

IDAHO PERSONNEL COMMISSION  
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**IDAHO PERSONNEL COMMISSION**

**STATE OF IDAHO**

STEPHEN SICKLES,	)	
	)	
	)	
Petitioner/Appellant,	)	IPC NO. 04-15
	)	
vs.	)	DECISION AND ORDER ON
	)	PETITION FOR REVIEW
IDAHO DEPARTMENT OF LABOR,	)	
	)	
Respondent.	)	
_____	)	

THIS MATTER CAME FOR HEARING ON PETITION FOR REVIEW on April 26, 2005. Appellant Stephen Sickles (“Appellant”) represented himself pro se. Respondent Idaho Department of Commerce and Labor (“IDCL”) was represented by Cheri Bush. After a hearing on the matter, Hearing Officer Heidi Fisher (“Hearing Officer”) upheld IDCL’s termination of Appellant. **WE AFFIRM.**

**I.**

**BACKGROUND AND PRIOR PROCEEDINGS**

**A. Facts**

The Hearing Officer set forth detailed findings of fact that Appellant has not disputed. Appellant was hired by IDCL (then, just the Idaho Department of Labor), in March 1999 as an

IT Information Systems Technician. Appellant's work was in four of the Department's local offices in the northern part of Idaho, Region II.

In each of the performance plans from March 1, 1999, to March 2004, Appellant signed an acknowledgement that he understood the key job assignments, performance standards, minimum requirements and goals of his position. Each of the plans also required Appellant to understand, implement, and enforce IDCL standards and policies relating to PCs and LANs. Appellant was to assist all IDCL personnel in properly using PC and LAN equipment and he was to maintain a credible professional profile and posture. Appellant admits he was aware of IDCL computer security policies including No. 2660, Exhibit 4 which requires all IDCL employees to not share passwords or display passwords anywhere they may be easily accessed by someone else, and to report any potential breaches in security.

Appellant's performance plan/evaluation effective March 6, 2001, through March 23, 2002 rated him as "does not achieve performance expectations." Appellant was advised by his supervisor, Leonard Denton, that he was slower than he should be and he excessively relied on other technicians in order to complete his tasks. Exhibit I, D, p. 7 (Supervisory Notes). Appellant had been receiving extensive training/counseling throughout the year and still was not able to perform to standards on a consistent, reliable basis; his performance over the period is characterized by supervisor Denton as a "roller coaster." Id. at p. 6.

On January 30, 2002, Appellant was given a "letter of counseling" from his supervisor, Denton. Exhibit 1, AA. The reason the memorandum was given to Appellant was for excessive personal use of State equipment. Appellant admits he had used the State cell phone to check his voice mail while on vacation. He admits he had used the Department modem connection from

his home during non-work hours. Appellant neglected to disconnect the modem when he was done, resulting in prolonged connections and substantial internet charges.

The March 6, 2001 - March 23, 2002, performance plan/evaluation was followed by two sixty-day evaluation periods (3/23/02 - 5/15/02 and 5/16/02 - 7/16/02). These evaluations (Exhibits 1, E and F) rate Appellant as "achieves performance expectations." They recite improvement in Appellant's performance in accomplishment of key job responsibilities, but also note supervisor Denton's concern about whether the improvements and performance level will be sustained "without intensive management involvement or oversight" in light of past history. Exhibit 1, E, p. 6. Appellant's next performance plan/evaluation was for the period of July 15, 2002, through January 15, 2003. Exhibit 1, G. Again, Appellant was rated "achieves performance expectations." Improvements in Appellant's interpersonal skills and the timeliness, quantity and quality of his work are recited by supervisor Denton and, overall, this performance evaluation was "satisfactory." However, it is apparent from the evaluation that failure to sustain the improvements would cause Appellant's performance rating to slip below adequate. Id., pp.7-8. Finally, Appellant's annual performance evaluation ending January 15, 2004 rated him as "achieves performance expectations," although supervisor Denton notes ongoing deficiencies in Appellant's remedy tickets completion. Exhibit 1, H.

