MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Ryan P. Sink
Fox & Sink, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES

Theodore E. Rokita
Attorney General of Indiana

Aaron T. Craft
Frances H. Barrow
Deputy Attorneys General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Alex Lesniak,
Appellant-Petitioner,

v.

Indiana State Employees Appeals Commission, and Indiana Department of Workforce Development,
Appellees-Respondents.

June 28, 2021

Court of Appeals Case No. 21A-PL-356

Appeal from the Marion Superior Court

The Honorable John F. Hanley, Judge

Trial Court Cause No. 49D11-2003-PL-10505

Kirsch, Judge.

[1] Alex Lesniak ("Lesniak") appeals from the trial court's denial of his petition for judicial review of the decision of the Indiana State Employees Appeals Commission ("SEAC"), which upheld the Indiana Department of Workforce Development's ("DWD") decision to terminate Lesniak for just cause. On appeal, Lesniak raises two issues, which we consolidate and restate as whether the trial court erred when it affirmed SEAC's decision and denied his petition for judicial review.

[2] We affirm.

Facts and Procedural History

[3] Lesniak began his employment at DWD on April 10, 2017 as an Audit Examiner III. *Appellant's App. Vol. II* at 245; *Appellant's App. Vol. III* at 230. In that role, his job responsibilities included taking a class in Successorship Training ("the Training"), which included both theory and applied learning components designed to educate and train DWD staff on merger and acquisition related matters. *Appellant's App. Vol. III* at 58, 230. On May 17, 2017, Lesniak successfully completed the theory-based portion of the Training but did not complete any of the applied learning portions of the Training because completion of the applied learning portion was not required at the time. *Id.* After his completion of the theory-based portion of the Training, Lesniak began to work on unemployment insurance cases. *Id.* at 230.

[4] Due to certain organizational changes in October of 2017, DWD reclassified Lesniak's position as an Unemployment Insurance Auditor II, which came with

a thirty percent pay raise. *Appellant's App. Vol. II* at 245; *Appellant's App. Vol. III* at 86-87, 230. Also, in October of 2017, DWD determined that Lesniak (along with all other employees in Lesniak's section) needed to complete the applied learning portion of the Training. *Appellant's App. Vol. III* at 59, 231. On November 1, 2017, DWD informed Lesniak that he was required to complete the applied learning portion of the Training with an accuracy rate of ninety percent. *Id.* at 59, 62, 231. In December of 2017, Lesniak attempted the applied learning portion of the Training for the first time and received a score of forty percent, and DWD instructed him to take the applied learning portion of the Training again. *Id.* at 62-66, 88, 231. In February of 2018, Lesniak received additional instruction related to the applied learning component and completed the Training for the second time but received an accuracy rate of only twenty percent. *Id.* at 68, 231. DWD again informed Lesniak that he could retake the applied learning portion of the Training and receive training to help him pass. *Id.* at 231.

[5] On March 5, 2018, DWD met with Lesniak to discuss his 2018 work profile, which outlined his position's purpose, competencies, and performance expectations and goals.[1] *Id.* at 16-23, 231. On March 8, 2018, DWD again met with Lesniak to update his 2018 work profile, which included a requirement that if Lesniak did not successfully complete the applied learning portion of the

[1] The March 5, 2018 work profile did not contain a requirement that if Lesniak was unable to successfully complete the applied learning portion of the Training within three attempts, he would be placed on a sixty-day work improvement plan. *Appellant's App. Vol. III* at 21.

Training within three attempts, he would be placed on a sixty-day work improvement plan ("WIP"); the 2018 work profile was signed by Lesniak and his supervisor. *Id.* at 30-31, 231. This same requirement to successfully complete the applied learning portion of the Training within three attempts or be placed on a sixty-day WIP was also imposed on other DWD employees working in the same position as Lesniak. *Id.* at 34-41, 231.

[6] Lesniak attempted to successfully complete the applied learning portion of the Training for a third time, and on March 19, 2018, Lesniak was verbally informed that he had scored a seventy percent. *Id.* at 43, 100, 231. Lesniak was placed on a thirty-day WIP, which gave him notice of substandard performance for failure to successfully complete the applied learning portion of the Training. *Id.* at 43, 231. Pursuant to Lesniak's March 19, 2018 WIP, he would "not be given any other opportunities" to successfully complete the applied learning portion of the Training and was subject to reassignment, demotion, or termination if he was unsuccessful. *Id.* Lesniak emailed his supervisor about his dissatisfaction with both the applied learning portion of the Training and his WIP, and his supervisor told him that his WIP would remain in place, reminded him of the importance of passing the applied learning portion of the Training because DWD could not "continue letting [Lesniak] take the course and not pass," and that DWD would provide additional instruction to help him pass. *Id.* at 45, 231.

