitor numerous programs, including the REA Program. (Davisson Testimony).

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[9] The local office managers for the East and West offices were Freddie Campbell and Kenneth Michael, respectively.

21. Hollman and Lawell reported to Nancy Davisson ("Davisson"), the Director of Field Operations, and kept Davisson informed about Petitioner's performance. (Id.).

22. To varying degrees, Hollman, Lawell and Davisson initiated or supervised the suspension, transfer and overall work conditions of Petitioner. Given the gender allegations, it is notable that the decisions concerning Petitioner's employment were actively participated in by females, not just males.

23. The 2012 REA Program was originally scheduled to last from July 1, 2012, to December 31, 2012. However, Respondent was granted a three (3) month extension, which reset the end date to March 31, 2013. (Exhibit C).

24. Based on the 2012 REA Program timeline, Region 12 was assigned a regional goal of servicing one thousand five hundred sixty-three (1,563) claimants or five hundred twenty-one (521) claimants per REA Coordinator. This was further broken down into a goal of one hundred seventy-four (174) claimants per month. (Id.).[10]

25. *Region 12 Management.* Petitioner's Region 12 did not succeed in meeting any of the monthly goals except for January and March of 2013. Based on the regional statistics, Region 12 contained enough UI claimants collecting benefits to have potentially met the monthly REA program goals. (Exhibit C; Lawell testimony).

26. Two other regions, Region Two ("Region 2") and Region Six ("Region 6"), also struggled to meet their monthly REA Program goals. However, they had a better excuse than Region 12. Unlike Region 12, Region 2 and Region 6 did not contain enough UI claimants collecting benefits to meet the service goals. (Id.).

27. Petitioner struggled with meeting deadlines, compiling REA Program data, and cooperatively arranging catch-up conferences, as discussed in more detail below.

28. During Respondent's auditing activities from October 2012 to April 2013, errors in data reporting were discovered in Track One, an electronic tracking system, for Region 12. Respondent conducted monthly audit reports and sent them out to each regional office. The audit report included a deadline to complete corrections and an expectation that any problems would be timely communicated to the relevant supervisor. (Exhibit C; Lawell testimony).

29. Petitioner was given a two (2) week deadline to correct all of the reporting errors uncovered by the audit report. However, Respondent needed to rerun the audit report twice because Petitioner's region did not complete the necessary corrections or communicate issues on time. All of the other regions timely fulfilled the audit correction requirements. (Id.).

30. As an expansion on the monthly audits, there was an REA Data Error clean-up project established. The regions were required to start correcting entry errors in

[10] Such numbers in this order are approximate.

November 2012. Yet, by December 2012, Region 12 had not yet started the clean-up activities. Region 12's failure to start the clean-up project on time required an intervention from the central office's administrative staff. Data entry clean-up required an expenditure of grant funds to cover the extra hours of labor. (Id.).

31. Following the clean-up, Lawell discovered that the Region 12 staff was violating the DWD data entry policy. The staff was failing to enter current REA Program services into Track One within three (3) days of service delivery. Yet, Region 12's failure to follow the data entry policy persisted for sometime after notice. (Id.).

32. Turning to staffing, in April 2012, Respondent received grant approval for additional funding to hire more personnel for Region 12. Petitioner understood that she was given approval to hire in summer, 2012. Petitioner thus had the responsibility of hiring three (3) additional REA Coordinators to help out with Region 12. (Lawell testimony).

33. Petitioner failed to act swiftly with the hiring process and allowed nearly three (3) weeks to pass from the time of the original job posting date before contacting the applicants. None of the applicants responded to Petitioner's belated phone calls. (Id.)

34. Petitioner hired the first full-time REA Coordinator on or about September 4, 2012, the second on October 1, 2012, and the third on January 7, 2013. All three (3) of the REA Coordinators were internal hires. (Id.).

35. All of the other regions fully staffed their offices before August, 2012. (Id.).

36. On February 8, 2013, Lowell also approved an additional four (4) hours per week for support staff to work on data entry during the 2012 REA Program. (Exhibit J).

