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IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

MARK HYNDMAN,	)	
	)	
Appellant,	)	IPC NO. 10-04
	)	
vs.	)	DECISION AND ORDER
	)	ON PETITION FOR REVIEW
IDAHO STATE DEPARTMENT OF	)	
AGRICULTURE,	)	
	)	
Respondent.	)	
_____	)	

This matter is on petition for review from the November 9, 2010 decision of Hearing Officer Jean Uranga (hereinafter "Hearing Officer"). After a four-day hearing on August 17-18 and September 7-8, 2010, the Hearing Officer found that the Idaho State Department of Agriculture (hereinafter "ISDA" or "Respondent") had shown by a preponderance of the evidence that proper cause existed to discipline Mark Hyndman (hereinafter "Hyndman" or "Appellant") from classified service. The Hearing Officer also awarded ISDA attorney fees and costs against Hyndman under Idaho Code § 12-117, finding that Hyndman's defenses and appeal are without a reasonable basis in fact or law. *Findings of Fact, Conclusions of Law and Preliminary Order* (November 9, 2010) (hereafter "*Preliminary Order*").

Hyndman petitions for review in disagreement and seeks reinstatement, back pay and back benefits to which he would have been entitled during the period since his dismissal and seeking a reversal of the award of attorney fees and costs.

The Idaho Personnel Commission (hereinafter "IPC" or "Commission") heard oral argument in this matter on May 6, 2011. Robert C. Huntley represented Hyndman. ISDA was represented by Deputy Attorney General Angela Schaer Kaufmann with Deputy Attorney General Tyson K. Nelson, present.

I.

**PROCEDURAL AND FACTUAL BACKGROUND**

**A. Procedural Background**

On December 28, 2009, ISDA issued a Notice of Contemplated Action and Basis and Evidence Relied Upon for Contemplated Action ("NOCA") to Hyndman. Ex. U. In the NOCA, ISDA set forth the grounds for disciplinary action pursuant to the Idaho Code section 67-5309(n) and the Rules of the Division of Human Resources and Idaho Personnel Commission, IDAPA 15.04.01.190.01 ("Rule 190"). Specifically, the NOCA provided that ISDA was contemplating disciplinary action against Hyndman for violations of Rule 190.01.b and 190.01.e.

ISDA set forth two separate reasons Hyndman's performance was inefficient, incompetent, or failed to meet established performance standards in violation of Rule 190.01.b.: (1) Hyndman failed to make adequate progress toward the ISDA goal of obtaining a complete and accurate inventory of animal feeding operations ("AFOs") in Idaho; and (2) Hyndman failed to meet established performance expectations regarding report writing.

ISDA set forth one basis for Hyndman's violation of Rule 190.01.e: On November 30, 2009, at Skaar and Sons Feedlot, Hyndman engaged in insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the agency when he left an ISDA "crib sheet" (discussed in more detail below) with a producer and directed him to complete the form.

ISDA received Hyndman's written response to the NOCA on January 4, 2010. See Ex. 107. On January 14, 2010, ISDA issued a Notice of Dismissal to Hyndman, effective January 15, 2010. See Ex. V. Hyndman appealed to the Idaho Personnel Commission ("IPC"), and the IPC referred this case to Hearing Officer Jean Uranga. ISDA filed a Motion for Summary Judgment, which the Hearing Officer denied due, in part, to untimely late filing of the same just over two weeks before the scheduled evidentiary hearing. *Order Denying Motion for Summary Judgment*. A hearing on the merits was held on August 17-18, and September 7-8, 2010. Dr. Bill Barton, Marv Patten, John Bilderback, and Brian Oakey testified on behalf of ISDA. Hyndman testified on his own behalf, and also presented the testimony of Clyde Huseby and Dr. David Hayes. The telephonic deposition transcript of Dr. Tom Williams was admitted as Exhibit 114.

On November 9, 2010, following post-hearing briefing, the Hearing Officer issued the Preliminary Order in which she denied Appellant's appeal, and awarded costs and attorney fees to ISDA pursuant to Idaho Code § 12-117. ISDA filed its Memorandum of Costs and Attorney Fees and the Affidavit of Angela Schaer Kaufmann on November 24, 2010, seeking attorneys fees in the amount of \$32,362.94 to which Appellant objected and filed a request for hearing on November 30, 2010. In lieu of a hearing,

Appellant filed a Brief in Support of Appellant's Objection to Attorney Fees and Costs on December 9, 2010 and ISDA's filed its Reply Brief Re: Costs and Attorney Fees, along with supporting affidavits on December 10, 2010.

On December 21, 2010, the Hearing Officer issued her *Order on Costs and Attorney's Fees* finding ISDA was entitled to \$20,185.50 in attorney fees and \$52 in costs. On December 13, 2010, Appellant timely filed his Petition for Review on the merits and, after issuance of the *Order on Costs and Attorney's Fees*, filed his Supplemental Petition for Review on December 28, 2010 to include appeal on the issue of whether an award of attorney fees against him under Idaho Code § 12-117 was warranted.

#### **B. Established Facts**

ISDA regulates animal feeding operations under the Beef Cattle Environmental Control Act, Idaho Code § 22-4901 et seq., and the Rules Governing Beef Cattle Animal Feeding Operations, IDAPA 02.04.15.000 et seq. Tr. p. 214; L 14 – p. 215, L. 2. ISDA Agricultural Investigators, commonly called "Livestock Inspectors", have inspection and enforcement responsibility in ISDA's animal health programs and environmental programs, both of which are administered within the Division of Animal Industries. Tr. p. 10, LL. 12-16. Hyndman was an ISDA Livestock Inspector and his duties included inspection responsibilities for small AFOs, medium AFOs and CAFOs<sup>1</sup>. Exhibit B, p. Barton 1; Tr. p. 10, LL. 6-11; p. 514, LL. 12-16; pp. 217-220. At the time of his

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<sup>1</sup> An animal feeding operation ("AFO") is a facility that confines animals for feeding for at least 45 days during a 12-month period, and in the facility no vegetation or crops are present during the normal growing season. See Tr. p. 17, LL. 15-19; p. 215, L. 21—p. 216, l. 2; see also IDAPA 02.04.15.010.03. A small AFO confines less than 300 head of animals, while a medium AFO confines 300 to 900 head of animals. See Tr. p. 216, LL. 3-14. A confined animal feeding operation or concentrated animal feeding operation ("CAFO") is a facility confining 1,000 head or more of animals. See Tr. p. 17, LL. 21-24; p. 216, LL. 3-20.

dismissal, Hyndman's work territory included the following counties: Bonneville, Butte, Custer, Clark, Fremont, Jefferson, Madison, Teton, Lemhi. Tr. p. 608-610.