[7] Lesniak received additional instruction to help him pass the applied learning portion of the Training. *Id.* at 60, 232. DWD also modified Lesniak's WIP

from thirty days to sixty days on April 20, 2018 because at that time Lesniak had not yet retaken the applied learning portion of the Training. *Id.* at 232. Lesniak eventually retook the applied learning portion of the Training for the fourth time and was informed on May 23, 2018, that he scored sixty percent and was unsuccessful. *Id.* at 60, 232. After he was unsuccessful on his fourth attempt, DWD held a pre-deprivation meeting with Lesniak on June 26, 2018, to discuss his inability to successfully complete the applied learning portion of the Training as required by his WIP, and on that same day he was terminated for failure to meet the terms of his WIP. *Id.* at 50, 232.

[8] Lesniak unsuccessfully sought relief from DWD's decision to terminate him from his appointing authority and the state personnel director. *Appellant's App. Vol. II* at 100, 104. On August 24, 2018, Lesniak filed a civil service complaint with SEAC, seeking administrative review of his termination and alleging that he was erroneously terminated from his position at DWD. *Id.* at 97-99. DWD filed a motion for summary judgment, a list of exhibits, and a brief in support of its position with SEAC on November 22, 2019. *Id.* at 229, 231, 242. Lesniak filed an objection opposing DWD's motion, a list of exhibits, and a brief in support of his position on January 3, 2020. *Appellant's App. Vol. III* at 105, 108, 125-26. DWD filed its reply on January 22, 2020. *Id.* at 220. SEAC granted DWD's motion for summary judgment on February 11, 2020 and dismissed Lesniak's complaint. *Id.* at 229-36.

[9] Lesniak filed a petition for judicial review of SEAC's order with the trial court on March 9, 2020. *Appellant's App. Vol. II* at 2, 23-28. On February 10, 2021,

the trial court affirmed SEAC's order granting summary judgment in favor of DWD and denied Lesniak's petition for judicial review. *Id.* at 6-13. Lesniak now appeals.

Discussion and Decision

[10] Our review of an administrative agency's order is governed by the Administrative Orders and Procedures Act, pursuant to which we may set aside an agency's action if it is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14(d). "A decision is arbitrary and capricious when it is made without consideration of the facts and lacks any basis that may lead a reasonable person to make the decision made by the administrative agency." *Hotmer v. Ind. Fam. & Soc. Servs. Admin.*, 150 N.E.3d 705, 708-09 (Ind. Ct. App. 2020) (quoting *Ind. Real Estate Comm'n v. Martin*, 836 N.E.2d 311, 313 (Ind. Ct. App. 2005), *trans. denied*.)

[11] In reviewing an agency's order, we apply the same standard as the trial court. *Ind. Dep't of Nat. Res. v. Prosser*, 132 N.E.3d 397, 401 (Ind. Ct. App. 2019), *trans. denied*. Our supreme court has described our standard of review as follows:

> Our review of agency action is intentionally limited, as we recognize an agency has expertise in its field and the public relies on its authority to govern in that area. We do not try the facts de novo but rather defer to the agency's findings if they are supported by substantial evidence. On the other hand, an agency's conclusions of law are ordinarily reviewed de novo. While we are not bound by the agency's conclusions of law, an interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself. In fact, if the agency's interpretation is reasonable, we stop our analysis and need not move forward with any other proposed interpretation.

Moriarity v. Ind. Dep't of Nat. Res., 113 N.E.3d 614, 619 (Ind. 2019) (citations, quotation marks, and brackets omitted). "Substantial evidence is more than a scintilla, but something less than a preponderance of the evidence." *Prosser*, 132 N.E.3d at 401. "Reviewing courts must consider the record in the light most favorable to the administrative proceedings and may not reweigh the evidence or assess the credibility of witnesses." *Pendleton v. McCarty*, 747 N.E.2d 56, 61 (Ind. Ct. App. 2001), *trans. denied.* The burden of demonstrating the invalidity of the agency action is on the party who asserts the invalidity. *Parker v. Ind. State Fair Bd.*, 992 N.E.2d 969, 976 (Ind. Ct. App. 2013).

