

BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

ROBERT J. KNICK)
Petitioner,)
) SEAC NO. 03-13-020
vs.)
)
INDIANA DEPARTMENT OF)
HOMELAND SECURITY)
Respondent.)

**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 to Petitioner against a reprimand 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 **June 23, 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.

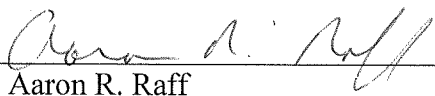
If objections are filed within the time specified, the State Employees' Appeals Commission (SEAC) will hear the objections at a regularly scheduled meeting. Prior to that meeting any motions filed regarding the objections will be dealt with by the Administrative Law Judge.

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: June 5, 2014



Hon. Aaron R. Raff
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SEAC Commissioners

SEAC ISSUED
JUN 05 2014

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

I. Introduction and Summary

This administrative review is conducted pursuant to I.C. 4-15-2.2 (the Civil Service System's classified provisions).¹ Petitioner Robert Knick is a classified employee for Respondent Indiana Department of Homeland Security ("IDHS"). The issue is whether Respondent IDHS had just cause by a preponderance of the credible evidence to written reprimand Petitioner on November 28, 2012.

An evidentiary hearing in this matter was held February 7, 2014 before the undersigned Chief Administrative Law Judge (the "ALJ") at SEAC's main conference room in Indianapolis, Indiana. Petitioner Knick appeared by counsel, Mr. Steven Fulk. Respondent IDHS appeared by counsel, Ms. Mara Snyder. Having reviewed the arguments, witness testimony, admitted evidence, the applicable law and proposals,² and being duly advised, the ALJ makes the following Findings of Fact, Conclusions of Law and Non-Final Order. Judgment for Petitioner Knick against the reprimand.³

Respondent IDHS failed to prove by a preponderance of the credible evidence that just cause supported the reprimand. The preponderance of the evidence did not support a finding of insubordination which might have risen to the just cause standard.

¹ The proceedings were also under the Administrative Orders and Procedures Act ("AOPA"). I.C. 4-21.5-3

² The ALJ received post-trial proposals from IDHS on the reprimand and a Motion to Correct Error related to a letter of counseling from Petitioner. Parties' respective counsel also made efforts, but reported the parties could not reach a settlement.

³ Petitioner also asserted claims about a performance evaluation(s) and a post-trial letter of counseling, which were dismissed in separate orders because they were not materially adverse discipline matters, and therefore not appealable under the Civil Service System.

The reprimand was not based on real shortcomings in Petitioner's work product or performance, but instead based on inter-personal drama, mixed signals and retaliation⁴ for Petitioner's complaints to and about supervisors' own conduct.

II. Findings of Fact

1. At the relevant times, Petitioner Robert J. Knick is an employee with Respondent IDHS working in the Planning Branch division.
2. Respondent IDHS presented Petitioner with a written reprimand on November 28, 2012. The reason offered by Respondent for the reprimand was Petitioner's failure to follow explicit directions regarding the chain of command within IDHS, following a November 14, 2012 verbal counseling session.
3. Petitioner timely appealed the discussed reprimand to SEAC at Step III in March, 2013
4. At the relevant times, Petitioner's direct supervisor was Steven Broniarczyk.
5. At the relevant times, as the Planning Branch Chief, Jennifer Richardson was Mr. Broniarczyk's direct supervisor and Petitioner's indirect supervisor.
6. At the relevant times, Ms. Richardson's supervisor was IDHS Field Services Director, Gerri Husband. Ms. Husband was Mr. Broniarczyk's indirect supervisor.
7. While with the Planning Division, in fall 2012, Petitioner was tasked with compiling a Continuity of Operations Plan ("COOP") budget for the fifty-one (51) critical state agencies. The budget would allocate federal funds among the critical state agencies to ensure continued functionality during an emergency. Originally this task had fallen to another employee or team, who had fallen behind, so Petitioner was being asked to step-up and handle the COOP given an approaching 2013 deadline.
8. While no witness had an instant recall of the relevant events, Ms. Richardson's credibility was undermined when compared with the exhibits. Ms. Richardson testified that Petitioner was only assigned fifteen to twenty (15-20) agencies for the COOP, which is in direct conflict with the fifty-one (51) agencies listed in Exhibits F and G. (Exs. F and G). It is reasonable to think that Ms. Richardson should have come