On June 26, 2003, Appellant assisted Jeff Klein, IT Network Analyst Senior, via cell phone, to resolve some critical problems with the router located at the Lewiston local office. Klein gave Appellant detailed instructions on what he needed to do to resolve the problems. The repair took extra time because Appellant unplugged the T-1 line and did not discover the error until the steps to correct the router problems were not effective after at least two attempts. Appellant has admitted he wrote down the detailed instructions on a piece of paper during the

course of the repair and taped this paper to the outside of the server cage, in case he needed to refer to the instructions later in the process. The notes included complicated user names and passwords in addition to all steps to access all computer equipment statewide. The server cage was not in a secure location and was accessible to any persons who went to the basement, which included local office state employees and non-state employees, such as Qwest telephone technicians. There was no reason for Appellant to use the information again after the repair was completed.

On March 30, 2004, the paper with the detailed instructions, user names and passwords, was discovered on the outside of the server cage by Jake Meissner, IT Network Analyst, and Kelly Dooms, IT Network Analyst, who were working in the Lewiston office. Meissner immediately removed the paper and the two men attempted to contact Appellant, but he could not be located. After discovery of the posting of Appellant's instructions in an unsecured area, Appellant was placed on paid administrative leave pending an investigation. IDCL personnel had to expend numerous man-hours to protect against the potential damage that could result from such a breach of security.

Appellant admitted to his supervisor Denton, that he had taped the paper to the outside of the server cage and that it had been there for nine months. Appellant also admitted to Eric Beck, Chief of the Information Systems Bureau, and John McAllister, Deputy Director of IDCL, that he had taped the paper on the outside of the server cage; he apologized for causing a "security hole" by doing so. Appellant made the same admissions and apology at the hearing of November 4, 2004.

Appellant has not disputed the facts in this matter. In fact, according to Appellant's own estimation of his employment performance at Region II, as reflected in his responses to

performance evaluations and his testimony, he enjoyed his work for the Department and wanted to perform up to expectations; he endeavored to improve his performance and exhibited positive qualities, including good customer relations. He attributes his admitted errors to mistake, misjudgment or accident, and not wrongful intent. As stated herein, he even admits his actions in taping the detailed instructions to the outside of the server cage and leaving them there for nine months were serious breaches of security and that the Department can discipline him for doing so.

On June 7, 2004, Respondent discharged Appellant for violations of Idaho Code § 67-5309(n)(1)(2),(5) and (7) and corresponding DHR Rule 190.01.a, b, e, and g(IDAPA 15.04.01.190.01.a, b, e and g).

**B. Appeal to Personnel Commission.**

Appellant filed a timely appeal to the IPC on July 6, 2004. The matter was assigned to Hearing Officer Heidi L. Fisher, and the appeal was heard on November 4, 2004. Thereafter, the Hearing Officer issued her December 17, 2004 Findings of Fact, Conclusions of Law and Preliminary Order in which she determined that IDCL established proper cause for the imposition of discipline on Appellant, by a preponderance of the evidence. Namely, the Hearing Officer found, after consideration of all the evidence (testimony and exhibits) that IDCL proved cause for discipline that occurred during Appellant's employment under I.C. § 67-5309(n)(1), (2), (5) & (7) and IDAPA 15.04.01.190.01.a., b., e. & g. Appellant filed a timely Petition for Review on January 13, 2005. His position has consistently been that he should not have been fired but rather subjected to lesser discipline. He seeks reinstatement and lost wages.

## II.

### ISSUE

Did IDCL prove by a preponderance of the evidence that Appellant violated Idaho Code § 67-5309(n)(1), (2), (5) & (7) and IDAPA 28.01.01.190.a.,b.,e. & g?

## III.

### STANDARD OF REVIEW

The standard of review on disciplinary appeals to the Commission 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 29.01.01.201.06. 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 Department of Welfare*, IPC No. 94-03 (February 21, 1996), *aff'd*, 132 Idaho 166, 968 P.2d 261 (Ct. App. 1998).