#### **1. Chain of Command**

There was a clear chain of command for the ISDA animal health and environmental programs during the relevant timeframe. Since April 2007, Brian Oakey has been ISDA's Deputy Director, and in that capacity, he plays a role regarding personnel matters, including employee discipline, as well as setting agency priorities.

Dr. Bill Barton is the Division's Administrator and State Veterinarian, and has been in that position (first as acting, and then permanently) since February 27, 2008. See Tr. p. 4, LL. 18 - 22. Dr. Barton is also the direct supervisor for the animal health aspects of a livestock Inspector's job, and reviews the inspectors' performance on animal health issues. See Tr. p. 50, LL. 20-25; p. 622, LL. 4-18. With the Director's approval, Dr. Barton also sets the priorities for the Division. See Tr. p. 12, L. 20—p. 13, L. 4. Marv Patten has been the Bureau Chief of the Dairy and CAFO Bureau since December 2007, and was the Bureau Chief for the Dairy Bureau for a number of years prior to that. See Tr. p. 138, LL. 20-25. See Tr. pp. 458-59, 481-82.

While Dr. Barton was Hyndman's supervisor for animal health issues, John Bilderback was his supervisor for environmental issues, including inspections of CAFOs and AFOs. Mr. Bilderback reviewed Hyndman's performance as to those issues, including report writing and the AFO inventory process, which is the primary focus involved in this appeal, and described in more detail below. See Tr. p. 53. Mr. Bilderback and Dr. Barton, as Hyndman's supervisors, were responsible for completing and administering Hyndman's performance evaluations, with Dr. Barton (and ISDA

Director Celia Gould) having ultimate authority regarding performance reviews and discipline. Tr. p. 61, L. 13 – 62, L. 14.

Prior to Dr. Barton assuming the role of direct supervisor as to animal health issues (although as Division Administrator, he ultimately supervised all employees), Hyndman's direct supervisors *on animal health issues* were Clyde Huseby and then Dr. David Hayes, each of whom left ISDA. Mr. Huseby supervised the animal health work of livestock inspectors from April 25, 2008, to October 8, 2008. See Ex. B, p. Barton L; Tr. p. 84, LL. 9-10. However, Mr. Huseby testified he did not supervise the environmental responsibilities (for purposes of this appeal, AFO and CAFO inspections) of livestock inspectors. See Tr. p. 338, LL. 6-10.

Following Mr. Huseby's departure, Dr. Hayes supervised the animal health work of livestock inspectors for less than a year, from October 8, 2008, to September 3, 2009. See Ex B, p. Barton L, Tr. p. 84, LL. 11-12. Like Mr. Huseby, Dr. Hayes did not supervise the environmental responsibilities of livestock inspectors. See Tr. p. 392, pp. 1-7. Dr. Hayes' position was eliminated via a reduction in force in September 2008. See Tr. p. 398, L. 17.

## **2. ISDA's AFO and CAFO Inspection Program**

At the hearing, several witnesses testified about animal feeding operations ("AFOs") and confined animal feeding operations ("CAFOs"), and ISDA's statutory responsibility for overseeing those operations. The legislature specifically recognized the great value of animal feeding operations to the State of Idaho, while also acknowledging that there could be adverse environmental impacts from improper waste management pursuant to I.C. § 22-4902, 22-4903 (1)-(3).

In addition to that legislative direction, ISDA (along with the Environmental Protection Agency ("EPA"), the Idaho Cattle Association and the Idaho Department of Environmental Quality ("DEQ")) entered into the Idaho Beef Cattle Environmental Control Memorandum of Understanding ("MOU") in 2001, wherein ISDA agreed to undertake several responsibilities. See Ex. Q; Tr. p. 463, L. 5 – p. 465, L. 7.

In 2003, EPA, sent a letter to ISDA commenting on ISDA's implementation of the MOU. Exhibit R. The EPA was concerned about the quality of the inspection reports being prepared by the ISDA and the slow pace of the inventory. The EPA outlined its concerns with ISDA's beef cattle inspection and compliance program, noting:

- each facility file should have photos of waste handling procedures;
- photos and maps should be provided when there is even a slightest problem noted on an inspection form;
- it was important that files give a reviewer a full understanding of each facility;
- inspection reports did not have enough detail to be of much use in the future;
- sometimes it was difficult to read inspector's hand writing; and
- suggested training for inspectors.

Exhibit R., pp. Oakey 513-515.

In order to fulfill its statutory obligations, and the responsibilities it assumed via the MOU, and because of a the slow pace of inspections being completed, ISDA management placed a high priority on getting the AFO and CAFO inventory and inspections completed, beginning in December 2007. ISDA directed its livestock inspectors conduct complete inspections of CAFOs and AFOs, and fully and accurately document those inspections via written reports. In addition, ISDA undertook an inventory process, designed to obtain a complete picture of the beef cattle CAFOs and AFOs in Idaho.

ISDA also provided ongoing training to Livestock Inspectors. On March 6-7, 2008, ISDA held a training meeting for Livestock Inspectors on the laws and rules for animal feeding operations, inspection requirements, and reporting requirements. Marv Patten also distributed a publication "Producers Compliance Guide for CAFOs, Revised Clean Water Act Regulations for Concentrated Animal Feeding Operations (CAFOs)." Exhibits F, G; Tr. pp. 158-161.

Following that meeting, Mr. Patten reviewed AFO inspection reports prepared by Kelly Mortensen and Mark Hyndman and sent an email to them on April 7, 2008 reminding them they must follow the directives and reporting requirements discussed at the March 6, and 7, 2008 training. Exhibit G. Hyndman's response was that he understood only facilities out of compliance had to receive a full inspection and that facilities in compliance did not need a detailed inspection. *Id.* Mr. Patten advised Hyndman he was mistaken and that it was clearly explained to Hyndman at the March 2008 meeting what was expected.

In the later part of April 2008, Mr. Patten and Mr. Oakey went to Idaho Falls to meet with Hyndman and Mortensen. Mr. Patten and Mr. Oakey were concerned about the resistance coming from Hyndman to their demand that the AFO and CAFO inspections be given a higher priority. The topics of the meeting included ISDA's CAFO inspection program and the AFO inventory and reiteration of ISDA policy at making this a high priority for the agency. Tr. pp. 170-172; 470-473.

On April 25, 2008, Hyndman started a new employee performance period April 25, 2008 through August 31, 2009. Hyndman's employee performance plan for the performance period included six (6) objectives. Exhibit B, pp. Barton 1-9. In May 2008,

ISDA held another training meeting for Livestock Inspectors. During the training meeting, ISDA staff discussed nutrient management and inspection reports. Tr. pp. 173-175. The training handouts included examples of completed inspection forms and site plans. Exhibit H, pp. Patten 90-100. The priority of getting the AFOs and CAFOs inventoried and inspected was again emphasized.