37. Petitioner's failure to hire extra support staff or utilize the existing staff efficiently resulted in the under-scheduling of clients for orientation and poor claimant service on several occasions. (Lawell testimony).

38. Petitioner blamed Region 12's lower performance on the lack of staffing. Similarly, she claimed that some of her staff only worked part time in 2012. However, the preponderance of the credible evidence shows Petitioner was responsible for a major chunk of the delay in staffing completion (e.g. securing more full time help). (Petitioner's arguments; Lawell testimony; Exhibit J and others.).

39. Petitioner had difficulties utilizing effective communication, collaboration, and planning with the RO and various other local personnel. These difficulties resulted in poor claimant service during REA Program orientations. (Davisson testimony; Exhibit C and N).

40. On May 7-8 of 2013, there were two REA Program orientations which evidenced a lack of communication and planning, on the part of Petitioner. For example, on or

about May 8, 2013, over one hundred (100) claimants showed up for the orientation at the East side office. Petitioner failed to utilize staff from the West side office to help with the large volume. Petitioner had the authority to utilize staff between the two offices but neglected to do so until Davisson arrived and suggested using the other staff. The delay resulted in a three (3) hour wait-time for a number of claimants. (Davisson testimony; see Exhibits D, E, and N).

41. Before both orientations occurred, Petitioner failed to communicate an accurate number of expected claimants to the ROs, which contributed to the influx of claimants versus limited staffing on May 7-8, 2013. (Id.). The 2013 Transitional REA Guidelines for orientations were also not followed. (Davisson testimony; see Exhibits D, M, and N).

42. The Indiana public was poorly served as to long wait times on May 7-8, 2013, due to Petitioner's mismanagement of those orientations, supporting just cause for the suspension. (Davisson testimony, Exhibits D-E, and M-N). Proper planning and communication by Petitioner could have prevented same. (Id.)

43. *Work Flow & Production.* Petitioner, along with other REA Coordinators, attended a webinar in September of 2012. All of the regional offices were advised to increase their claimant numbers and were instructed to plan accordingly. (Lawell testimony).

44. Lawell advised Petitioner again in October and November of 2012 that Region 12 had specific REA Program goals and was falling short. (Id.).

45. Region 12 did not meet the 2012 REA Program's monthly goals from July to December of 2012. While the overall goal for the entire year was met, this was only accomplished after intervention and assistance from additional personnel. (Exhibit C; see Davisson and Lawell testimony).

46. Lawell did contact Regions 1, 3-5, 7 and 11 because they were falling short of monthly goals and needed to increase production efforts. However, no other regions requested or required additional assistance or personnel to meet those goals. (Lawell testimony; Exhibit C).

47. In an effort to hit the year end REA Program goal, Region 12 served a high volume of clients during March of 2013. The six hundred twenty-nine (629) claimants were served mainly through the efforts of administrative staff provided by the Respondent and other Region 12 staff that were not part of the REA Program. (Davisson and Lawell testimony; Exhibit C).

48. The additional personnel assistance and extra work hours cost the Respondent nearly twenty-two thousand dollars ($22,000) as of May 19, 2013. (Id.).

49. Each REA Coordinator had a regional goal of servicing five hundred twenty-one (521) claimants, which does not appear to be unreasonable since Region Eight (8)

serviced nine hundred ninety-eight (998) claimants during the 2012 REA Program Period. (Id.).

50. Petitioner attended a REA Field Training session in August of 2012. All of the attendees were informed about the program goals and policies for the upcoming REA Program, including the requirement of five hundred twenty-one (521) claimants per REA Coordinator. (Id.).

51. Additionally, the policies on data entry into the Track One system were discussed during the training session. (Id.).

52. While Region 12 had three (3) REA Coordinators, which equates to a high claimant service goal, the expectations were not unreasonable when compared to the other Regions. (Id.).

53. Petitioner was, at all relevant times prior to the suspension and transfer, on notice of Respondent DWD's expectations per her role within the REA Program. (Davisson testimony; Exhibit C).

54. *Suspension and Transfer.* Based on Petitioner's and Region 12's poor job performance, Lowell and Davisson gathered performance documentation to share with DWD's Deputy Commissioner Wimer. (Davisson testimony).

