

SHERRY DYER, CHAIR  
IDAHO PERSONNEL COMMISSION  
P.O. Box 83720  
Boise, Idaho 83720-0066  
Phone: (208) 334-3345

**IDAHO PERSONNEL COMMISSION**  
**STATE OF IDAHO**

	)	
	)	
Department of Correction,	)	
	)	
Petitioner/Respondent,	)	
	)	IPC NO. 95-21
	)	
vs.	)	<b>DECISION AND ORDER</b>
	)	<b>ON PETITION FOR</b>
Larry Morriss,	)	<b>REVIEW</b>
	)	
Respondent/Appellant.	)	
_____	)	

THIS MATTER CAME ON FOR HEARING ON THE PETITION FOR REVIEW on June 18, 1999. Petitioner/Respondent Department of Correction (DOC) was represented by Ron Christian, Deputy Attorney General; Respondent/Appellant Larry Morriss (Morriss or Petitioner) was represented by Brian B. Benjamin, Esq.. The petition for review involves the hearing officer's decision of March 4, 1997 and the supplemental findings and conclusions on remand dated January 26, 1999. We AFFIRM the hearing officer's decision on remand.

## I.

### **BACKGROUND AND PRIOR PROCEEDINGS**

#### **A. Facts.**

Morriss was a correctional officer at the Idaho Correctional Institution at Orofino (ICIO) when he was dismissed in September 1995. The dismissal came following two separate investigations regarding allegations of Petitioner's involvement in introducing drugs into the institution or knowing about the introduction of drugs into the institution. One investigation concerning Morriss' activities outside ICIO was conducted by a detective in the county sheriff's office. A second investigation concerning Morriss' activities inside ICIO was conducted by DOC staff. As a result of the investigations, Morriss received a notice of contemplated action, which advised him that DOC was contemplating dismissing him. The notice of contemplated action cited Petitioner's involvement in introducing drugs into the institution or knowing about the introduction of drugs into the institution together with his failure to file officer incident reports when inmates asked him to bring drugs into the institution. The notice of dismissal discusses the failure to file reports as a part of the evidence which supported DOC's belief that Morriss was bringing or was involved with bringing contraband into the institution, a violation of IPC Rules 190.01.a (failure to perform the duties) and 190.01.e (insubordination or conduct unbecoming).

Morriss filed a grievance over his dismissal. An impartial review panel upheld the dismissal, noting both a failure to file appropriate reports as well as Morriss' being implicated in drug activity.

#### **B. Appeal to Personnel Commission.**

Morriss appealed his dismissal to IPC. The matter was assigned to hearing officer Bergquist. At the first hearing, DOC presented testimony both regarding the failure to file

officer incident reports and Morriss' alleged involvement in or knowledge of drug smuggling within the institution. The hearing officer issued findings of fact and conclusions of law on March 4, 1997. He found that both allegations were established by a preponderance of the evidence, and upheld DOC's decision to dismiss Morriss.

Morriss filed a petition for review, which was heard by this Commission on August 15, 1997. Morriss raised two issues in his petition for review: (1) whether the hearing officer's findings that Morriss brought or was involved with contraband being brought into the institution was supported by substantial and competent evidence where the evidence consisted of hearsay and the results of polygraph examinations; and (2) whether dismissal was an appropriate discipline for Morriss' failure to write timely and meaningful officer incident reports.

The Decision and Order on Petition for Review, issued October 20, 1997, addressed four issues:

(1) whether the polygraph reports were properly admitted into evidence; (2) whether the Hearing Officer properly relied upon hearsay testimony; (3) whether dismissal was too harsh a sanction; and (4) whether the department met the burden for establishing proper cause, under Rule 190, for disciplinary action.

Id. at 3

The Commission ruled that polygraph results are admissible, and that relevant hearsay is admissible in the context of IPC administrative proceedings. The Commission determined that it lacked sufficient information to answer the remaining two questions concerning the harshness of the discipline and whether DOC met its burden of proof in dismissing Morriss. The Commission remanded the case for the taking of further evidence and directed the hearing officer to make additional findings on four issues:

(1) Whether the polygraph examination was properly administered by a qualified person, including the circumstances surrounding the actual examination of Morriss and the inmate, the meaning and reliability of the polygraph results, and any other necessary foundational testimony and evidence.

