

IDAHO PERSONNEL COMMISSION
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IDAHO PERSONNEL
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IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

DAN WILD,)	
)	
Appellant,)	IPC NO. 18-2
)	
vs.)	DECISION AND ORDER ON
)	PETITION FOR REVIEW
LEWIS-CLARK STATE COLLEGE,)	
)	
)	
Respondent.)	
_____)	

This matter is on petition for review from the June 19, 2018 *Administrative Hearing Officer's Findings of Fact, Conclusions of Law, and Preliminary Order* ("Preliminary Order") of Hearing Officer Marc Lyons ("Hearing Officer") dismissing Appellant Dan Wild's ("Appellant" or "Wild") appeal and upholding the Lewis-Clark State College's ("Respondent" or "LCSC") termination of Appellant from classified service.

The Hearing Officer found that Respondent had met its burden of proof that Appellant failed to meet the performance standards established by LCSC and failed to comply with security policies. Therefore, LCSC had just cause for termination pursuant to IDAPA 15.04.01.190.01(b) ("IPC Rule 190.01.b" - insufficiency, incompetency, or negligence in performing duties, or job performance that fails to meet established performance standards). Appellant timely appealed the Hearing Officer's Preliminary Order by filing Petition for Review on July 19, 2018.

The Idaho Personnel Commission ("Commission") heard oral argument in this matter on September 25, 2020.

**DECISION AND ORDER
ON PETITION FOR REVIEW - 1**

I.

FACTUAL BACKGROUND

The relevant facts are laid out by the Hearing Officer in the Preliminary Order, and a review of the Respondent's Reply Memorandum Re: Appellant's Petition for Review ("LCSC Reply Memorandum"), filed March 18, 2019, also sets forth a detailed recitation of the relevant facts at pp. 1-6 (on to top of p. 7). Based on review of exhibits and the hearing transcript, it is clear the findings of fact are supported by substantial evidence in the record.

While not challenging a majority of the factual findings, Appellant has argued that his supervisor, Campus Security Director Barbara Pierce, has always had a vendetta against him and has made general allegations of retaliation. With respect to the College Place incident set forth at Section IV B, below, Mr. Wild argues he was simply refusing to perform allegedly unlawful acts regarding 4th Amendment federal and state law in the broad realm of search and seizure and right to privacy.

II.

ISSUE

Did LCSC prove by a preponderance of the evidence that there was basis for discipline of Appellant pursuant to IPC Rule 190.01.b.?

III.

STANDARD OF REVIEW

When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. LCSC has the burden to prove cause for discipline by a preponderance of the evidence. IDAPA 15.04.01.201.07. Discipline must be based upon one of the reasons set forth in IDAPA 15.04.01.190.01 ("Rule 190"). Any one violation of Rule 190 supports the level of discipline the state agency decides to enforce. *Idaho Dept. of Health & Welfare v. Arnold*, IPC No. 04-26. If cause for discipline exists, IPC does not have jurisdiction to decide the level of discipline the agency decides to impose.

IV.
DISCUSSION

On June 16, 2016 – approximately eight months after being hired – Appellant was placed on a ninety day performance improvement plan at the direction of LCSC’s then President, J. Anthony Fernandez. Appellant was informed that he must demonstrate immediate improvement in the following areas:

1. Show an ability to fully take control of an incident or emergency situation.
2. Demonstrate “due-care” for the campus community and
3. Demonstrate the ability to put policies and procedures into practice.

Appellant was also specifically informed that:

There must be immediate and sustained improvement, or further action up to and including termination may occur. A decrease in performance after successfully completing the improvement plan may result in disciplinary action up to an including termination without the issuance of another warning or performance improvement plan.

(Respondent’s Exhibits 8 and 9)¹.

Thereafter, Appellant’s performance improved and was mostly acceptable, and he was given a positive performance review by Security Director Barbara Pierce, the Campus Security Director, for the review period ending February 6, 2017. Appellant’s Exhibit C. However, serious performance problems arose thereafter, culminating with two specific incidents that Respondent has relied upon for Appellant’s termination. These are set forth and described in the Notice of Contemplated Action dated 11/3/2017 (“NOCA”). Respondent’s Exhibit 4.