## IV.

### DISCUSSION

#### **Proof of Cause for Discipline**

The question before the Commission is whether IDCL established proper cause for Appellant's termination by a preponderance of the evidence and whether the Hearing

Officer's findings of fact and conclusions of law are supported by substantial competent evidence.

The Hearing Officer rendered detailed findings of fact, reviewing the evidence, including testimony and exhibits introduced in support of Appellant's misconduct. The Hearing Officer determined there was sufficient evidence to support Appellant's dismissal. Specifically, the Hearing Officer found that the following causes for imposition of discipline occurred during Appellant's employment: Appellant's private use of the State cell phone and internet connection constituted cause under Idaho Code § 67-5309(n)(7) and IDAPA 15.04.01.190.01.g. (careless, negligent, or improper use or unlawful conversion of state property, equipment or funds). Appellant's failure to maintain the security of the router instructions and passwords constituted cause under Idaho Code § 67-5309(n)(2) and IDAPA 15.04.01.190.01.b. (inefficiency, incompetency, or negligence in the performing duties); and that both of the above constituted cause under Idaho Code § 67-5309(n)(1) and IDAPA 15.04.01.190.01.a, e. (failure to perform the duties and carry out the obligations imposed by rules of the department (IDCL); insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department). These specific occurrences coupled with Appellant's job performance over the course of his employment, as recorded in the series of evaluations cited above, reflect a work history of failure to maintain a reliable standard of performance by Appellant of his job duties and obligations, constituting cause under Idaho Code § 67-5309(n)(1), (2) and IDAPA 15.04.01.190.01.a, b., as identified above, as well.

The Commission has reviewed the record including the submitted briefs of the parties<sup>1</sup> on petition for review and finds that there is ample substantial, competent evidence to support the Hearing Officer's findings of fact and conclusions of law.

In fact, as mentioned above, Appellant's main thrust in pursuing this appeal is that termination is too harsh and that he should have been subjected to lesser discipline. He has admitted, for example, that his actions surrounding the taping of the detailed instructions to the outside of the server cage and leaving them there for nine months constitute a serious breach of security and that IDCL can discipline him for doing so. He admits he was aware of IDCL computer security policies (2660, Exhibit 4) that require all IDCL employees to not share passwords or display passwords anywhere they may be easily accessed by someone else, and to report any potential breaches in security. Certainly, Appellant's actions constituted negligence in performance of his duties under I.C. § 67-5309(n)(2) and IDAPA 15.04.01.190.01.b.

Further, even if he did so with "clear conscience" (*Appellant's Memorandum on Petition for Review*, p.3), Appellant's admitted use of his cell phone to check voice mail while on vacation and his admitted use of the IDCL modem connection from his home during non-work hours (whereupon he neglected to disconnect it when finished resulting in prolonged connections and substantial internet charges to IDCL) constituted improper use of state property and equipment pursuant to I.C. § 67-5309(n)(7) and IDAPA 15.04.01.190.01.g. This, combined with Appellant's job performance over the course of his employment, as recorded in the series of

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<sup>1</sup> In its brief on petition for review, Respondent argued that Appellant's brief should be stricken because it was not timely filed. Appellant's brief was due February 18, 2005. On February 16, 2005, Appellant called DHR asking when his brief was due and he was informed that it was due by 5:00 p.m. on February 18, 2005, but that if he mailed the brief by that time, that would be acceptable. Appellant's brief was received and filed February 22, 2005 and hand-delivered to Respondent's counsel that same day. Respondent filed its brief March 2, 2005. Based on these facts and there being no evidence of any prejudice to Respondent, Appellant's brief was considered and was not stricken. However, the Commission disregarded new arguments raised by Appellant in said brief based on facts that were not presented to the Hearing Officer below. Factual allegations not raised before the hearing officer cannot be considered by the Commission on petition for review. IDAPA 15.04.01.202.03. Therefore, the Commission did not consider Appellant's arguments in his brief concerning denial of unemployment benefits (p. 4) or allegations of disparate treatment- others not terminated for doing more serious things (p. 5).

evaluations cited above, reflect a work history of failure to maintain a reliable standard of performance concerning Appellant's job duties and obligations, and this failure constituted proper cause under I.C. § 67-5309(n)(1),(2) and IDAPA 15.04.01.190.01.a., b.