(2) The nature of the so-called report or record allegedly destroyed by Morriss, including its purpose, contents and the relevance of its destruction.

(3) Whether the inmates who allegedly made allegations against Morriss, or otherwise named Morriss in the context of the underlying investigations, can provide testimony or evidence to support the hearsay statements made by the DOC witnesses and/or contained in the investigative reports.

(4) Whether contraband or illegal drugs were ever found at the institution or in the possession of Morriss in the context of the underlying investigations.

Id at 4.

A hearing on remand was held on June 16, 1998. DOC presented foundational evidence regarding the polygraph exam. DOC demonstrated that the polygrapher was properly certified and had substantial experience. The polygrapher testified that the tests were conducted in conformity with standard testing protocols and that the equipment was properly calibrated. Because DOC failed to disclose raw polygraph data to Morriss in a timely fashion, Morriss was unable to have the results reviewed by his own expert.

Additional testimony was offered about the notebook Morriss kept and discarded after the allegations against him came to light, but it provided little new information.

DOC declined, for policy reasons, to present the testimony of any of the inmates who had made allegations against Morriss.

Finally, there was additional evidence presented on the alleged connections between Morriss and illegal drugs.

The hearing officer issued supplemental findings and conclusions on January 26, 1999. He determined that the reliability of the polygraph examinations was not adequately

resolved because of the failure of DOC to provide timely copies of the raw test data to Morriss for review by an independent expert. The hearing officer also found that Morriss threw away his notebook before he was placed on administrative leave. The hearing officer found that, absent testimony from the inmates who made allegations against Morriss, their credibility could not be tested. DOC put on a witness who was intended to corroborate the inmate's stories. The testimony did provide independent corroboration of some, but not all of the inmates' allegations, but provided no corroboration of any of the inmates' allegations against Morriss.

Finally, the hearing officer found that no drugs were ever found on Morriss, in his possession, at his home, in his briefcase or in his locker, and that none of the drugs found at the institution or at the homes of others could be connected in any way to Morriss. Similarly, although the drug problem at the institution declined in 1995, there was no evidence that could establish whether the decline was a result of Morriss' departure, or the fact that visiting privileges of several women found to possess drugs were revoked and the two inmates they were visiting were transferred to another institution.

Based on the supplemental findings, the hearing officer concluded: that DOC's allegation that Morriss either brought contraband into the institution or that he was involved with contraband being brought into the institution *was not* substantiated; that DOC's allegation that Morriss failed to report inmate contacts *was* substantiated; that DOC "failed to prove by a preponderance of the evidence that its disciplinary dismissal of Morriss for either bringing contraband into the institution or being involved with contraband being brought into the institution and for failing to report inmate contacts was for proper cause" (Supplemental Findings of fact, Conclusions of Law, and Order on Remand, p. 7); and that, having failed to prove cause by a preponderance of the evidence, DOC's dismissal of

Morriss for either the contraband issue or the failure to report issue, was not proper under Idaho Code §67-5309(n), and IPC Rules 190.01(a) and (e).

The hearing officer ordered that Morriss be reinstated with back pay and benefits, and went on to find that DOC's dismissal of Morriss was without any reasonable basis in fact or law and awarded Morriss attorney fees and costs.

DOC appealed the supplemental findings and conclusions of the hearing officer, and so, once again, the matter is back before this commission.

## **II.**

### **ISSUES**

- A.** Did the hearing officer err when he consolidated two separate grounds for discipline together in making his initial and supplemental findings and conclusions?
- B.** Did the hearing officer err when he awarded attorney fees and costs to Morriss?

## **III.**

### **STANDARD AND SCOPE OF REVIEW**

The standard and scope of review on disciplinary appeals to the IPC is as follows:

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. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 28.01.01.201.06. That is, the burden of proof is on the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.