A. July 26, 2017 Clark Hall Incident

As established in the record (again, see Preliminary Order, pp. 3-4) and LCSC

¹ Appellant filed a problem solving request relating to the events of April 9, 2016, and to resolve the request, Appellant’s performance improvement plan does not in any way refer to the events of April 9, 2016 as a basis for the same. Appellant argues it was used as evidence for basis for termination, but it simply was not. It is not in the NOCA, for example, and it was not raised by Respondent at the hearing.

Reply Memorandum, pp. 2-3, for relevant facts), on July 26, 2017, approximately 10:20 p.m., Mr. Wild refused a request by Resident Director (RD) Keaton Trom that he conduct a sweep of Clark Hall. Construction crews had been working on Clark Hall, which is an area known to be frequented by vagrants, and doors and windows had been left open. RD Trom was alone, the only one living in the building at that time during the summer, and was concerned. This was a reasonable request, particularly under the circumstances, but Mr. Wild did not agree. He responded that the request was not reasonable and that it would take a SWAT team to clear the building. Respondent's Exhibit 6.

Mr. Wild failed in performing his job responsibilities in refusing to sweep through Clark Hall. In fact, his refusal contravened several of his job responsibilities: (1) "confronting unauthorized visitors and persons violating college policy"; (2) "search buildings and other areas for intruders or unauthorized persons"; 3) "conduct building searches in regards to suspicious circumstances and activity; 4) "create strong working relationship with Residence Life night employees – RD's and RA's." Appellant's Exhibit C. Appellant's response also violated LCSC Campus Security Department Policy and Procedures: 1) "Officers shall remain vigilant and shall investigate all Security risks and suspicious circumstances and take appropriate corrective action when necessary"; and 2) "Security is contacted for a wide variety of reasons due to our availability after hours. We will render assistance promptly and to the best of our ability with professionalism, courtesy, and respect." Respondent's Exhibit 10.

Mr. Wild has not disputed he did not immediately respond to the RD Trom's request when he was contacted. In fact, he only points out that a different LCSC security officer was the duty officer and it would have been his call to make. Transcript, pp.115-117. Although there is no documentary evidence in the record to substantiate who eventually conducted a security sweep of Clark Hall checked on Clark Hall and when, Security Director Pierce testified that according to Mr. Wild's logs, he did not respond at the time of the request but did do a sweep later that night at his normal time, after midnight, and over two hours after the initial request. Transcript p. 29. The fact remains, substantial evidence exists to support the factual findings that he violated the aforementioned LCSC security officer job responsibilities and policies and procedures.

This conduct constitutes violation of IPC Rule 190.01.b. His job performance was insufficient, at the very least, and certainly failed to meet established performance standards.

B. October 28, 2017 Incident at College Place Residence Hall

The record establishes that on October 28, 2017, a LCSC Resident Advisor called campus security and reported that he had seen someone who looked very drunk walk away from a residence hall room and leave campus. The RA also reported that there was loud music and loud voices coming from the room. Appellant and another security officer responded, but Appellant was the senior officer. When the officers entered the room, they saw eleven individuals, smelled alcohol, and observed numerous bottles of alcohol. They asked the individuals to produce ID. Many of them did produce ID, and many of those who produced ID were under age. Two or three of the individuals claimed that they did not have ID – and Appellant simply told them that they had to leave campus. Respondent's Exhibit 5.

Appellant's conduct in directing the individuals without IDs to leave the campus – without taking names, ages, assessing sobriety, or calling for police assistance -- violated LCSC Campus Security Department Policy and Procedures: 1) "The officers should be conscientious of any actions that could put the campus community or guests in danger. Common sense should always prevail"; 2) "Anyone in possession or consuming alcohol must be able to produce picture ID"; 3) "possession or consumption of alcohol by a person under the age of 21 is also a liquor law violation and the police can be called to issue citations if warranted, especially if the group consists of non-students. If the situation can be handled by Security Officers, a detailed report including all names, ages, and student IDs must be submitted before the end of the Officer's shift"; and 4) "It is crucial that identification is shown. If the person(s) is/are between 18-21 years of age they should not be allowed to leave on their volition. If they do not have a responsible non-drinking friend that can take them home then the police need to be called. If the person is under 18 then a parent or guardian will be called to respond." Respondent's Exhibit 10.