On September 2, 2008, ISDA personnel, including Brian Oakey, Dr. Bill Barton, Marv Patten, and Dr. David Hayes, met with all ISDA Livestock Inspectors during a conference call. Hyndman was a participant in the conference call. See Tr. p. 474, LL. 10-12. During the call, Mr. Oakey directed all Livestock Inspectors to complete a minimum of three (3) new inspections of animal feeding operations per day. See Ex. B, p. Barton 8.; Tr. p. 475. Dr. Barton also sent a follow-up email to all Livestock Inspectors, where he reiterated the direction to Livestock Inspectors that was communicated during the conference call. See Ex. A.

In November 2008, John Bilderback sent an email to the Livestock Inspectors again reminding them what was expected in a timely, complete and accurate inspection. Exhibit I. Hyndman emailed responses to Mr. Bilderback's email again complaining about what they were being requested to do and complaining about the detail that was being requested of the inspectors. *Id.*

In March 2009, Mr. Bilderback distributed the Google Earth Map to the Livestock Inspectors as a tool to complete the AFO inventory. See Tr. p. 229, L. 9 - p. 230, L. 12. He used "pins" to identify possible AFO sites. On March 9, 2009, Mr. Bilderback sent another email to all Livestock Inspectors providing them with additional information on the AFO and CAFO inspections. Exhibit J. In response to that email, Hyndman again

complained about the project and assigned work claiming it was impossible to complete the work requested. *Id.*

On May 5, 2009, ISDA held yet another training meeting for Livestock Inspectors on the requirements for inspections at AFOs and CAFOs. See Tr. pp. 25-26, 177, 234-235. During this meeting, John Bilderback introduced the Beef Cattle Animal Feeding Operations Crib Sheet. Exhibit K, pp. Bilder 3-5. Mr. Bilderback distributed a handout with the crib sheet and examples of completed inspection reports that had previously been distributed during the May 2008 training meeting. Exhibit. K., pp. Bilder 6-16. ISDA revised the crib sheet after the May 2009 training meeting, after receiving feedback from Livestock Inspectors. Exhibits M and N; Tr. pp. 258-260.

On June 5, 2009, after the training meeting in May, Mr. Bilderback sent an email with feedback to Hyndman regarding his inspections reports. In his email, Mr. Bilderback asked Hyndman to obtain the information identified on the crib sheet during his inspections, and Mr. Bilderback provided an additional copy of the crib sheet to Hyndman. Mr. Bilderback reminded Hyndman that his writing was illegible and his spelling incorrect and unacceptable for public documents. Exhibit L; Tr. p. 262, L. 16 - p. 263, L. 15. In fact, Bilderback continued to provide comments to Hyndman on multiple inspection reports, sending emails to him in June. Ex. B, pp. Barton, 83, 85; 108, 123; 134, 136; 317, 320; 337, 339; Tr. pp. 270-276. On July 17, 2009, Mr. Bilderback distributed guidelines on taking photographs to all Livestock Inspectors. Exhibit O.

**3. Hyndman's Performance Review, Performance Improvement Plan and Skaar "Crib Sheet" Incident**

On September 30, 2009, Dr. Barton gave Hyndman his annual employee performance review. See Ex. B. In the review, Hyndman's supervisors reviewed his performance of the six (6) objectives that had previously been communicated to him in April 2008. Dr. Barton reviewed the objectives related to animal health. See Tr. p. 52, L. 21 - p. 53, L. 3. John Bilderback reviewed the objectives related to environmental issues, including implementing the Beef Cattle Environmental Control Act. See Tr. p. 264, LL. 8-14.

The performance evaluation was compiled and set forth as Exhibit B. It is voluminous, comprised of two parts, much of which is provided examples of Hyndman's written inspection reports, contained in Appendix A. Exhibit B establishes Hyndman's reports, with examples included in Appendix A, were poorly done, incomplete, inaccurate and failed to comply with performance standards set by ISDA. Exhibit B, p. Barton 4 (Objective 3).

In addition, Exhibit B establishes Hyndman failed to comply with performance objectives and inventories and inspection of beef cattle animal feeding operations. Exhibit B, p. Barton 5 (Objective 5). Exhibit B, page 8 relates that from May, 2008 to September 2, 2008, Hyndman did not conduct any new AFO inspections in his coverage area. *Id.* at p. Barton 8. During a telephone call on September 2, 2008, all livestock inspectors were directed to conduct at least three new AFO inspections per day. See Ex. B, p. Barton 8.; Tr. p. 475. From September 3, 2008 through December 31, 2008, Hyndman only conducted 27 new AFO inspections. From January 1, 2009 to May 5, 2009, Hyndman only conducted 16 new AFO inspections. Ultimately, Dr. Barton

rated Hyndman's performance as "does not achieve performance standards." See Ex. B, p. Barton 1.

Based on his performance evaluation, Hyndman was placed on a performance improvement plan for sixty (60) days. The performance improvement plan was divided into two (2) periods of thirty (30) days each. Hyndman's performance was reviewed at the end of each thirty (30) day period. On September 30, 2009, Dr. Barton communicated to Hyndman his performance improvement plan, with specific performance objectives, for the first thirty (30) day period, from October 5, 2009 to November 3, 2009 (the "30 Day Review" period). See Ex. B, pp. Barton 11-15.

On November 18, 2009, Dr. Barton communicated to Hyndman his performance review for the 30 Day Review period. Exhibit C, page 453 indicates that Hyndman had been directed to complete sixty-six (66) inspections during the performance period. In his Tracker report, he claimed he had completed twenty-five (25) but he had only actually completed sixteen (16). He also failed to remove the required number of "pins" and there were continuing problems with the quality of his reports submitted during the first thirty (30) day period. Exhibit C, Barton, pp. 455-461. Dr. Barton rated Hyndman's performance as "does not achieve performance standards." Ex. C, p. Barton 452. On the same day, Dr. Barton reiterated to Hyndman his performance improvement plan for the second thirty (30) day period (the "60 Day Review" period). See Ex. C, p. Barton 466-469.

On November 30, 2009, Hyndman went to Louis Skaar and Sons Feedlot in Lewisville, Idaho. See Tr. p. 117, LL. 9-11; p. 118, LL. 5-11. DuWayne Skaar testified that Hyndman gave him a document later identified as a crib sheet. See Tr. p. 118, LL.

16-20; p. 119, L. 20 - p. 120, L. 18; Ex. M. Hyndman told Mr. Skaar that Marv Patten wanted procedures to complete the crib sheet and asked Mr. Skaar to complete the form and provide photographs of his facility. *See id.*; Tr. p. 121, LL. 17-20. Mr. Skaar indicated Hyndman told him that he would return to the facility in five (5) days to collect the completed form and photographs. *Id.* Mr. Skaar later reported his conversation with Hyndman to Dr. Barton. *See* Tr. p. 34, L. 22—p. 36, L. 2. Hyndman testified he dropped the crib sheet off with Mr. Skaar's brother Justin and his son. Tr. p. 566, LL. 5-24.