On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, transcript,

and briefs submitted by the parties. Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). We exercise free review over issues of law. The Commission may affirm, reverse or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

*Soong v. Idaho Dep't of Health and Welfare*, IPC No. 94-03 (February 21, 1996), *aff'd* 132 Idaho 166, 968 P.2d 261 (Ct. App. 1998) (footnote omitted).

#### IV.

#### ANALYSIS

##### A. Preliminary Matters

This matter is before us for a second time with an admittedly convoluted history. No doubt the tortuous path that brought this case back to this commission is due, at least in part, to our own lack of clarity in setting forth the reasoning behind our initial decision to remand.

One of the fundamental issues that has arisen as a result of the posture of this matter pertains to the initial grounds for Morriss' dismissal. DOC contends that it dismissed Morriss for *two* reasons: (1) for failing to file reports (a violation of DOC Field Memorandum I.105.03.1); and (2) for being involved with or having knowledge of, the introduction of contraband into ICIO (a violation of DOC Policy 217-A). DOC notes that on remand, the only issues pertained to the second cause. Since Morriss admitted that he failed to file timely reports, DOC questions why the matter was remanded at all, contending that the hearing officer's decision upholding Morriss' dismissal should have been affirmed. Morriss, on the other hand, contends that there was only one basis for his dismissal—the allegation that he was involved with or had knowledge of the introduction of drugs into the

institution. Because resolving this issue is fundamental to resolving this case, we will address it first.

**B. Basis for Discipline of Morriss**

Our review of the entire record in this matter leads us to the conclusion that there was really only one basis on which DOC relied in imposing discipline on Morriss—his alleged involvement with or knowledge of the introduction of drugs into ICIO. We are led to this conclusion for several reasons. First, the failure to file reports was only discovered as a result of the investigation into Morriss' alleged involvement with drugs in the institution. It appears to us that the issue of filing reports was actually offered in support of the DOC's contention that Morriss was involved with drugs, and only became a basis for discipline when the case against Morriss vis a vis contraband began to fall apart. Finally, even if the failure to file reports was a proper cause for dismissal standing alone, we do not believe that DOC proved that Morriss' failure to file reports was in fact a violation of the DOC policy.

This Commission addressed a similar issue of violation of a comparable field memorandum requiring officer reports in the matter of *Anderson v. Idaho Dep't of Correction*, IPC No. 96-11 (July 2, 1998), 1998 IPC Reporter 66, 80. As in *Anderson*, there was testimony that the field memorandum left much to the judgment of an officer in determining whether an incident was serious enough to require reporting. As in *Anderson*, there was testimony that the kind of comments inmates directed at Morriss were so commonplace that they would not normally be reported pursuant to the field memorandum. In light of the evidence presented, we do not believe that DOC alleged two independent grounds for Morriss' dismissal. Even assuming, for purposes of argument, that two bases were alleged, we do not believe that DOC proved that Morriss' failure to file officer incident reports was a violation of the field memorandum.

Thus, we are left with what we believe to be the sole reason for Morriss' dismissal—DOC's conviction that he was involved with or had knowledge of the introduction of drugs into ICIO. We agree that the hearing officer's handling of the conclusions of law led to come confusion regarding the cause or causes for the discipline. However, since we find that only the allegations regarding involvement with or knowledge of drugs in the institution remain at issue, it is unnecessary to determine whether the hearing officer erred by combining two causes in his conclusions.

We initially remanded this case because we had serious questions about the evidence upon which DOC relied in making its decision to dismiss Morriss. We will discuss each issue in turn.

### **C. Issues on Remand**

#### **1. *The Polygraph***

At the hearing on remand, DOC presented sufficient evidence to lay a foundation for the validity of the polygraph examination administered to Morriss. The test was administered by a certified polygrapher with a number of years of experience. The polygrapher testified that the examinations were administered according to proper and established standards with properly calibrated equipment. The polygrapher admitted that there remain differences in the scientific community regarding the reliability of polygraph results. The testimony of the polygrapher was uncontested.