⁴ Retaliation here refers to unfairness, lack of reasonableness or unjustness under the just cause standard, and not to a protected class analysis SEAC might use in an unclassified, at-will cases. There was limited discussion at trial about whether Petitioner's supervisor, Mr. Broniarczyk, was stricter on fellow veterans like Mr. Knick. There is no need to reach that issue.

up with a figure closer to the actual assignment, given the heightened scrutiny on Petitioner's work. The testimony appears to be an attempt at minimizing the amount of work and time pressure Petitioner was actually under.

9. In summer, 2012, an exhibit shows a general written directive disseminated by Ms. Richardson that all planning branch employees, including Petitioner, were to stay within the chain of command as to communications. The directive was also distributed by Mr. Broniarczyk. However, this is where the Respondent's consistency ends with respect to this matter.
10. As explained even by Ms. Richardson, Petitioner's budget task would have surely required interaction with other IDHS sections and contact of outside entities. Petitioner's supervisors knew, and initially or tacitly approved, of Petitioner making contact with other IDSH (both planning and non-planning) employees and outside entities in early fall, 2012 to work on the COOP budget project. In other words, the summer 2012 directive was not enforced and could not logically be enforced given the project assigned to Petitioner. (Richardson, Broniarczyk and Petitioner Knick testimony.) The approval to get Petitioner's work done only ended (in a verbal counseling session) after Petitioner angered his supervisors by complaining about them, as discussed below.
11. Petitioner approached Mr. Broniarczyk in early 2012 to discuss concerns stemming from his perception that Mr. Broniarczyk was using state time improperly.⁵ Mr. Broniarczyk's response was closing his door and using headphones to continue the activities, which were not expressly denied at trial.
12. Petitioner attempted to speak with Ms. Richardson about the alleged misuse of state time in August or September of 2012, and did directly mention same in October 2012.
13. From April to August of 2012, Petitioner and Ms. Richardson had minimal contact. On or around October 9, 2012, only after Petitioner complained, Ms. Richardson started e-mailing Petitioner almost daily, and over the weekend, with pressure to complete some tasks within twenty-four (24) hours of receipt. (Exs. D, E, testimony.)
14. In October of 2012, Ms. Richardson had an open door meeting with Petitioner and spoke to him in an uncivil manner and tone. The meeting was likely heard by others present within the office.

⁵ Petitioner alleged Mr. Broniarczyk was doing schoolwork and watching television at the office.

15. In fall 2012, Petitioner contacted higher supervisor Ms. Husband⁶ and complained about the tone of the open door meeting and aggressive behavior in general. Petitioner was asked to put his concerns in writing at that time, but did not. Petitioner explained there was an offer to mediate but it never happened. Later however, Petitioner did forward emails to Ms. Husband about a different point of friction between himself and Ms. Richardson (see below).
16. Ms. Richardson testified that the Section Chief of the Exercise Division, Megan Luke, privately complained to her because Petitioner asked questions or sought input regarding his COOP budget tasks on several occasions. Ms. Richardson explained that she felt Petitioner was making her leadership look weak. However, her reprimand reaction was a muddled mix of personal drama, defensiveness, and irritation with Petitioner for complaining.
17. Ms. Richardson and Mr. Broniarczyk did not initially object when Petitioner contacted the Indiana Department of Transportation (“INDOT”) or the Indiana State Police (“ISP”) for necessary information.
18. Later they objected when Petitioner contacted the Exercise Division, ran by Ms. Luke, within IDHS. The objection to contacting the Exercise Division occurred only after the Petitioner complained about Mr. Broniarczyk.
19. On November 13, 2012 Petitioner forwarded an e-mail exchange with Ms. Richardson to Ms. Husband. The exchange illustrated a conflict and request for clarification over budget spending on equipment.⁷ Ms. Husband replied on the morning of the 14th with instructions to either follow Ms. Richardson’s directives or request a meeting for clarification. (Ex. G).
20. Ms. Richardson and Mr. Broniarczyk conducted a verbal counseling session with Petitioner on November 14, 2012. Petitioner and Respondent’s witnesses had conflicting recollections of the meeting.
21. Ms. Richardson and Mr. Broniarczyk recalled directing Petitioner not to seek outside input (e.g. to stay “inside the chain of command”) or direction from other sections, but did not recall mentioning Ms. Husband.
22. Petitioner explained that the main purpose of the counseling session was actually an attempt to eliminate Ms. Husband as a channel for complaints. Petitioner was,