On December 28, 2009, Dr. Barton communicated to Hyndman his performance review for the 60 Day Review period. Dr. Barton rated Hyndman's performance as "does not achieve performance standards." Ex. D, p. Barton 624. Again, Hyndman failed to meet the established number of inspections which need to be done and continued to have problems with the quality of his reports. Exhibit D, pp. Barton 627, 633, 642-645.

#### **4. Disciplinary Action**

On December 28, 2009, ISDA issued a Notice of Contemplated Action ("NOCA") to Hyndman. *See* Ex. U. The NOCA signed by Brian Oakey, the Deputy Director, stated two grounds under Rule 190 for the contemplated action. First, the NOCA set forth that Hyndman had been inefficient, incompetent or negligent in performing duties or had job performance that failed to meet established performance standards under Rule 190.01.b. The NOCA stated Hyndman's September 30, 2009, performance review identified specific areas where Hyndman had been inefficient and negligent following specific instructions and in performing his job duties. He was placed on a sixty day

improvement plan divided into two thirty (30) day review periods with specific objectives to meet performance standards. Hyndman failed to meet the required performance standards during both of the two designated review periods.

The second basis for the contemplated action set forth in the NOCA was insubordination, conduct unbecoming a state employee and conduct detrimental to good order and discipline in the Department (under Rule 190.01.e.), occurring when Hyndman left the "crib sheet" with a producer and advised that Marv Patten wanted it filled out and that the producer should fill it out. Exhibit U, p Oakey 7. The NOCA stated it was the responsibility of the livestock inspectors, not the producers, to complete and conduct inspections.

On January 4, 2010, ISDA received Hyndman's response to the NOCA. See Ex. 107. On January 14, 2010, ISDA issued a Notice of Dismissal to Hyndman. See Ex. V. Hyndman's dismissal was effective January 15, 2010. See Ex. V, p. Oakey 23. The Notice of Dismissal included a detailed explanation of the grounds and bases for the dismissal. With respect to ISDA's determination that there was inefficiency, incompetency, or negligence in performing duties or job performance that fails to meet established performance standards by Hyndman, the Notice of Dismissal identified a history going back to 2004 related to ongoing and unanswered concerns regarding Hyndman's resistance to change to and to accept new responsibilities. The letter further recites a historical and ongoing concern regarding the thoroughness, accuracy and readability of his reports. The Notice of Dismissal reported a significant amount of resistance by Hyndman to perform the new responsibilities Livestock Inspectors were required to assume after the Idaho Legislature adopted the Beef Cattle Environmental

Control Act in 2000. This Act changed the focus of the Department to add new responsibilities in the environmental area. The Notice of Dismissal related Hyndman had repeatedly failed to honor policy decisions made by management and directions given regarding prioritizing the AFO and CAFO inspections. It was noted his reports continued to have grammatical and spelling errors and were inadequate and, most importantly, did not include required information.

In response to Hyndman's complaint (set for in his response to the NOCA) that he had to travel long distances to perform his work, the Notice of Dismissal noted that many of the livestock facilities were within the same county where Hyndman resided and another significant number were in the county where Hyndman's office was based. He was also dismissed for insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department when he left the "crib sheet" for Producer Skaar to complete. See Exhibit V.

## II.

### ISSUES

- A. Whether ISDA proved, by a preponderance of the evidence, that it had proper cause under Rule 190.01.b. to discipline Mark Hyndman for job performance that was inefficient, incompetent or failed to meet established performance standards?
- B. Whether ISDA proved, by a preponderance of the evidence, that it had proper cause under Rule 190.01.e. to discipline Mark Hyndman for conduct that was insubordinate, unbecoming a state employee or detrimental to good order and discipline in the agency?
- C. Whether ISDA is entitled to costs and to attorney fees pursuant to Idaho Code Section 12-117?

### 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 15.04.01.201.06. 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 15.04.01.190.01, exist by a preponderance of the evidence.

On a petition for review to the Idaho Personnel Commission, the Commission conducts a review of the record, any transcripts submitted, and briefs submitted by the parties. I.C. § 67-5317(1). 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).

Williams v. Idaho Dep't of Correction, IPC Case No. 08-25 (Decision and Order on Petition for Review, August 12, 2010).

### IV.

#### DISCUSSION

#### A. ISDA Proved, By a Preponderance of the Evidence, That It Had Proper Cause to Discipline Hyndman Pursuant to Rule 190.01.b.

##### 1. Hyndman's Written Reports Fell Below Established ISDA Standards

Hyndman was disciplined, in part, pursuant to Rule 190.01.b. That rule provides that an employee may be disciplined for "[i]nefficiency, incompetence, negligence in performing duties, or job performance that fails to meet established performance standards." The Hearing Officer found that "Hyndman has been inefficient, incompetent or negligent in performing his duties and with respect to his refusal to follow the express

direction of his supervisors and in preparing incomplete and inadequate inspection reports." *Preliminary Order*, p. 14. This finding is supported by evidence in the record.

The importance of complete, accurate reporting was clearly emphasized and established at ISDA. At the hearing, Dr. Barton testified:

- A. We utilize the reports on several levels.  
One, to confirm that we are meeting our statutory obligations for the programs and Statutes which are charged with administering;  
We use the reports to determine whether producers are in compliance with State law and rule;  
We use the reports to determine if we can assist the producer in making modifications to their operation which can protect them from future enforcement actions on behalf of EPA or the State;  
And we use the reports as a form of education for the producer in general.

Tr. p. 47, LL. 6 – 17.

The reports are a public record, and are also given to the producer to let him or her know how his facility fared in the inspection; to provide the producer notice of noncompliant areas so they can be corrected; to let the producer know about areas that could be improved to further prevent discharges of waste; and if the producer's facility is completely compliant, to let the producer know that he is doing a great job. See Tr. p. 47, L. 18 – p. 48, L. 23. See also Tr. p. 237, L. 20 – p. 21, L. 10. Therefore, it is imperative that the inspection reports provide a complete picture to the producer, and to anyone else who has not been physically present at the facility. The reports are also used in any necessary legal proceedings to enforce statutes/rules in a case against a producer. Tr. p. 22, LL. 5-22.

ISDA has established that Hyndman's report writing was not in conformance with clearly established and communicated ISDA performance standards, and for an extended period of time. It was not for a lack of training and repeated communication

on what manner and form of written inspection reports are expected from all Livestock Inspectors. The factual record shows there were numerous training and direction meetings for all ISDA Livestock Inspectors concerning the laws, rules, inspection requirements and reporting requirements relating to AFOs and CAFOs. See Section B. 2., pp. 7-10, herein.