[12] Lesniak argues that SEAC's decision was arbitrary and capricious because it was not based on just cause and relied on counting two of his two unsuccessful attempts that occurred before the three-attempt requirement was set forth in his

2018 work profile.[2] He points to a prior decision of SEAC[3] citing other SEAC decisions in which it stated that just cause requires a determination of whether the employer's expectations were reasonably well communicated to similarly situated employees. Lesniak contends that including his two prior failures of the Training as part of his three attempts is a "retroactive application" of the requirement that he complete the Training within three attempts, which is "inconsistent with the just cause standard" rendering SEAC's decision arbitrary and capricious. *Appellant's Reply Br.* at 7. Stated differently, he maintains that his termination was without just cause because only two of his failures occurred after the requirement to successfully complete the Training was added to his 2018 work profile. We reject Lesniak's contentions.

[13] Lesniak was a classified employee, and, pursuant to statute, a classified employee is an employee who has "been appointed to a position in the state classified service . . . completed the working test period under section 34 of this chapter . . . [and] been certified by the appointing authority for that classification of positions." Ind. Code § 4-15-2.2-4. The working test period

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[2] Lesniak also contends that SEAC erred by applying an at-will standard to its review of DWD's decision to terminate him. In one conclusion of law, SEAC cited two federal cases addressing at-will employment in federal age discrimination in employment claims, which did not apply in a case involving a classified employee like Lesniak. Despite the reference to these federal cases, it is clear that SEAC's order recognized that Lesniak was a classified employee, which required DWD to show that just cause existed for its decision and applied the just cause standard. *Appellant's App. Vol. III* at 232. As we discuss more fully, SEAC's order concluded that DWD had met its burden to show that just cause existed for its decision to terminate Lesniak. *Id.* at 235. We cannot say that SEAC improperly applied an at-will employment standard in reviewing DWD's decision to terminate Lesniak's employment.

[3] *See Pollard v. Ind. Dept. of Child Servs.*, SEAC No. 060-19-040 at 6 (March 24, 2020) (available at https://www.in.gov/seac/files/06-19-040-Pollard-v.-DCS-Order-Granting-Respt-MSJ.pdf).

applies to "every person appointed to a classification in the state classified service" and continues until a time established by the state personnel director; during the working test period, a full performance appraisal of the employee's work must be prepared for the state personnel director by the employee's appointing authority. Ind. Code § 4-15-2.2-34(a). With certain exceptions that are not relevant here, the state classified service "consists of positions in programs that have a federal statutory or regulatory requirement for the establishment and maintenance of personnel standards on a merit basis" and includes eleven federal programs that require state employees whose work involves implementing those programs to be employed on a merit basis. Ind. Code § 4-15-2.2-21(a).[4] Lesniak's position description specified that the United States Department of Labor required DWD "to meet many federal performance metrics for all [unemployment insurance] [p]rogram areas in order to keep its federal funding for administration of that program" and that the duties of Lesniak's position are required by the United States Department of Labor *Appellant's App. Vol. III* at 12.

[14] A classified employee who has successfully completed a working test period may be dismissed, suspended, or demoted only for just cause and is entitled to

[4] By contrast, the unclassified service "consists of all offices and positions in the state civil service other than those in the state classified service[,] is separate from the classified service, and, except as expressly provided by Indiana Code chapter 4-15-2.2, the human resource management systems that apply to the classified service do not apply to the unclassified service. Ind Code § 4-15-2.2-22. An employee in the unclassified service is an at will employee and may be dismissed, demoted, disciplined, or transferred "for any reason that does not contravene public policy." Ind. Code § 4-15-2.2-24(a)-(b).

an appeal of the dismissal, suspension, or demotion as provided by statute. Ind. Code § 4-15-2.2-23. In cases of employee discipline involving a classified employee, SEAC "shall defer to the appointing authority's choice as to the discipline imposed, if the appointing authority establishes that there was just cause for the imposition of the discipline," and the appointing authority has "the burden of proof on this issue." Ind. Code § 4-15-2.2-42(g). The state personnel director is also authorized, in cooperation with an appointing authority, to establish and "periodically amend" employee performance standards, expected outcomes for employees, and a system of service ratings for employees based on performance and expected outcomes. Ind. Code § 4-15-2.2-36(a). The statute provides that employee performance standards and expected outcomes "must be specific, measurable, achievable, relevant to the strategic objective of the employee's state agency or state institution, and time sensitive." Ind. Code § 4-15-2.2-36(b). It further provides that, among other purposes, an employee's service ratings may be used to discover employees "who, because of a low service rating are candidates for demotion or dismissal." Ind. Code § 4-15-2.2-36(e)(3).

[15] The entirety of the chapter is to be "liberally construed" on the basis of merit principles, which (among others), includes the "training of employees to ensure high quality performance" and "retention of employees based on . . . the quality of the employees' performance; and [] the correction of inadequate performance; and the dismissal of employees whose inadequate performance is not corrected." Ind. Code § 4-15-2.2-12(a)(3)-(4). The statute's principle of

construction also specifies that the merit principles in subsection (a) guide "[a]ll employment matters in the state classified service[.]" Ind. Code § 4-15-2.2-12(b).