Appellant presented evidence that he had satisfactory performance evaluations and felt he was a solid worker during his six (6) years of employment with IDCL. However, the fact remains that he still admitted to actions discussed above, attributing these errors to mistake, misjudgment, accident rather than any wrongful intent and maintains the position that a "lesser disciplinary action should have been taken instead of a termination decision". *Appellant's Memorandum on Petition for Review*, p. 6.

As the Hearing Officer clearly indicated in her December 17, 2004 decision, once proper cause has been established for the imposition of discipline, termination of a classified state employee is a permissible disciplinary action. *Findings of Fact, Conclusions of Law and Preliminary Order*, p.6, § 20. There simply is no requirement that prior disciplinary action have occurred or that a lesser type of discipline be imposed before imposition of dismissal for offenses specified under I.C. § 67-5309(n) and IPC Rule 190. *Id.* at p. 7, § 21. The Hearing Officer is correct. The law is clear that once proper cause is proven for discipline under I.C. § 67-5309(n) and IPC Rule 190, the Commission (and its hearing officers) have no authority to second guess the choice of discipline imposed. There is no legal basis for the argument that the discipline is too harsh. The Commission addressed this argument in *Webster v. Department of Health and Welfare*, IPC No. 96-14 (November 14, 1997):

Webster argues that even if grounds for discipline exist, dismissal was inappropriate and excessive under the facts of her case. As specified by statute (Idaho Code § 67-5309(n)) and Rule (IDAPA 28.01.01.190.01), any of the listed can justify dismissal. In this case, as in any other disciplinary matter, DHW had a choice as to the type of discipline it was to impose and it chose dismissal. So long as there is substantial evidence supporting the hearing officer's determination that

DHW proved, by a preponderance of the evidence, that it had 'proper cause' to impose discipline, this Commission will not second guess the department's choice of discipline.

*Webster v. Department of Health and Welfare*, IPC No. 96-14 (Decision and Order on Petition for Review, p. 7-8) (November 14, 1997).

The Commission cannot visit the level of discipline imposed on Appellant by IDCL. IDCL has proven factual basis for the imposition of discipline on Appellant by a preponderance of the evidence and the Hearing Officer's decision is supported by substantial and competent evidence.

#### V.

#### **ATTORNEY FEES**

IDCL requested an award of attorney fees and costs on petition for review in its brief. However, Appellant has not acted without a reasonable basis in fact or law. I.C. § 12-117. While unsuccessful on petition for review, Appellant, in his brief, set forth good faith arguments challenging certain of the Hearing Officer's findings with respect to his misuse of state property as a basis for termination, and overall, the Commission does not find Appellant pursued his petition for review in a frivolous manner. The Commission declines to award any attorney fees and costs on petition for review.

#### VI.

#### **CONCLUSION**

Based upon the foregoing, the Hearing Officer's decision is upheld and IDCL's termination of Appellant is AFFIRMED.

IT IS SO ORDERED.

**VII.**

**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 \_\_\_ day of May, 2005.

BY ORDER OF THE  
IDAHO PERSONNEL COMMISSION

\_\_\_\_\_  
Mike Brassey, Commission Chair

\_\_\_\_\_  
Don Miller, Commissioner

\_\_\_\_\_  
Pete Black, Commissioner

\_\_\_\_\_  
Clarisse Maxwell, Commissioner

\_\_\_\_\_  
John Cowden, Commissioner

**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 \_\_\_\_ day of May, 2005.

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Laurie L. Jilbert  
Secretary to the Idaho Personnel Commission