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BEFORE THE
STATE EMPLOYEES' APPEALS COMMISSION

IN THE MATTER OF:

BRENDA LOUTHAIN Petitioner,	))
	) SEAC NO. 12-13-110
vs.	)
	)
INDIANA DEPARTMENT OF NATURAL RESOURCES Respondent.	)))

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER TO DETERMINE STANDARD OF REVIEW

Pursuant to the ALJ's[1] Initial Case Management Order of January 22, 2014, both parties' respective counsel timely filed their briefs in support of a proposed standard of review. Overall, this state employment case is about Petitioner Louthain's three day suspension from Respondent DNR on September 24, 2013. However, the task of this order is to first determine the appropriate standard of review. Several state employment related statutes must be considered together, including the Indiana Civil Service System (I.C. 4-15-2.2) and I.C. 14-9-8-14 (providing certain rights to DNR conservation officers).[2]

Petitioner Louthain argues that the net effect of I.C. 14-9-8-14 is to require "for cause" to support the suspension. Respondent DNR argues that Petitioner's choice to appeal under the Civil Service System, instead of I.C. 14-9-8-14, means that Petitioner is an unclassified employee who must show a public policy (at-will) exception to the suspension. Because there is, to a limited degree, ambiguity and conflict between the applicable statutes, the ALJ determines that Petitioner is unclassified under the Civil Service System, but that I.C. 14-9-8-14 is a specific statutory right provided by the General Assembly that confers a public policy exception to employment at-will. Respondent DNR is therefore required to show "for cause" to support the suspension. This conclusion is reached by the rules of statutory construction, as analyzed in the findings of fact and conclusions of law below.[3]

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[1] Administrative Law Judge
[2] Choice of forum and 312 IAC 4-4-5 to 6 (DNR regulations) are also reviewed.
[3] Additionally, Petitioner has a property interest in her employment under I.C. 14-9-8-14 requiring "for cause".

I. Interpretation of Statutes

A facially clear and unambiguous statute need not and cannot be interpreted by a court. However, statutory ambiguity mandates interpretation in order to ascertain and effectuate the general intent of the legislature. *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012); *Fishburn v. Ind. Pub. Ret. Sys.*, 2 N.E.3d 814, 824 (Ind. Ct. App. 2014). When confronted with a question of statutory construction, an administrative Commission or ALJ must read the statute plainly, and in any areas of ambiguity follow the General Assembly's legislative intent. *McCabe v. Comm. Ind. Dep't of Ins.*, 949 N.E.2d 816, 819 (Ind. 2011); *Siwinski v. Town of Ogden* Dunes, 949 N.E.2d 825, 828-829 (Ind. 2011).

When a statute is susceptible to more than one interpretation, then the court may consider the consequences of a particular construction. *Sees v. Bank One, Ind., N.A.*, 839 N.E.2d 154, 157 (Ind. 2005); *M.R. v. R.S. (In re Paternity of C.S.)*, 964 N.E.2d 879, 885 (Ind. Ct. App. 2012). The Supreme Court of Indiana recognizes "a strong presumption that when the legislature enacted a particular piece of legislation, it was aware of existing statutes relating to the same subject." *Wagler v. West Boggs Sewer Dist., Inc.*, 898 N.E.2d 815, 818 (Ind. 2008); *Lincoln Bank v. Consell Const.*, 911 N.E.2d 45, 50 (Ind. Ct. App. 2009). Statutes that occupy the same general subject matter should be construed together in an effort to produce a harmonious statutory system; however, if statutes are in irreconcilable conflict, then the more detailed will prevail as to the subject matter it covers, regardless of which is the later statute. *Lotz v. Hoyt*, 900 N.E.2d 1, 5 (Ind. 2009); *Sanders v. State*, 466 N.E.2d 424, 428 (Ind. 1984); *Indiana Alcoholic Beverage Com. v. Osco Drug, Inc.*, 431 N.E.2d 823, 833-834 (Ind. App. 1982).

Our Supreme Court also very recently reminded that form will not trump substance. *Moryl v. Ransone, et al*, 2014 Ind. LEXIS 168 (Ind. March 10, 2014). Where possible, a clearly constitutional construction of statutes is always preferred to a constitutionally doubtful one. *State v. I.T.*, 2014 Ind. LEXIS 193, 7-8 (Ind. Mar. 12, 2014); *Girl Scouts of Southern Ill. v. Vincennes Ind. Girls, Inc.*, 988 N.E.2d 250, 255 (Ind. 2013).

II. Findings of Fact

The following facts are taken from the record and briefs:

1. Petitioner Louthain is an unclassified employee for Respondent DNR under the Civil Service System because there is no federal statute or regulation providing her classified status. This statutory portion is unambiguous. See I.C. 4-15-2.2-21(a), 22.