In addition, Hyndman was provided with a significant amount of individual feedback, in an effort to help him improve his report writing and succeed. On June 5, 2009, Mr. Bilderback sent an email to Hyndman reminding him to use the crib sheet, attaching an additional copy to the email. Mr. Bilderback also addressed issues related to illegible handwriting and spelling. See Ex. L. Mr. Bilderback continued to provide comments to Hyndman on his inspection reports, sending emails to him in June 2009. See Ex. B, pp. Barton 85, 123, 136, 320, and 339; Tr. pp. 270-276.

That feedback and instruction continued prior to and throughout Hyndman's employee performance period, but without any real improvement. Instead ISDA met with Hyndman's continued resistance to the ISDA objectives. Therefore, Hyndman's performance review was not favorable, as set forth in Exhibit B. Mr. Bilderback explained that he reviewed Hyndman's reports to verify whether all the required information was included in the reports. Tr. p. 264, L. 21 – p. 266, L. 10. Mr. Bilderback identified numerous inspection reports that did not meet ISDA's requirements, and attached the reports to Hyndman employee performance review. See Exhibit B, Appendix A.

There was continued feedback and communication during Hyndman's performance improvement plan period. Contrary to Hyndman representations in

briefing and at oral argument before us, there is credible evidence of continued failures during the performance improvement plan period.

As part of the 30 Day Review period, Mr. Bilderback reviewed Hyndman's reports and provided comments on where the reports failed to meet ISDA's requirements for inspection reports. See Tr. p. 285, LL. 12-25. In fact, Mr. Bilderback prepared a detailed summary of sixteen (16) more of Hyndman's inspection reports completed during the 30 Day Review period, noting where the reports failed to meet ISDA's requirements. See Ex. C, pp. Barton 455-461. Mr. Bilderback reiterated that "Mark's Livestock Waste Inspection Reports still leave many unanswered questions as noted under Objective #2. Mark should follow the 'crib sheet' or the facility information sheet developed by his colleague, John Klimes." Ex. C, p. Barton 463.

In the 60 Day Review period, Mr. Bilderback prepared a detailed review of seven (7) of Hyndman's inspection reports completed during that timeframe. See Ex. D, pp. 627-629, 642-645; Tr. p. 290, L. 15—p. 292, L. 5. Hyndman's reports continued to lack required information, and concluded that Hyndman's reports "all show an inability for Mark to thoroughly and completely capture the information needed in a livestock facility waste inspection, despite repeated instruction." Ex. D, p. Barton 633.

In spite of repeated emphasis on the importance of complete and accurate inspection reports that was communicated in trainings and in feedback on his inspection reports, Hyndman decided not to follow the direction from his supervisors. He asserts requirements for completing reports was a "moving target", he didn't know he had to "report the negative," (Tr. p. 572, LL. 2-4) and that it seemed "redundant" to note when things did not exist. Tr. p. 539, LL. 21-22. However, that subjective perception or

opinion was directly contrary to the repeated and clear direction provided by Mr. Bilderback and others at ISDA. It is simply untenable for Hyndman to argue that did not know he needed to provide full, complete, accurate and readable inspection reports, particularly after the May 2008 training and those that followed.

Hyndman attempts to minimize the insufficiency of his inspection report writing in his argument to the Commission. He implies he was fired for failing "to fill in every blank or inquiry on inspection report forms" and argues there was no evidence where any omission on Hyndman's reports caused pollution or animal waste run-off. See Hyndman's Memorandum, p. 10. These arguments continued at oral argument before us.

Hyndman oversimplifies the matter. Perhaps, from his perspective, he felt the way he wrote his reports was adequate, but it clearly fell short of well-communicated ISDA standards. The allegation that no pollution or waste run-off resulted from Hyndman's inadequate written reports is irrelevant. The evidence clearly establishes Hyndman received multiple trainings and was given multiple opportunities to complete reports with required information and he repeatedly failed to do so. ISDA's concerns were not just failure to fill in blanks, misspellings and bad handwriting. The central problem was a pattern of failing to obtain the required substantive information.

Simply stated, Hyndman's supervisors communicated their expectations, and properly relied on him (and the other livestock inspectors) to provide ISDA with an accurate picture of a livestock facility. Hyndman was the sole link for ISDA in fulfilling its regulatory duties as to knowledge of conditions of livestock facilities. Because Hyndman was the ISDA representative "on the ground" in his territory, it was incumbent

on him to ensure that the information he provided in his written report (including its attachments) would allow someone reading the report to fully understand the facility, its problems, and its successes. That expectation was clearly and repeatedly conveyed to him, as described above. Despite that, the clear and detailed evidence in the record shows that Hyndman did not follow ISDA's requirements for inspection reports. See *generally*, Ex. B, pp. Barton 4-9; 85, 123, 136, 320, and 339; Ex. C, pp. Barton 455-461; Ex. D, pp. 627-629, 642-645; and Ex. L.

This failure, in itself, constitutes grounds for discipline for Rule 190.01.b. ([I]nefficiency, incompetence, negligence in performing duties, or job performance that fails to meet established performance standards).

## **2. Hyndman Failed to Meet the AFO Inventory Requirement**

The AFO inventory was a priority for ISDA starting in December 2007 and early 2008. As the factual record demonstrates, ISDA repeatedly communicated to all Livestock Inspectors that obtaining the inventory was a priority and there was even specific followup with Hyndman when he voiced resistance to this priority. See Section B.2, pp. 6-10, herein.

For the vast majority of the time leading up ISDA's disciplinary decision, Hyndman did not even come close to meeting the AFO inventory goal. From December 2007 until September 2, 2008, a period of approximately eight and one-half months, Hyndman inspected just four (4) new AFOs. See Ex. B, p. Barton 8. After Mr. Oakey's three-a-day inspection directive was released on the conference call, from September 3, 2008 through December 31, 2008, Hyndman inspected only 27 new AFOs. *Id.* From January 1, 2009 to May 5, 2009, Hyndman inspected 16 new AFOs. *Id.*

Hyndman's performance was not even remotely close to satisfactory, or to achieving performance standards. The lack of satisfactory performance continued during the performance improvement plan. During the 30 Day Review period, Hyndman inspected 14 new AFOs. See Ex. C, p. Barton 455. During the 60 Day Review period, Hyndman inspected seven new AFOs. See Ex. D, p. Barton 626.

Hyndman's predominant argument in his defense is that he was singled out and "set up to fail,;" He argues his performance standards were impossible to meet. However, the record in this matter is to the contrary:

- The objectives in Hyndman's April 2008 performance plan, (Ex. B, pp. Barton 2-9) under which he was evaluated in September 2009 were the same as those for every other livestock inspector. See Tr. p. 53, L. 23 -- p. 54, L. 8.
- ISDA's prioritization of the CAFO program, and its requirement that livestock inspectors complete an accurate inventory of CAFOs and AFOs in Idaho, was the priority for every livestock inspector. Tr. p. 13, LL. 7-9, p. 23, LL. 16-24.