⁶ Earlier, Petitioner had also submitted an anonymous complaint.

⁷ The contention between Petitioner and Ms. Richardson was centered around spending funds on handcars.

directly or indirectly, instructed to avoid taking any concerns directly to Ms. Husband without going through his direct supervisors first.

23. Neither party's testimony or demeanor was fully credible about the events of the November 14, 2012 meeting, but the differences were the normal product of heated emotions. The witnesses all demonstrated some selective memory, and self-serving testimony. However, overall, Petitioner's testimony was more detailed, and more credible. The ALJ finds that Ms. Richardson and Mr. Broniarczyk expressly used the meeting to pressure Petitioner to not complain or contact their higher supervisor Ms. Husband.
24. Respondent's HR representative, Maria Limon, a State Personnel Department (SPD) employee, did attend that meeting mostly as an observer. Her memory of the event was also faded. Ms. Limon did offer Petitioner to serve as a sounding board or for general HR advice. However, Ms. Limon did not prevent Petitioner's supervisors from trying to wall off Ms. Husband as a path of review, nor provide sufficient clarity to Petitioner about who he could complain to about his immediate supervisors without those same immediate supervisors standing right there. Similarly, even Ms. Husband had referred Petitioner back to those immediate supervisors, when instead a path of appeal should have been left open.
25. Supervisors Richardson's and Broniarczyk's efforts to block access to Ms. Husband were improper and contrary to the state's open door policy and reporting procedures for complaints. Immediate supervisors who are being complained of may not try to lock out the upper echelon from finding out. See SPD Employee Handbook and SPD Workplace Harassment Prevention Responsibilities and Procedures⁸; see also, *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005). The verbal counseling session was not job focused, but focused on Petitioner's supervisors' irritation with him, and thus was retaliatory in the common sense of the word.
26. In that timeframe, Petitioner was the kind of employee to question his supervisors, and sometimes require detailed instructions. Regardless, as a just cause employee he is protected from discipline based on retaliation, mere supervisor irritation or arbitrary response.
27. With the exception of a summer 2012 general e-mail, that was in practice not applied and ignored for the COOP job, there was no written policy concerning the chain of command prior to the reprimand.

⁸ Copy publically available on SPD's website. Official notice taken. I.C. I.C. 4-21.5-3-26(f).

28. Additionally, during the process, there were reasonable work related COOP questions asked by Petitioner that Ms. Richardson or Mr. Broniarczyk did not always have an answer for so he had to ask the Exercise Division or outside agencies (which at first was allowed before Petitioner complained). The employer charged Petitioner with completing a task then created artificial barriers to completing it.
29. Ms. Richardson and Mr. Broniarczyk admitted there was no major problem with Petitioner's work product and that the reprimand was based solely on allegedly breaching the directive to stay within the chain of command.
30. The reprimand was not materially linked to job performance.
31. Petitioner participated in a work improvement plan ("WIP") during 2012 and was passed on same.
32. The preponderance of the credible evidence shows the reprimand in question was unfair, unreasonable or the product of retaliation, and thus lacking just cause.