55. As a result, Petitioner was scheduled for a pre-deprivation meeting on or about May 20, 2013. The pre-deprivation meeting culminated with a thirty (30) day suspension, instead of a possible termination. (Id.).

56. Following the thirty (30) day suspension, Petitioner was relieved from her position as an REA Manager and was given different PAT II position. Given Petitioner's strengths as an employee, the new position appeared to be a more appropriate fit to utilize her skills more effectively. Petitioner's title and job duties changed, but her new position was still within the same SPD job class. (Id.).

57. While Petitioner was not paid during the suspension, the job reassignment did not affect her employment compensation. (Id.). The transfer was lateral. (Id.)

58. In summary, based on a preponderance of the credible evidence, Respondent DWD had just cause to suspend Petitioner Johnson's employment, and to transfer her to a lateral position thereafter. The state showed Petitioner caused problems with data entry, orientation meeting overload, and/or late or low production.

59. *2012 Performance Evaluation and 2013 WIP.* Petitioner's 2012 annual Performance Evaluation found that she met expectations in some areas but did not meet expectations in other areas. In particular, Respondent DWD had concern over Petitioner's teamwork, communication, and collaboration skills or interpersonal style. (Exhibit N).

60. The evaluation by supervisor Mark Hollman is well written, reasonably detailed, and inherently credible – as it is balanced in viewing strengths and weaknesses. There is also no evidence that Petitioner's gender (or race) was a factor in the evaluation. (Exhibit N; Hollman testimony). However, suffice to say, Petitioner disagreed with the evaluation.

61. There is no good ground to reverse the evaluation as Petitioner may request. The Evaluation is accurate, fair, and represents the employer's opinion of Petitioner's work performance. Generally speaking, state employers are required to prepare annual evaluations under the Civil Service System. Moreover, as non-discipline, it cannot alone be appealed under the better, more harmonious, read of the statutes' appeal provisions. See I.C. 4-15-2.2 and I.C. 4-1-6-5.[11]

62. Following the Performance Evaluation, between February 6, 2013, and May 6, 2013, Petitioner Johnson was placed on a ninety (90) day work improvement plan (WIP) to address the 2012 shortcomings: including teamwork, communication, and collaboration.

63. Petitioner passed this WIP. Respondent determined that, over the ninety days, Petitioner had improved enough in those areas to warrant a pass. The case is, in part, moot to the degree that Petitioner seeks to reverse the WIP. There is no need because she was passed on the WIP. (Exhibit A).

64. Petitioner specifically asked the ALJ to compare the Performance Evaluation and the WIP to check for inconsistency. (Compare Exhibits A and N). The ALJ finds no material inconsistency. Furthermore, Respondent's witnesses were consistent in explaining the reasonable purposes of both. Respondent had wanted Petitioner to take teamwork, collaboration, and communication more seriously and in a gentler spirit, especially with other managers and contractors of DWD. (Exhibits A, L-M, and P).

65. It was candidly pointed out in trial by Respondent DWD that the WIP ended with a pass in the same time frame as the suspension was issued. May, 2013 was thus the focus point of many events in this case. Respondent's non-discriminatory explanations on this point were credible, and not addressed by Petitioner.

66. The WIP period was primarily focused on Petitioner's teamwork and communication skills before May 6, 2013. Those improved enough that Petitioner passed the WIP on May 20, 2013. However, as Petitioner was passing the WIP, Petitioner was continuing to not meet data entry and production goals without major outside assistance, and had mismanaged the two conferences on May 7-8, 2013 resulting in long wait times for the public. Moreover, the May 7-8 conference problems were a resurfacing of the teamwork or communication pre May 6, 2013 problem warranting a response by the employer.

[11] I.C. 4-1-6-5 already allows a state employee to enter a 200 word written statement on the employee record about a performance appraisal they disagree with.

67. The data entry, low production, and May 7-8, 2013, conference problems caused or contributed to by Petitioner Johnson were points in time because of the grant cycle. A second WIP would not have helped or prevented them as opposed to 'teamwork' or 'communication' skills in general. It was reasonable, and supported by just cause, for Respondent to proceed to the suspension even though the WIP had been passed on other grounds.