This is not a case where an employee was saddled with unachievable goals, given no direction, and left to flounder. The priorities were repeatedly delineated for Hyndman, and were the same for every livestock inspector. Hyndman states in his brief and at oral argument that "there is no evidence in the record that any inspector was able to complete 66 inspections in any 22 day period." Conversely, however, there was almost no evidence presented in the record that any inspector failed to live up to Mr. Oakey's September 2, 2008 mandate of completing at least three (3) new AFO inspections per working day<sup>2</sup>.

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<sup>2</sup> In his testimony at the hearing, Oakey explained he didn't expect inspectors would perform three inventories every single working day, but that he wanted them to average that many. "If they did six in one day and zero the next, I didn't care". Tr. p. 475, LL. 17-24.

The only evidence in the record as to whether other Livestock Inspectors were able to comply with Oakey's "three per day" performance objective, comes from Oakey's testimony at the hearing. Upon questioning from Hyndman's counsel, as to how many new inspections other inspectors completed, Oakey responded: "I don't know how each of them did. I know one inspector did less than Hyndman and that inspector was also put on a performance plan, the same performance plan, and that inspector passed that performance plan and is still on staff". Tr. p. 425, LL. 4-12.

Hyndman has not shown the "three per day" objective was unreasonable. He tried to exaggerate the performance objective, by testifying that the length of time required in completing a CAFO inspection, was 4 hours each. Tr. p. 538, LL. 19-22. Dr. Tom Williams, Hyndman's co-worker, testified to this as well in a telephonic deposition conducted by Hyndman's counsel. But he was describing an initial CAFO inspection. Exhibit 114, pp. 16-18.

The Hearing Officer didn't find this persuasive evidence as to whether the objective was an unreasonable performance objective and nor do we. First, inspecting AFOs, take significantly less time than CAFO's. Hyndman's primary objective was to complete AFO inspections. With advance planning a Livestock Inspector could travel to one area and view several sites on the same day, rather than traveling separately to each site on different days. Further, completing inspections was simply that – there was no requirement to complete the write-up and the site plan in the same day. Tr. p. 453, LL. 7-22. The evidence establishes that many of the sites Hyndman was to cover were within the same county where he resided. Mr. Bilderbeck plainly testified how a

Livestock Inspector could meet the reasonable goal of three AFO inspections per day. Tr. pp. 450-453.

Hyndman also asserts he could not meet the inspection objective in his performance improvement plan because of his duties with the brucellosis outbreak. He asserts Dr. Barton advised him to "forget about the CAFOs and focus on brucellosis." Hyndman Memorandum, p. 24. However, Dr. Barton testified he never made such a statement to Hyndman, knowing full well that Hyndman had requirements to meet in his performance review period. Tr. p. 629, LL. 4-11.

Nonetheless, Hyndman did work on the brucellosis outbreak during his performance plan period. ISDA acknowledged this and gave Hyndman credit for this. Dr. Barton testified that he adjusted and pro-rated the "three per day" goal in light of Hyndman's responsibilities in other areas, and even gave Hyndman credit for new inventories on those facilities he had already visited. Despite those adjustments, Hyndman still failed to meet even the pro-rated numbers. See Tr. p. 286, L. 1 – p. 287, L. 8; p. 627, LL. 8-22.

Finally, in his defense, Hyndman presented testimony from Clyde Huseby and Dr. David Hayes, Hyndman's direct supervisors *on animal health issues*, indicating they were satisfied with Hyndman's work. Each left ISDA after relatively short stints. However, neither were direct supervisors of Hyndman with respect to AFO inspections and reporting. Dr. Tom Williams also testified favorably for Hyndman as his co-worker, particularly with respect to his work on animal health issues, and particularly brucellosis matters. Exhibit 114, p. 11-13. However, Williams did not testify to having any knowledge concerning Hyndman's inspection report writing and AFO inspection rate,

nor did he testify in any way about Hyndman's conduct at the Skaar and Sons Feedlot. We understand why the Hearing Officer gave this testimony no weight.

In summary, ISDA reviewed Hyndman's performance in three separate reviews, covering his job performance from April 25, 2008 through December 2, 2009. In each review his performance failings in the AFO and CAFO inspection inventory are amply documented and supported by evidence in the record. His performance failed to meet reasonable performance standards even before he was placed on the performance improvement plan. Exhibit B., pp. Barton 7-9. Hyndman's failings continued throughout the performance improvement plan period. Exhibits C, D.

This failure, also in itself, constitutes grounds for discipline for Rule 190.01.b. ([i]nefficiency, incompetence, negligence in performing duties, or job performance that fails to meet established performance standards).

**B. ISDA Proved, By a Preponderance of the Evidence, That It Had Proper Cause to Discipline Hyndman Pursuant to Rule 190.01.e.**

ISDA disciplined Hyndman under Rule 190 for "[i]nsubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the agency." Rule 190.01.e. This ground is based on Hyndman's conduct at Louis Skaar and Sons Feedlot ("Skaar Feedlot") on November 30, 2009.

Hyndman went to Louis Skaar and Sons Feedlot on November 30, 2009. See Tr. p. 118, LL. 5-14. DuWayne Skaar, the owner/operator of the feedlot, testified that he spoke with Hyndman at the feedlot. See *id.* According to Mr. Skaar, Hyndman produced a document, later identified as version of the crib sheet, and asked Mr. Skaar to fill out the form. See Tr. p. 118, LL. 16-20; p. 119, LL. 14-19; p. 120, LL. 9-18. Hyndman explained his request by stating that Marv Patten wanted the information filled

out. See Tr. p. 121, LL. 1-9. Hyndman also asked Mr. Skaar to take photographs of his facility. See Tr. p. 121, LL. 13-20. Hyndman said he was returning in five days to pick up the form and photographs.<sup>3</sup> See Tr. p. 122, LL. 2-5. Subsequently, Mr. Skaar contacted Dr. Bill Barton to discuss Hyndman's conduct and request.

Hyndman's conduct on November 30 at Louis Skaar and Sons Feedlot was unbecoming a state employee and detrimental to good order of ISDA under Rule 190.01.e. Livestock inspectors conduct inspections at AFOs and CAFOs. ISDA personnel have directed and trained all livestock inspectors to conduct these inspections. See Exs. H and K; Tr. pp. 25-31; p. 158, L. 15 - p. 160, L. 4; pp. 173-175, 177, 234-235. ISDA specifically trained the livestock inspectors how to use the crib sheet during their inspections. See Tr. pp. 29-31, 238-241. Moreover, it is not the policy or practice of ISDA for livestock producers to conduct inspections of their own facilities. See Tr. p. 242, L. 5 - p. 243, L. 17. In fact, that would defeat the goal of having a neutral inspection. By requesting that Mr. Skaar fill out the crib sheet, Hyndman's conduct on November 30, 2009, did not comport with the training he received from ISDA on using crib sheet during inspections.