The hearing officer determined, however, that the reliability (and therefore admissibility) of the polygraph results in this matter *remained unresolved*. He reached this conclusion because Morriss did not receive the raw data on which the polygrapher's opinion was based until five days before the hearing despite repeated requests dating from January 1998. Without the raw data, Morriss was unable to have the results reviewed by an

independent expert. Without such a review, Morriss was left with no way to dispute the validity or reliability of his test result. We believe that a properly administered polygraph examination may be admissible in matters before this Commission when its reliability has been established. We do not believe that the Commission should admit polygraph evidence in a personnel hearing without a thorough airing of the test's validity and reliability in the particular case at issue. Since no such airing occurred in this matter, we believe that the hearing officer was correct in finding that the issue of the reliability of the polygraph examinations was not resolved. DOC has the burden of proof on this issue, and absent proof of reliability by a preponderance of the evidence, the polygraph test results should be excluded.

## ***2. Destruction of Records***

Morriss was never charged with failing to cooperate in an investigation or with hampering an investigation by destroying relevant documents. On remand we identified this issue not because it might be an independent basis for discipline, but rather because Morriss' handling of possibly probative evidence could be relevant in deciding the primary issue

The hearing officer determined that Morriss threw the notebook away *before* he was put on leave with pay. Such timing suggests an innocent and routine action. The testimony at the remand hearing directly contradicts the finding regarding timing. Morriss stated twice in his testimony that he discarded the notebook the day he was placed on administrative leave. DOC makes much of this error, noting that by the time the notebook was disposed of, Morriss had already been subject to search, and was well aware of the charges against him. The timing of Morriss' actions certainly puts a different slant on Morriss' motivation.

Even after the remand we don't know what was in the notebook, or the circumstances under which it went out of existence. The hearing officer's finding was clearly

in error regarding the timing of the notebook's demise. The remand shed little light on the issue. The notebook could have either implicated or exonerated Morriss. But it is gone, we're still not sure what was in it, and it neither helps nor hurts either party in absentia.

### **3. *Credibility and Reliability of Hearsay Testimony***

As the Commission correctly noted in its first Decision and Order in this matter, *relevant* hearsay is admissible in the context of IPC hearings. IRAP 600, IPC Rule 201.01. The question is whether the hearsay evidence “is of a type commonly relied upon by prudent persons in the conduct of their affairs.” *Id.* If the hearsay meets that requirement, it is *admissible*. Once hearsay testimony has been admitted, then one can look to the weight to be accorded the testimony—its credibility. It was the credibility of the inmate hearsay that was at issue on remand. DOC chose not to produce any of the inmates who made allegations about Morriss' involvement with illegal drugs, so the credibility of the hearsay testimony could not be tested.

DOC did endeavor to corroborate the hearsay testimony through the use of another witness, Detective Carlock. Carlock was a narcotics detective for the Clearwater County Sheriff's Office. He was the detective who investigated the allegations of inmate Spry regarding drugs being smuggled into the institution for other inmates, an incident that everyone agrees had nothing to do with Morriss. Detective Carlock was able to establish the validity of the information that Spry provided that three women were or had been smuggling drugs into the institution when they visited their inmate acquaintances. Detective Carlock was also asked by DOC to investigate inmate Spry's allegations that Morriss was receiving drugs at a post office box in Cottonwood, that the drugs were being shipped there by an individual in Southern Idaho, and that Morriss was introducing the drugs into the institution. Carlock testified at the remand hearing that he was not able to validate *any* of Spry's claims

regarding Morriss, that inmates often fabricate such claims, and that he could find *nothing* to connect Morriss with contraband in the institution. Nevertheless, Detective Carlock maintained the opinion that Morriss was being untruthful.