68. *Discrimination and Harassment.* Petitioner's discrimination and harassment claims must be disposed of as without merit. Petitioner did not specify the protected class she felt was targeted until discovery in litigation, suggesting gender.

69. There was no showing that Petitioner ever gave her employer reasonable notice of protected class discrimination or harassment.

70. Petitioner's operating definition of harassment, based on argument, pleadings, and demeanor at trial, is anything that subjectively offended or annoyed her. There was no objective evidence of gender or race based action by Respondent violating the law.

71. Petitioner did not get along well (and it was mutual) with one of the state contractors, Gus Linde, a white male. In one meeting state contractor Linde lost his temper because Petitioner was not receptive to his help with getting Region 12's numbers up. Linde testified that he tossed a pencil at that meeting, which was unacceptable.

72. However, Petitioner left that and other meetings, like collaboration and training meetings, abruptly and rudely.[12] Such behavior was not acceptable by either of them, and Petitioner was in the wrong as much as Linde (who was not a decision-maker as to the suspension anyway).

73. Here, the incivility had no impact on the employment actions. But the ALJ reminds that state government requires civility in the workplace at all times.

74. While there might have been moments of turmoil, there is not a shred of evidence to suggest that Linde, Hollman or any other state witness that testified ever considered Petitioner's gender (or race). Petitioner's and Hollman's supervisors and colleagues, including Nancy Davisson and Catherine Lawell, were both female. Linde noted his own company has female executives in key positions, which he respected.

75. All witnesses asked denied any gender or race motive in any employment decision. For example, evidence showed Hollman had requested discipline on a white male in a recent unrelated matter for which the details were not identical, but did involve work place performance generally.

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[12] Petitioner stated she was going to the bathroom after Linde's outburst (which is understandable), but evidence showed Petitioner left that and several other work meetings in the middle and did not return. If Petitioner was annoyed, she felt she could just leave.

76. Petitioner did not testify herself. She hardly bothered to argue discrimination or harassment based on gender (or race) in her opening or closing arguments either.

77. In sum, no evidence of intentional action based on gender or race was presented. Unlawful causation is not shown, and affirmatively disproved by the state.

III. Conclusions of Law

1. By a preponderance of the credible evidence, Respondent DWD proved just cause for Petitioner Johnson's suspension. Respondent DWD thus established its burden of required proof to show just cause for the suspension under the classified Civil Service provisions and AOPA. I.C. 4-15-2.2; and I.C. 4-21.5-3. Petitioner's pre-deprivation and procedural rights, under the classified provisions of the Civil Service System, were also respected in the discipline processes.

2. By a preponderance of the credible evidence and applicable law, Petitioner Johnson's performance appraisal, WIP and suspension were not the product of gender (or race) discrimination or harassment. Petitioner Johnson did not establish a *prima facie* case of discrimination or harassment. She provided no evidence to support the claim(s). The evidence also shows that Petitioner Johnson's claim as to gender came late, primarily appearing after the litigation in discovery.

3. To support the suspension, Respondent DWD established the legitimate, nondiscriminatory reason of failures relating to a pair of conference organizations, office management, production and data entry, by Petitioner Johnson, which was not rebutted as an invidious pretext. No gender (or race) factors appeared in the evidence. Furthermore, Petitioner failed to put forth any evidence that similarly situated employees were treated more favorably than her. As Petitioner was the only REA Manager within the state, there were no other similarly situated employees. While REA Coordinators shared similar responsibilities and job functions, no other regions had performance shortcomings similar to that of Region 12. In addition, Hollman sent a male manager to a pre-deprivation meeting just weeks before Petitioner.

4. As to the suspension, Petitioner Johnson fell short of satisfying the reasonable performance expectations or policies of Respondent DWD. These expectations and policies were clearly communicated to all of the regional offices within DWD. Petitioner was on notice of her job expectations, and there is no evidence to show any inconsistency of their application to the rest of the DWD regions within the REA Program. While Petitioner's job title was unique, the same expectations were applied to those in a similar capacity.