Appellant does not dispute the fact that he violated the above policies. Instead, he claims that he merely refused to perform the allegedly unlawful act of detaining the individuals. Appellant is incorrect on two fronts. First, his report regarding the incident

nowhere states that he let the unidentified individuals go for legal reasons – it merely stated that he told them to leave LCSC and not come back until they had ID. (Exhibit 5, p. 2). And second, nothing in LCSC policy required Appellant to detain the individuals, and Appellant was not terminated for failing to detain the individuals but for his failure to take any action. As explained by Security Director Pierce, Appellant should have tried to persuade the students to produce their IDs, and if that didn't work he should have attempted to coerce them into producing their IDs by threatening to call the police, and if that didn't work, he should have actually called the police. (Transcript p. 37-40). Under no circumstance is a Security Officer to simply let potentially intoxicated persons who refuse to produce IDs leave. (Id.) Doing so was a direct violation of an important LCSC policy, and finding that Mr. Wild failed to perform his job responsibilities in accordance with established performance standards in violation of IPC Rule 190.01.b. is supported in the record.

C. Behavior Response Team Review

Security Director Pierce discussed the July 26, 2017 and October 28, 2017 incidents with the Residence Life Director, Deborah Kolstad. Ms. Kolstad told Security Director Pierce that based on those and other incidents, LCSC's Residence Advisors and Directors did not trust Appellant's actions. (Respondent's Exhibit 4 and Transcript pages 32-34).

Security Director Pierce also discussed the July 26, 2017 and October 28, 2017 incidents with LCSC's Behavioral Response Team (BRT). The BRT consists of the Vice President of Student Affairs, the Security Director, the Residence Life Director, the Human Resources Director, the Student Disability and Counseling Director and the Title IX Coordinator. The BRT's duties include monitoring and reviewing campus security. Based on Appellant's actions – and inactions – the BRT unanimously concluded that retaining Appellant as a security officer would not be consistent with campus security. (Transcript, pp. 41-42).

From there, The NOCA was issued and Mr. Wild provided his response to it and met with LCSC Vice President Todd Kilburn. Ultimately he recommended termination after consideration of Mr. Wild's written and oral response and that recommendation was forwarded to LCSC President J. Anthony Fernandez, who concurred. Mr. Wild was

terminated effective December 15, 2017. These facts are set forth in the Preliminary Order and the LCSC Reply Memorandum, and are supported by exhibits in the record.

V.

CONCLUSION

The Hearing Officer found the LCSC met its burden of proof that Appellant failed to meet performance standards established by LCSC and failed to comply with the Security Policies. The findings and conclusions are supported by substantial and competent evidence in the administrative record. While Mr. Wild alleges that the whole thing is an extended retaliation effort by Security Director Pierce (apparently because Mr. Wild filed several problem solving grievances related to her), it is a general conclusory accusation and LCSC has certainly set forth objective, documented policy violations as the basis for disciplinary action.

Lewis-Clark State College has proven by a preponderance of the evidence that Appellant has failed to meet established performance standards over the course of his employment and had just cause in terminating him from employment pursuant to IPC Rule 190.01.b. The Commission unanimously affirms Respondent's termination of Appellant.

Commissioners Mark Holubar, Nancy Merrill, Sarah E. Griffin, and Amy Manning CONCUR.

VI.

STATEMENT OF APPEAL RIGHTS

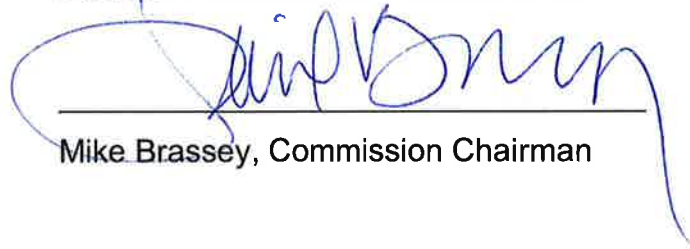
Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers;

- (3) That the findings of fact by the commission do not as a matter of law support the decision.

Idaho Code § 67-5318.

**BY ORDER OF THE
IDAHO PERSONNEL COMMISSION**



Mike Brassey, Commission Chairman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following parties by the method stated below on this 3rd day of November, 2020.

FIRST CLASS MAIL

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Secretary, IPC