Hyndman not only asked Mr. Skaar to complete the crib sheet, but he went even further and asked Mr. Skaar to submit photographs of his facility. See Tr. p. 121, LL. 13-20. ISDA trained livestock inspectors to take photographs during their inspections. See Tr. p. 254, LL. 12-21. Mr. Bilderback trained the livestock inspectors when and how to take photographs. See Ex. O; Tr. p. 256, LL. 16-23. When preparing the site

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<sup>3</sup> While Hyndman testified that he gave the crib sheet to Mr. Skaar's brother, Mr. Skaar testified that did not happen. Mr. Skaar testified he spoke with Hyndman directly. See Tr. p. 118, ll. 5-20; p. 119, ll. 3-8; p. 125, 2-8. Other than this, Hyndman does not dispute what occurred, rather he admits it. Tr. p. 566, LL. 5-22. For purposes of whether there were grounds for discipline, it matters not who he left the crib sheet with. The fact is he did leave the crib sheet with a producer for filling out.

map for inspection reports, the livestock inspectors were required to identify location where they took the photographs. See Ex. O, pp. Bilder 40-41. ISDA's training clearly communicated the responsibility of livestock inspectors to take photographs according to the guidelines. On November 30, 2009, Hyndman inappropriately passed his responsibility for obtaining photographs on to a livestock producer.

During the training meetings and conversations with supervisors, livestock inspectors were never directed to have producers fill out the crib sheet and supply inspection photographs. Hyndman's actions are contrary to training and direction provided by ISDA. When Hyndman asked Mr. Skaar to complete the crib sheet and provide photographs of the feedlot, Hyndman was asking Mr. Skaar to conduct the inspection, gather necessary information, and document the findings. Such activities are exactly what livestock inspectors are trained to do. In other words, Hyndman was asking Mr. Skaar to do his (Hyndman's) work for him.

Dr. Barton explained why it is a problem if livestock producers were to conduct their own inspections, "It's our responsibility to complete the inspections as livestock investigators. There's nothing that allows self-certification on behalf of producers regarding inspections, so they shouldn't be put under that requirement to fill out their own information on inspection reports." Tr. p. 39, LL. 20-24. Mr. Bilderback also testified that producers do not self-certify their compliance with ISDA laws and rules. Mr. Bilderback explained that ISDA administers a "regulatory program" and it is the "inspector's job to fill out the regulatory paperwork." Tr. p. 242, L. 21—p. 243, L.3.

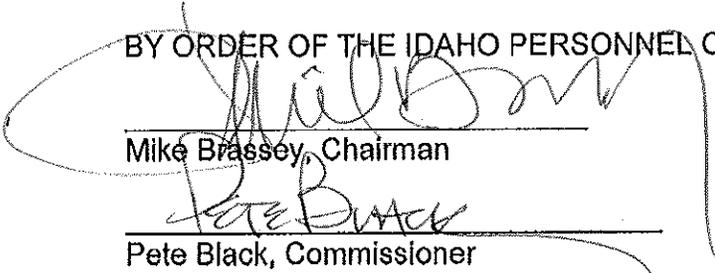
Hyndman's conduct on November 30, 2009, was unbecoming a state employee and conduct detrimental to good order and discipline in the agency. He directed a

producer to complete the work of a livestock inspector, contrary to ISDA training and policy. ISDA has shown by a preponderance of the evidence, that Hyndman's conduct constituted a violation of Rule 190.01.e.

**C. Conclusion**

Upon review of the record and consideration of arguments at oral argument hearing, and based upon our findings above, we find substantial and competent evidence in the record to support ISDA's imposition of discipline on Hyndman. IDOC has proven by a preponderance of the evidence that there is proper cause for Hyndman's termination under Rule 190.01.b. and e. ISDA's termination of Hyndman is upheld.

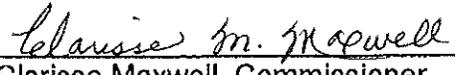
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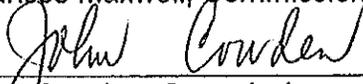
\_\_\_\_\_  
Mike Brassey, Chairman



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Pete Black, Commissioner



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Clarisse Maxwell, Commissioner



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John Cowden, Commissioner



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Evan Frasure, Commissioner

V.

**ATTORNEY FEES AND COSTS**

The Hearing Officer awarded ISDA costs and attorney fees pursuant to IDAPA 15.04.01.201.11 (Rule 201.11) and Idaho Code § 12-117. *Preliminary Order*, p. 15. After briefing, the Hearing Officer conducted the analysis required by Rule 201.12, and reduced the amount of fees requested by ISDA from \$32,362.94 to \$20,185.50, and awarded costs in the amount of \$52. *Order on Costs and Attorney's Fees*. ISDA has not appealed that reduction. Hyndman objects to the award of any attorney fees and costs (whether they are warranted), but has not appealed the Hearing Officer's calculation of the amount of fees and costs, as reduced, which was based upon the Hearing Officer's consideration of the factors set forth in Rule 201.12.

Rule 201.11 requires the Hearing Officer to make findings as to a party's entitlement to attorney fees pursuant to Idaho Code Section 12-117. Section 12-117 provides that attorney fees shall be awarded to the prevailing party in any administrative proceeding, if the administrative tribunal "finds that the nonprevailing party acted without a reasonable basis in fact or law." I.C. § 12-117. Generally, it is understood that a non-prevailing party must have pursued or defended the case frivolously. In fact Black's Law Dictionary defines "frivolous defense" as "[a] defense that has no basis in fact or law", thus, echoing the language in I.C. § 12-117. Black's Law Dictionary (9<sup>th</sup> ed. 2009).

Further guidance is provided by this Commission's recent ruling on the standard. The Commission recently found that Idaho Code § 12-117 requires a showing that a non-prevailing party's claims/defenses are frivolous, unreasonable, groundless or in bad faith. *Idaho Department of Environmental Quality v. Rebecca Goehring*, IPC No. 08-07,

(Decision and Order on Respondent's Motion to Reopen On Issue of Attorney Fees and Costs, July 1, 2010) (citing *Boise Tower Associates, LLC v. Timothy J. Hogland*, 147, Idaho 774, 784, 215 P.3d, 494, 504 (2009)).