5. Petitioner cannot raise claims for co-workers before SEAC. Petitioner lacks standing under the Civil Service System to do so. Moreover, although Petitioner administratively exhausted her own claims, there is no showing on this record of co-worker claim exhaustion. The co-worker claims must be denied or dismissed. Additionally, the co-worker claims had no evidence behind them, just bald allegations.

6. *Wages and damages*. Petitioner sought additional wages and compensation for 2008 to May, 2013 and then after she was reassigned following the suspension (June 2013 forward). Petitioner's wage claims lack any basis to afford relief. First, SEAC may not award back pay/wages more than thirty days before a Step I Complaint is first filed. I.C. 4-15-2.2-42(d). Applied here, the wage claim for 2008 to about April, 2013 must be denied.

Second, Petitioner expressly declined to testify, only making opening or closing arguments about wages, which is not evidence. The only credible evidence admitted in the record shows that the Respondent did not reduce Petitioner's wages before or after the transfer. Her wages were only not paid during the suspension itself. No material, adverse action has come to Petitioner except the suspension, which was supported with just cause. Lateral transfers are not material, adverse actions in this context. *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d, 270, 274 (7th Cir. 1996); *O'Neal v. City of Chicago*, 392 F.3d 909, 911-912 (7th Cir. 2004); *Lavalias v. Vill. Of Melrose Park*, 734 F.3d 629, 634-635 (7th Cir. 2013); and *Alexander v. Casino Queen, Inc.*, 739 F.3d 972 (7th Cir. 2014).

Third, SEAC cannot simply give Petitioner a retroactive raise because she subjectively wants one. To do so would flagrantly ignore SPD's authority and administrative role to set pay ranges within job classifications. I.C. 4-15-2.2-1 et seq., 15, and 27. Petitioner's overall job classification or pay table did not change before or after the suspension as relevant here. Her job title and duties shifted but stayed within the same SPD defined PAT II job class.

Fourth, Petitioner's wage claims were based on a vague argument (not evidence) that she was performing many important duties at a high level or out of class. Petitioner never identified what supposed class she was performing in other than the assigned one. Moreover, Petitioner's wage claim arguments included that Respondent had increased their trust and authority in her at various times both pre and post suspension. These arguments undercut the credibility of Petitioner's theory of discrimination, harassment or alleged disrespect from the Respondent employer.

7. Petitioner Johnson already prevailed (or it is moot) on the work improvement plan (WIP) because Respondent voluntarily passed her on the same. Litigation of that issue was unnecessary. This claim must be dismissed, including as moot.

8. All prior sections are incorporated by reference. To the extent a conclusion of law stated herein is a finding of fact or the reverse, it shall be so deemed and remain effective.

IV. Non-Final Order

Judgment is entered in favor of Respondent DWD upon the merits following an evidentiary hearing. Respondent DWD's thirty (30) day suspension of Petitioner Johnson's state employment is **UPHELD** as supported with just cause and not unlawful for any reason. All of Petitioner's additional claims such as to the Performance Evaluation, for co-workers or wages, or the lateral transfer are also without legal basis and/or merit and **DENIED**. Except, Petitioner already prevailed, or it is at minimum moot, on the Work Improvement Plan because Respondent voluntarily passed her on the same. Litigation of that issue was unnecessary, and is **DISMISSED,** including as **MOOT**. The parties shall bear their own fees and costs.

DATED: February 25, 2014

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm N501
100 N. Senate Avenue
Indianapolis, IN 46204
(317) 232-3137
Email: araff@seac.in.gov

A copy of the foregoing was sent to the following:

Tasha E. Johnson
Petitioner
534 E. 38th Street, #2
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Legal Department SE 117
10 N. Senate Avenue
Indianapolis, IN 46204

Cynthia Lee, Counsel for Respondent
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Legal Department SE 117
10 N. Senate Avenue
Indianapolis, IN 46204

Additional copy to:

Joy Grow, State Personnel Department
IGCS, Room W161
402 W. Washington Street
Indianapolis, IN 46204

BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

TASHA E. JOHNSON Petitioner, vs. INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT Respondent.	))) SEAC NO. 05-13-034))))))