2. Petitioner Louthain is a sworn Master/Senior Conservation Officer for Respondent DNR. See 312 IAC 4-1-4.

3. Respondent instituted Petitioner's three (3) day suspension on September 24, 2013.

4. Petitioner Louthain timely appealed her suspension under the Civil Service System with the appeal reaching Step III, the State Employees' Appeals Commission ("SEAC"), on December 17, 2013.

5. Both DNR's and SPD's lower step letters explicitly name SEAC and the Civil Service System as an available means of further appeal. (See Exhibit A and letter from SPD).

6. The applicable statutes provide ambiguity or conflict in some but not all provisions, as discussed in the conclusions of law.

7. This order does not require the merits to be considered, just the standard of review, so further facts are left for another day.

III. Conclusions of Law

1. Finding number 1 is also a parallel conclusion of law. The ALJ agrees with Respondent's brief that Petitioner is clearly unclassified under the Civil Service System. However, as discussed below, the ALJ agrees with Petitioner's brief that I.C. 14-9-8-14 then provides "for cause" job protection to Petitioner in the form of a public policy exception.

2. For unclassified Civil Service Cases, Indiana follows the at-will employment doctrine. Under this doctrine, "an employee may be dismissed, demoted, disciplined, or transferred for any reason that does not contravene public policy." I.C. 4-15-2.2-24(b), 42. While the public policy exception is narrowly construed, contravention of a statutorily created right or special status fits within said limitations. *Ogden v. Robertson*, 962 N.E.2d 134, 145 (Ind. Ct. App. 2012); see further, *Baker v. Tremco Inc.*, 917 N.E. 2d 650, 653-655 (Ind. 2009); *Meyers v. Meyers Construction*, 861 N.E.2d at 704, 706-707 (Ind. 2007); *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997); *Frampton v. Cent. Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

3. To the degree of ambiguity or conflict between I.C. 14-9-8-14(a) and (b) and I.C. 4-15-2.2[4], the statutes must be viewed in conjunction to discern the appropriate legislative intent and standard of review. These statutes should not be viewed in a vacuum, because that would frustrate the established standards of statutory interpretation and ignore the primary goal of effectuating legislative intent when statutes are unclear or conflicting. See Section I cites.

[4] See also regulations 312 IAC 4-4-5 to 6.

4. *Applicability of Ind. Code 14-9-8-14(a-b):*[5] I.C. 14-9-8-14 states:

> **Discharge, demotion, or suspension**
>
> Sec. 14. (a) the division director may, with the approval of the director, discharge, demote, or temporarily suspend an employee of the division, for cause, after preferring charges in writing.
>
> (b). An employee who is discharged or demoted is entitled to a public hearing before the department if the employee demands a hearing within ten (10) days after receiving notice of the charges. The employee may be represented by counsel.
>
> (c). The findings of the department are final, except that the employee may appeal to the appropriate court.
>
> (d). A probationary employee may be discharged without charges being made and is not entitled to a hearing.
>
> (e). A conservation officer may not be discharged because of political affiliation.
>
> [Effective since about 1995]

5. Going in reverse subparts, the language of I.C. 14-9-8-14(b) is clear and unambiguous on its face. This subpart need not be interpreted by the ALJ. The public hearing entitlement before DNR[6] rather than SEAC in subsection (b) is clearly limited to "[a]n employee who is discharged or demoted …. " The word "suspended" does not appear in the subpart.[7] I.C. 14-9-8-14(b). Petitioner was suspended, not discharged or demoted.

6. Therefore, Petitioner had to appeal to SEAC under I.C. 4-15-2.2 (the Civil Service System) to exhaust administrative remedies in this suspension case. See, *Young v. Indiana Department of Natural Resources*, 789 N.E.2d 550, 558 (Ind. Ct. App. 2003).[8] If subsection(b) is taken at face value, Petitioner could not go through the DNR appeal process under I.C. 14-9-8-14(b) for a suspension.

7. Even if Petitioner could have chosen the DNR appeal process for a suspension, the Petitioner could still choose to come to SEAC under I.C. 4-15-2.2. *Young*; and *Findings of Fact.* The ALJ agrees with Petitioner's brief that there is a potential absurdity if Petitioner is punished for selecting SEAC under these circumstances by ignoring the "for cause" employment protection of DNR conservation officers in I.C. 14-9-8-14(a). At minimum, Petitioner remains the rail selector of a dual administrative appeal track.

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[5] I.C. 14-9-8 is entitled "law enforcement".