[16] Lesniak was first told that he needed to successfully complete the applied learning portion of the Training in November of 2017 after his position was reclassified, and he was given a thirty percent pay raise as a result of the reclassification. *Appellant's App. Vol. II* at 245; *Appellant's App. Vol. III* at 59, 62, 86-87, 230-31. He was then given four opportunities to pass the applied learning portion of the Training. His first attempt at taking the applied learning portion of the Training was in December of 2017, and he received a score of forty percent. *Appellant's App. Vol. III* at 62-66, 88, 231. Lesniak was given remedial instruction and took the applied learning portion of the Training for a second time in February of 2018 where he received a score of twenty percent. *Id.* at 68, 231. Lesniak signed the final version of his work profile on March 8, 2018, which specified that he was required to pass the applied learning portion of the Training within three attempts and failure to do so would result in him being on a WIP. *Id.* at 30-31, 231. Despite remedial training, Lesniak was unsuccessful on his third attempt with a score of seventy percent. *Id.* at 43, 100, 231. Because he had been unable to pass the applied learning portion of the Training within three attempts, DWD placed Lesniak on a WIP, which gave him one final chance to pass or he would be subject to further discipline that could include termination if he did not pass. *Id.* at 43, 45, 231-32. Lesniak's WIP was modified, and he attended training in April 2018 before retaking the

applied learning portion of the Training for a fourth time and was again unsuccessful with a score of sixty percent. *Id.* at 60, 232. After this fourth failure, DWD held a pre-deprivation meeting on June 26, 2018 with Lesniak to address his inability to pass the applied learning portion of the Training, which was more than sixty days after the WIP and resulted in DWD terminating Lesniak for his failure to successfully complete the requirement in the WIP that he pass the applied learning portion of the Training. *Id.* at 50, 232.

[17] Our Supreme Court has stated that "'just cause' or 'cause' to terminate an employee often defies precision, at least at the margins." *Ghosh v. Ind. State Ethics Comm'n*, 930 N.E.2d 23, 27 (Ind. 2010). Here, contrary to Lesniak's assertions, DWD had just cause to dismiss him. DWD gave Lesniak a thirty percent pay raise when it reclassified his position, provided remedial training, modified his WIP, and gave him four attempts to pass the applied learning portion of the Training. Lesniak does not argue that the applied learning portion of the Training was too difficult, that DWD's expectations were unreasonable, or that an employee in his position should be permitted to fail a required Training four times without serious consequences, including dismissal. In addition, the inclusion of Lesniak's of two failures that occurred before his 2018 work profile toward his three attempts was not unfair; the requirement was applied to another similarly situated employee and gave him notice that if he did not pass on his third attempt he could face termination. Despite Lesniak's contentions to the contrary, the expectation that he pass the applied learning portion of the Training within three attempts was reasonably well-

communicated to him. Lesniak does not dispute that, pursuant to Indiana Code section 4-15-2.2-36, DWD has the authority to establish and amend performance standards that are "specific, measurable, achievable, relevant to the strategic objective of the employee's state agency or state institution, and time sensitive" and does not dispute that DWD imposing a limitation on the amount of times that Lesniak could attempt to take the applied learning portion of the Training falls within the statute's scope. Ind. Code § 4-15-2.2-36(b). We find no merit in Lesniak's contention that DWD retroactively or otherwise unfairly counted his two prior failures toward the three-attempt requirement in his 2018 work profile, as DWD also gave Lesniak a fourth opportunity and remedial instruction to help him successfully complete the applied learning portion of the Training. We cannot say that DWD failed to reasonably communicate that Lesniak would have three attempts to pass the applied learning portion of the Training or that it lacked just cause to terminate him on the basis of his repeated failures to successfully complete the applied learning portion of the Training.

[18] As previously noted, merit principles – including training to ensure high quality performance – guide all employment matters in the state classified service. *See* Ind. Code § 4-15-2.2-12. Based on Lesniak's inability to successfully complete the applied learning portion of the Training when he had ample opportunity to do so, we cannot say that Lesniak has shown that SEAC's decision upholding DWD's decision to terminate him for just cause lacked "any basis that may lead a reasonable person to make the decision made by the administrative

agency." *Hotmer*, 150 N.E.3d at 708-09. Because SEAC's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, we affirm the denial of Lesniak's petition for judicial review.

[19] Affirmed.

Altice, J., and Weissmann, J., concur.