NOTICE OF FILING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER OF ADMINISTRATIVE LAW JUDGE

The attached "Findings of Fact, Conclusions of Law and Non-Final Order of Administrative Law Judge" granting judgment on the merits after evidentiary hearing to Respondent DWD has been entered as required by I.C. 4-21.5-3. To preserve an objection to the document, either the Petitioner or the Respondent must submit a written objection that:

1. Identifies the basis of the objection with reasonable particularity.
2. Is filed at the following address, with service to the other party, by **March 17, 2014**:

State Employees' Appeals Commission
Indiana Government Center North
100 N. Senate Avenue, Room N501
Indianapolis, IN 46204-2200

Since the Commission has designated the Administrative Law Judge as the "trier of fact" for this cause, objections will not include items of evidence. If evidence is included with the objections it will be struck. The objections may include a brief addressing the applicable law being relied upon by the party.

If objections are filed within the time specified, the State Employees' Appeals Commission (SEAC) will hear the objections at a regularly scheduled meeting. Prior to that meeting any motions filed regarding the objections will be dealt with by the Administrative Law Judge.

During the time specified above any member of the SEAC may express the desire to review any specific issue addressed in the "Findings of Fact and Conclusions of Law" pursuant to I.C. 4-21.5-3-29(e). If such a review is ordered, it will be conducted at a regular scheduled meeting of the SEAC, and each party will be notified.

A party may move to strike any objections believed to be untimely. The Administrative Law Judge shall act upon a motion to strike. If the Administrative Law Judge grants the motion, the attached document will become final absent any desire to review an issue expressed by a member as discussed above. If the Administrative Law Judge denies the motion to strike, the findings and non-final order shall be reviewed by the SEAC as outlined above.

DATED: February 25, 2014

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
Indiana Government Center North, Rm N501
100 N. Senate Avenue
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BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

TASHA E. JOHNSON Petitioner,	)
	) SEAC NO. 05-13-034
vs.	)
INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT Respondent.	)

ORDER RESOLVING RESPONDENT'S MOTION TO STRIKE

An evidentiary hearing in this matter was held November 25, 2013. Petitioner Johnson appeared pro se. Respondent DWD appeared by counsel, Ms. Lee and Mr. Gannon. Both parties had leave to file post hearing briefs or proposed findings of facts or conclusions of law. The leave included making legal arguments or proposals. The leave did not include offering new evidence – the evidence closed with the resting of both parties' respective cases at the end of trial. Petitioner Johnson subsequently filed a Post Hearing Brief on January 23, 2014.[1] Respondent DWD replied with a Motion to Strike on January 27, 2014, which Petitioner did not further respond to. Petitioner's Post-Hearing Brief offers a number of exhibits in the form of new or amended evidence.

Respondent DWD is correct that the evidentiary record is closed. Petitioner cannot offer any additional testimony or supporting documents post trial outside of narrow statutory grounds, which are not met. AOPA, I.C. 4-21.5-3-26 et seq. Therefore, Respondent's Motion to Strike Petitioner's Post Hearing Brief is **GRANTED** as follows:

The portions of Petitioner's Post Hearing Brief which amount to new or amended evidence are **STRUCK**, and not considered in the Non-Final Order.[2] Additionally and alternatively, Respondent is correct that the new evidence portions must also be struck for being inadmissible hearsay that was objected to or evidence without foundation. See AOPA, I.C. 4-21.5-3; Ind. Evid. R. 801 and 901 et seq.

However, to the extent that Petitioner's Post Hearing Brief contains legal argument or proposals (which the leave covered), or is merely cumulative or identical to

[1] Respondent also filed a brief and proposals, but did not try to tender any new evidence.
[2] The materials are retained on the docket to allow further appeal review.

existing evidence, there is no need to strike those portions. Such portions do not prejudice the Respondent and are viewed as harmless.[3] So ordered.

DATED: February 25, 2014

Hon. Aaron R. Raff
Chief Administrative Law Judge
State Employees' Appeals Commission
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(317) 232-3137; Email: araff@seac.in.gov

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[3] See ALJ's Non-Final Order entering judgment in favor of Respondent DWD this same date.