There is a reasonable basis for awarding attorney fees and costs to ISDA in this matter. Hyndman's proffered defense to his failure to write and complete inspection reports as required and as repeatedly trained and reminded, has been, in essence, "no harm, no foul": if no discharge resulted from a poor report, then it should not be a problem. Tr. p. 539, LL. 7-22. Hyndman did not deny the reports did not meet ISDA standards. What he did do was attempt to minimize the established deficiencies in his report writing, repeatedly question why they needed to be done as instructed, and complain that it was unnecessary to be so thorough. That argument is unreasonable and irrelevant in nature – ISDA established that the very purpose of complete and accurate reports is to *prevent* problems from occurring, by ensuring that ISDA and the producer have a full picture of the facility and its condition. By having that complete picture, ISDA can work with the producer to fix any problems that might be present, and to encourage producers with good facilities to keep up the good work. See Tr. p. 22, L. 23 – p. 23, L. 12. Incomplete reports serve no one- not the producer, not ISDA, and not the public.

ISDA also provided ample evidence of the many training opportunities provided to all livestock inspectors, as well as the individualized assistance provided to Mr. Hyndman. See *supra*, pp. 12-14. Just because no direct harm resulted from his insufficient report writing does not render meaningless his failure to meet a clearly

established performance objective nor negate proper grounds for discipline under Rule 190.01.b. This assertion is without a reasonable basis in fact or law.

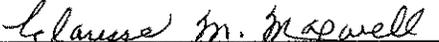
Further, Hyndman's primary defense regarding his failure to comply with the three AFO inspections per day requirement was that it was impossible and was a set up to terminate him. In fact, it is accurate to state this was the crux of Hyndman's defense. Yet, he produced no relevant evidence to support it. All Livestock Inspectors were required to meet this requirement. Hyndman produced no evidence that other livestock inspectors were unable to meet the inventory inspection mandate or that Hyndman was singled out. In fact, Mr. Oakey testified another Livestock Inspector fared worse than Hyndman in meeting the requirement, was placed on the same performance improvement plan, and passed it. He remains on staff. Tr. p. 425, LL. 4-12.

Finally, with respect to Hyndman's conduct at the Louis Skaar and Sons Feedlot, Hyndman provided no viable defense at all. When he testified at the hearing about the incident, he focused on his contention that the producer allegedly disliked the questions on the crib sheet, and asserted that "you've just got to trust [the producer's] records." Tr. p. 566, L. 5 – p. 567, L. 24. This statement bears no relation to any defense to his conduct in providing the crib sheet to Skaar. It's Hyndman's job to do the inspection. As noted above, the producer cannot self-certify, and it is the inspector's duty to fully conduct the investigation. In addition, if Mr. Skaar disliked the questions on the crib sheet, it was Mr. Hyndman's job to educate him. Dr. Barton testified that as ISDA's "front line people," the inspectors are responsible not only for enforcing the applicable statutes and rules, but to educate producers as well. Tr. p. 63, LL. 3 -22.

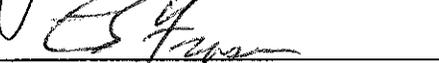
ISDA trained all livestock inspectors, including Hyndman on how to use the crib sheet to fill out inspection reports and how to take photographs for the inspection reports. Tr. pp. 29-31; 238-241; Exhibit O; Tr. p. 256, 16-23. During the training meetings and conversations with supervisors, livestock inspectors were never directed to have producers fill out the crib sheet and supply inspection photographs. Hyndman's actions were contrary to training and direction provided by ISDA. There was simply no reasonable basis in fact or law for Mr. Hyndman's actions at the Skaar feedlot, and his defense of the same.

Based on the foregoing, we adopt and uphold the Hearing Officer's award of attorney fees in the amount of \$20,185.50 and costs in the amount of \$52. Attorney fees and costs are also awarded to ISDA on petition for review pursuant to IPC Rule 202.08. ISDA shall file a request for attorney fees and costs, with accompanying memorandum and affidavit in support not later than ten (10) working days after receipt of this decision. Objections to the award of attorney fees and costs shall be filed not later than ten (10) days after receipt of the request for attorney fees and costs. There will not be oral argument unless pursuant to IPC order at the IPC's sole discretion.

BY ORDER OF THE IDAHO PERSONNEL COMMISSION

  
Clarisse Maxwell, Commissioner

  
John Cowden, Commissioner

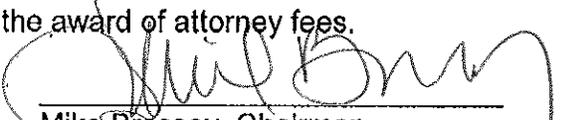
  
Evan Frasure, Commissioner

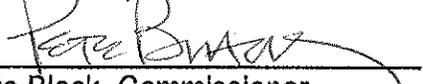
## DISSENT TO AWARD OF ATTORNEY FEES

The purpose of Idaho Code § 12-117 is to serve as a deterrent to groundless or arbitrary action in administrative proceedings and to provide a remedy for persons who have incurred unfair and unjustified financial burdens while defending against groundless claims. *Canal/Norcrest/Columbus Action Committee v. City of Boise*, 136 Idaho 666, 671, 39 P.3d 606, 611 Idaho (2001). Under Idaho Code § 12-117, a prevailing party is not automatically entitled to receive attorney fees and costs. Rather, the IPC may award attorney fees and costs to a prevailing party only in cases where the non-prevailing party has acted without some reasonable basis in fact or law in the matter. This "without a reasonable basis" standard exists so that parties can take action in administrative proceedings, including, in this case, exercising of statutory rights to appeal disciplinary actions, without being subject to automatic awards of attorney fees and costs should they not prevail, as long as there is some reasonable basis in fact or law for such action. This standard is difficult to reach. Section 12-117 requires a showing that a non-prevailing party's claims are frivolous, unreasonable, groundless, or in bad faith. *Boise Tower Associates, LLC v. Timothy J. Hogland*, 147 Idaho 774, 784, 215 P.3d, 494, 504 (2009).

We should exercise caution in awarding attorney fees because awards in cases that do not justify the award may have the effect of deterring appellants from exercising statutory rights under the Personnel System Act. While we fully agree ISDA proved proper cause for discipline in this matter, we do not agree that Hyndman's arguments and actions on appeal throughout this matter rise to a level of frivolousness that would warrant an award of attorney fees against him.

Therefore, we respectfully dissent solely to the award of attorney fees.

  
Mike Brassey, Chairman

  
Pete Black, Commissioner

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.

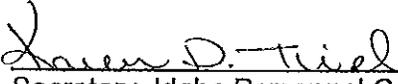
### CERTIFICATE OF SERVICE

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 1 day of June, 2011.

#### FIRST CLASS MAIL

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Idaho State Department of Agriculture  
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Secretary, Idaho Personnel Commission

**DECISION AND ORDER  
ON PETITION FOR REVIEW- 34**