We believe the hearing officer was correct in his finding that DOC had not established the credibility of inmate Spry's allegations against Morriss. Inmate Spry's allegations against Morriss initially had some credibility with DOC because of the accuracy of his information regarding other drug smuggling incidents. But none of inmate Spry's allegations against Morriss could be verified. The use of Detective Carlock to buttress inmate Spry's credibility failed when the detective admitted that he could not verify any of the information Spry provided regarding Morriss. Detective Carlock's feeling or opinion that Morriss was untruthful should not be the basis of vesting inmate Spry with credibility. Under the circumstances, it would appear fundamental that Morriss should have the opportunity to test the credibility of inmate Spry. DOC chose to deny Morriss that opportunity at the remand hearing, knowing the possible consequences of its decision.

In summary, while the hearsay testimony from inmate Spry was admissible, it lacked sufficient credibility upon which to base a disciplinary action.

#### **4. *Connection Between Drugs at ICIO and Morriss***

As discussed in the previous section, the evidence adduced at the remand hearing confirmed that the drugs found at ICIO and the homes of institutional visitors could not be connected to CO Morriss. Neither could DOC connect the reduction in the drug problem at ICIO with the departure of Morriss, since it coincided with the departure of two inmates who were receiving drugs and the revocation of visiting privileges of women who were visiting the problem inmates.

**D. Hearing Officer's Findings and Conclusions.**

At the conclusion of the remand hearing, the hearing officer amended his conclusions of law, and determined that DOC had not met its burden to prove proper cause for the dismissal of Morriss. As pointed out by DOC in its briefing, the hearing officer reversed himself on the issue of Morriss' failure to file reports. Since the filing of reports was not an issue on remand, there was no basis to support such a reversal. In fact, as DOC is careful to point out, the hearing officer's conclusions on remand are internally inconsistent. Conclusion of Law C specifically states that the failure to report was supported by substantial competent evidence. Conclusions of Law D and E then state that DOC failed to prove either of the two grounds for dismissal and therefore dismissal was improper. For the reasons discussed previously, we do not believe that the alleged failure to file reports is a basis for discipline in this case. For that reason, we believe that the hearing officer erred in his Supplemental Conclusion of Law C.

**E. Attorney Fees and Costs.**

We believe the hearing officer was correct in determining that DOC's dismissal of Morriss for involvement with or knowledge of smuggling drugs into ICIO had no reasonable basis in fact or law. It appears that DOC dismissed Morriss based on nothing more than a county detective's belief that Morriss was untruthful when there was no evidence or credible testimony connecting Morriss with contraband in the institution. We do not consider DOC's action to be reasonable in light of the facts as found by the hearing officer.

V.

**CONCLUSION**

For the reasons stated above, we affirm the hearing Officer's Supplemental Conclusions Of Law A, B, and D through I that DOC failed to establish, by a preponderance of the evidence, that Morriss was involved with or had knowledge of the introduction of illegal drugs into ICIO. The hearing officer's findings were supported by substantial competent evidence, and were essentially unchallenged.

We overturn the hearing officer's Supplemental Conclusion Of Law C for the reasons that it was not an issue on remand, the record on remand provided nothing by way of support for a reversal on this issue, and finally, because we do not believe that failing to file reports, as admitted by Morriss, was an independent basis for discipline, or constituted a violation of the DOC field memorandum.

We uphold the hearing officer's award of attorney fees and costs, and award attorney fees and costs on the petition for review.

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.

DATED this 9th day of August, 1999.

BY ORDER OF THE  
IDAHO PERSONNEL COMMISSION

/s/  
Sherry Dyer, Chair

/s/  
Peter Boyd

/s/  
Ken Wieneke

/s/  
Don Miller

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the Decision and Order on Petition for Review in *Dep't of Correction v. Morriss*, IPC No. 95-21, was delivered to the following parties by the method stated below on the 9th day of August, 1999.

**FIRST CLASS MAIL**

Brian Benjamin  
Randall Blake & Cox PA  
1106 Idaho Street  
PO Box 446  
Lewiston ID 83501

Ken Bergquist  
Hearing Officer  
910 Main Street  
PO Box 1775  
Boise ID 83701

**STATEHOUSE MAIL**

Ron Christian  
Deputy Attorney General  
Civil Litigation Division  
Office of the Attorney General  
Statehouse Mail

\_\_\_\_\_/s/\_\_\_\_\_  
Val Rodriguez