[6] 312 IAC 4-4-6 refers the hearing of DNR department proceedings to another related but independent state adjudicative and rule making agency the NRC, the Indiana Natural Resources Commission (NRC). To avoid confusion between many agency acronyms, this opinion refers to DNR and NRC as "DNR appeal process" collectively.

[7] The term "temporarily suspended" appears only in subpart (a) and the title.

[8] Respondent argues *Young* is wrongly decided, but SEAC may not override the Court of Appeals.

8. The limitation on subsection (b)'s reach is clear and does not require an expedition into the legislative intent. Subsection (a) includes suspension and subsection (b) does not include suspension. I.C. 14-9-8-14. It is contrary to the rules of statutory construction, to find that the General Assembly mistakenly omitted a clearly conspicuous type of employment action, suspension, which is listed in the immediately preceding subsection.

9. Meanwhile, I.C. 14-9-8-14(a), quoted supra, is clear upon its face that Petitioner has "for cause" protection against suspensions.

10. *Civil Service System impact.* Under I.C. 4-15-2.2-24(b), an employee in the unclassified service can be disciplined (including suspended) for any reason that does not contravene public policy.[9] However, I.C. 14-9-8-14(a) applies a "for cause" standard to conservation officers. As these statutes create a conflict within the same subject matter, they must be construed together, and the more detailed will prevail. *Lotz v. Hoyt*, 900 N.E.2d 1, 5 (Ind. 2009); *Sanders v. State*, 466 N.E.2d 424, 428 (Ind. 1984).

11. I.C.14-9-8-14 is more detailed, covering just sworn DNR conservation officers, as opposed to a large subset of state employees under the Civil Service System. Specifically, as I.C. 14-9-8-14(a) is more specific it prevails over the general paradigm in I.C. 4-15-2.2-24, 42, applying to many groups of state employees.

12. Furthermore, as the opposing employment standards create ambiguity or conflict in application, the legislative intent of the General Assembly must be examined and given effect. When viewed in conjunction, it is clear the legislature has afforded Petitioner's class of employees – conservation officers – a specific statutory right which requires a suspension be "for cause". I.C. 14-9-8-14(a). The ALJ cannot elect to ignore subsection (a) and apply the at-will doctrine in isolation.

13. Even though Petitioner is an unclassified employee, there is a specific statutory right that provides her with a public policy (at-will) exception in this context. Subsection (a) clearly states: "[t]he division director may … temporarily suspend an employee of the division, for cause, after preferring charges in writing." I.C. 14-9-8-14(a). Again, the language is clear and unambiguous, even when considering the at-will doctrine.

14. It is worth noting that the legislative intent to provide for cause protection to conservation officers is further bolstered because other sworn officers in the Indiana State Police are carved from the Civil Service System. See, I.C. 4-15-2.2-1(7). It is clear the General

[9] Also called the 'at-will' standard.

Assembly intended to provide different employment protections to state law enforcement, which is rational and consistent given the special authority, duties and discretion that law enforcement officers must carry out.

15. There is a strong presumption that the legislature was aware of I.C. 14-9-8-14(a)(1995) when the unclassified public policy (at-will) provisions in the Civil Service System were enacted in July 2011, which is evidence the special status was intentionally preserved. *Wagler v. West Boggs Sewer Dist., Inc.*, 898 N.E.2d 815, 818 (Ind. 2008). Furthermore, I.C. 14-9-8-14(a) survived a legislative clean-up during the intervening 2012 session. Some other similar statutes did not. For instance, former I.C. 13-13-4-2, providing for cause rights to certain IDEM employees, was repealed in 2012.

16. Respondent argues that public policy exceptions are narrowly construed,[10] but the scope is not so narrow as to block a statutorily conferred right. The public policy exception has been extended to acknowledge an exception if clear statutory expression of a right or duty is contravened. *Ogden v. Robertson*, 962 N.E.2d 134, 145 (Ind. Ct. App. 2012); See further, *Baker v. Tremco Inc.*, 917 N.E. 2d 650, 653-655 (Ind. 2009); *Meyers v. Meyers Construction*, 861 N.E.2d at 704, 706-707 (Ind. 2007); *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997); *Frampton v. Cent. Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973); and *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006).

17. As an at-will employee, Petitioner, and other similar conservation officers, are granted the specific statutory right of a "for cause" employment standard and Respondent DNR has a duty to adhere to said standard in this suspension matter.

18. The Indiana Supreme Court instructs to look at substance over form in determining legislative intent and statutory construction. *Moryl v. Ransone, et al*, 2014 Ind. LEXIS 168 (Ind. March 10, 2014). Respondent asks this forum to ignore the substance of I.C. 14-9-8-14 (for cause protection to DNR conservation officers) because Petitioner elected to appeal to SEAC through the unclassified provisions of the Civil Service System. Petitioner's offering to construe I.C. 14-9-8-14 and the Civil Service System (I.C. 4-15-2.2) harmoniously is favored given the rules of statutory construction and accepted. Petitioner has I.C. 14-9-8-14 as a public policy exception to the at-will doctrine.