III. Conclusions of Law and Further Analysis

1. This is a classified (just cause) case under the Civil Service System. A state agency may only discharge a classified state employee for just cause. I.C. 4-15-2.2-23, 42(g). 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. I.C. 4-15-2.2-12, 23, 42; *Non-Final and Final Orders in Miller v. FSSA*, SEAC No. 05-12-060, and *Non-Final and Final Order in Cole v DWD*, SEAC No. 02-12-019. 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). Overall, Respondent IDHS has the burden of proving by a preponderance of the credible evidence that there was just cause for imposing the adverse employment action. I.C. 4-15-2.2-23, 42(g).
2. The ALJ recognizes that adhering to the chain of command is valuable, but the level of regimentation was unnecessary here and only applied to pressure Petitioner to stop questioning or complaining about his supervisors. The nature of Petitioner's relevant COOP budget assignment required interaction with other IDHS sections. Petitioner could legitimately seek information within IDHS. Limiting the scope of Petitioner's collaborative abilities after-the-fact was unreasonable and in direct conflict with the assigned COOP preparation activities, which had a tight deadline. Some aspects of the budget required clarification on issues for which Ms. Richardson or Mr. Broniarczyk did not always have the answer. Furthermore, Ms. Richardson and Mr.

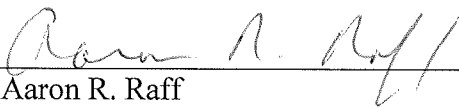
Broniarczyk did not object when Petitioner contacted INDOT or ISP to gather data for the budget. Petitioner was never given a workable explanation as to what could be considered acceptable versus unacceptable input and guidance. The evidence shows that the chain of command directive was simply exploited as a vehicle to punish Petitioner because there were no performance or work product issues to fall back on.

3. While the substance of the e-mail exchange forwarded to Ms. Husband on November 13, 2012 is mostly irrelevant, the involvement of Ms. Husband provides evidence Ms. Richardson had knowledge Petitioner was going around her to voice concerns to the upper echelon of management. Ms. Richardson's testimony that Petitioner made leadership look weak by posing budget questions to the Exercise Division creates an inference that Ms. Richardson was not going to tolerate any questioning, reasonable or not.
4. Ms. Richardson and Mr. Broniarczyk attempted to build a wall between Petitioner and upper supervisor Ms. Husband. Petitioner was not left with a clear and adequate path to voice concerns stemming from front line supervisors Ms. Richardson and Mr. Broniarczyk. Respondent cannot cutoff potential pathways of grievance, regardless of the need to follow the chain of command. This attempt at isolation undermines any constructive or progressive elements of the reprimand.
5. Moreover, Ms. Richardson's uncivil tone and relentless 'get this task done fast' style emails to Petitioner in October 2012 after Petitioner complained about Mr. Broniarczyk's alleged improper abuse of the State's time reinforce that the reprimand was unfair, unreasonable or retaliatory.
6. Respondent IDHS failed to prove by a preponderance of the credible evidence that just cause supported the reprimand. The preponderance of the evidence did not support a finding of insubordination which might have risen to the just cause standard. The reprimand was not based on real shortcomings in work product or performance, but instead based on inter-personal drama, mixed signals and retaliation for Petitioner's complaints to and about supervisors' own conduct.
7. All prior sections are incorporated by reference as necessary. Findings of Fact that may be construed as Conclusions of Law, or the reverse, are so deemed.

IV. Non-Final Order

Judgment is entered in favor of Petitioner Knick upon the merits following an evidentiary hearing. The November 28, 2012 written reprimand directed to Petitioner Knick by Respondent IDHS is **RESCINDED/REMOVED** as being without just cause. The reprimand shall be marked rescinded/void, and a copy of this order placed in Petitioner's personnel file. The parties shall bear their own attorneys' fees and costs.

DATED: June 5, 2014



Hon. Aaron R. Raff
Chief Administrative Law Judge
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