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[10] Indiana's higher courts explain that judges are not to create new public policy exceptions, but to look to statutory law. *Wior v. Anchor Indus.*, 669 N.E.2d 172 (Ind. 1996). It is legislation that determines if a statutory right shall be provided contrary to the at-will presumption. Here, the General Assembly has done exactly that for those in Petitioner's position by I.C. 14-9-8-14. Respondent's brief argument that I.C. 14-9-8-14 only protects against retaliation for appealing is contrary to the words of the statute, which is broader and provides "for cause" employment protection in general. Retaliation for appealing is prohibited, but the statute does not end there.

19. *Applicability of DNR Regulations* 312 IAC 4-4-5 (Discipline) to 6 (Review of Actions...):

> Sec. 5. The division director [referring to DNR] (or a person designated by the division director) may, for just cause, discharge, demote, or suspend an employee after preferring charges in writing and after the employee is afforded a predisciplinary meeting with the division director (or a person designated by the division director). The division director will normally impose discipline in a progressive manner; however, the division director shall impose the discipline that is appropriate to the seriousness of the misconduct.
>
> Sec. 6. (a) A conservation officer whose employment is terminated or who is demoted, suspended, or otherwise incurs direct pecuniary loss as a result of a final determination by the division director, or a person designated by the division director, may seek administrative review from the commission [here referring to NRC, not SEAC] under IC 4-21.5 and 312 IAC 3-1.
>
> [(b)-(d) omitted]

20. 312 IAC 4-4-5 to 6 support the statute I.C. 14-9-8-14 in showing that conservation officers like Petitioner have "for cause" protection against adverse employment actions, including suspensions.

21. One potential conflict between the regulation and governing statute is that technically 312 IAC 4-4-6 allows a conservation officer to appeal a suspension to the DNR[11]. However, the regulation exceeds the statutory mandate in this regard. I.C. 14-9-8-14(b) does not include suspensions as appealable to the DNR. Even if the regulation were allowed to fill this gap, the language of 312 IAC 4-4-6 is "may" or permissive, allowing Petitioner to appeal to SEAC anyway. See Conclusions of Law above.

22. SEAC's administrative forum is well-equipped to ensure the essence of administrative exhaustion is upheld.[12] The reasons for seeking administrative remedies are well established, and include fixing errors in the administrative process, avoidance of premature litigation and development of an adequate record for further judicial review. *Turner v. City of Evansville*, 740 N.E.2d 860, 862 (Ind. 2001); *Young v. Indiana Department of Natural Resources*, 789 N.E.2d 550, 558 (Ind. App. 2003). In *Young*, court reiterated the reasons for administrative exhaustion and expressly named SEAC as an available avenue of administrative relief for Young, a DNR conservation officer. *Young* at 557.[13]

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[11] Again, technically to the NRC.

[12] Because Petitioner either had to, or could at least, choose SEAC as an administrative exhaustion forum for the suspension challenge the Respondent's judicial economy argument is disfavored.

[13] While *Young* was a termination case, the same logic and reasoning is applicable to this case.

23. *Property/Due Process*[14] *Interest:* A constitutional construction of statutes is always preferred over a constutitonally suspect one. *State v. I.T.*, 2014 Ind. LEXIS 193, 7-8 (Ind. Mar. 12, 2014); *Girl Scouts of Southern Ill. v. Vincennes Ind. Girls, Inc.*, 988 N.E.2d 250, 255 (Ind. 2013).

24. I.C. 14-9-8-14(a) grants a property or due process interest in employment to conservation officers, like Petitioner. This triggers due process concerns in the suspension of employment as opposed to vanilla at-will treatment. See generally, *Darnell Cole v. Milwaukee Area Technical College District, et al.*, 634 F.3d 901, 903-906 (7th Cir. 2011). A "for cause" standard as an exception to the at-will doctrine avoids a potential constitutional issue. It is the favored construction.

25. 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.

V. Order Determining Standard of Review

Petitioner Louthain's proposed standard of review is **GRANTED** in that: Petitioner has a public policy exception to the suspension that, in net effect, requires Respondent to have conducted a "for cause" suspension, otherwise the suspension will be invalid.

As a reminder, telephone status conference remains set at 10:00 a.m. on April 3, 2014.

DATED: March 24, 2014

Aaron R. Raff

Hon. Aaron R. Raff
Chief Administrative Law Judge
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A copy of the foregoing sent to the following:

[14] 5th and 14th Amendments to the United States Constitution.

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