

IDOC petitions for review from the Hearing Officer's decision arguing that Campa's discharge is supported by substantial and competent evidence in the record, and the Hearing Officer's findings of fact and ultimate decision are in error and not supported by substantial and competent evidence in the record. (Petition for Review).

Campa cross-petitions for attorney fees denied by the Hearing Officer. (Cross Petition for Review, p. 1). Campa argues that he is entitled to attorney fees under Idaho Code § 12-117 because IDOC's dismissal was without reasonable basis in fact or law. (Cross Petition for Review, pp. 1-2).

Throughout this document, IDOC's exhibits are referred to as "(Respt. Ex. ____)" and Campa's exhibits are referred to as "(App. Ex. ____)". References to testimony in the Transcript are referred to as "(Tr. Vol. ____, p. ____:____-____:____)" to signify: (1) which volume the testimony is found, (2) the page upon which the testimony is found and (3) on that page, in which lines the testimony is found.

I.

PROCEDURAL BACKGROUND

The following facts are undisputed. Campa was employed at IDOC from 1988 until his termination effective March 23, 2010. (App. Ex. RR). At the time of his termination, he held the job title of Deputy Warden at the Pocatello Women's Correctional Center ("PWCC"). (Tr. Vol. II, p. 367:8-367:9). Warden Brian Underwood ("Underwood") was his direct supervisor. (Tr. Vol. I, pp. 20:12-21:4). In the last three years prior to his termination, Campa had received exemplary performance reviews. (Reports attached to App. Ex. JJJ). In or around March 2009, Underwood announced that he was seeking the nomination to be appointed as the U.S. Marshall for the State of Idaho. (Tr. Vol. III, pp. 659:9-660:11). Sometime in the March through May 2009 timeframe, Campa informed the Chief of Prisons, Pam Sonnen ("Sonnen") that he wished to be considered to replace Underwood as Warden at PWCC (Tr. Vol. II, p. 503:10-503-

17). Because of the lengthy nomination process, Underwood remained as Warden at PWCC until May 2010. (Tr. Vol. III, pp. 659:9-660:23). In the interim, Underwood submitted a written recommendation that Campa be appointed as Warden of PWCC upon his departure. (App. Ex. RR, p. 2).

In January 2010, Sonnen received an anonymous e-mail complaint alleging that, at Campa's request, Gary Williams ("Williams"), a PWCC employee, left his post at PWCC to work at The Depot Bar which Campa co-owned with his brother, Adrian Campa. (E-mail attached to Respt. Ex. 1). The e-mail stated that "chances exist" that this occurred on the IDOC clock and that Williams may have used an IDOC vehicle and IDOC equipment to perform the work. *Id.* Sonnen assigned James Woolf ("Woolf") to do a preliminary inquiry into the allegation. (Tr. Vol. II, p. 380:5-380:16).

Woolf interviewed Gary Williams, who denied the allegation in the anonymous e-mail. (Preliminary Inquiry Report attached to Respt. Ex. 1). He also interviewed IDOC employees Lieutenant Terry Greeson ("Greeson") and Officer Mike Grebstad ("Grebstad"), Campa, and Underwood. *Id.* Woolf issued a report on January 15, 2010 but did not make any written conclusions. *Id.* He testified, however, that he made a verbal recommendation that the matter be referred to IDOC's investigation unit, Office of Professional Standards ("OPS"). (Tr. Vol. I, pp. 74:19-75:4).

OPS Investigator Larry Callicut ("Callicut") conducted the formal investigation. (Respt. Ex. 1). The stated purpose of the investigation was the allegation that Campa "used the services of Building Facility Foreman Gary Williams from Pocatello Women's Correctional Center to perform repairs at the business he is a co-owner of in Pocatello." *Id.* at p. 2. Callicut interviewed fifteen witnesses, including Williams, Greeson, and Grebstad. *Id.* Callicut issued a report on January 21, 2010. *Id.*

On January 25, 2010, IDOC placed Campa on administrative leave with pay. (Notice attached to Respt. Ex. 1). On February 26, 2010, IDOC issued a Notice of Contemplated Action (“NOCA”) to Campa, advising him that IDOC was considering terminating his employment for violating Idaho Code § 67-5309(n), IDOC Administrative Policy 141, IDOC Administrative Policy 217, IDOC Administrative Policy 201, and DHR Rule 190 sections (a), (e) and (g). (Respt. Ex. 4). The NOCA stated that the evidence it relied upon includes, but is not limited to, the OPS investigation report and supporting documents. *Id.*

Campa provided a written response on March 10, 2010. (App. Ex. JJJ). On March 23, 2010, IDOC issued a Letter of Disciplinary Action (“LODA”) terminating Campa. (Respt. Ex. 5).

II.

ISSUES ON APPEAL

1. Whether IDOC proved by a preponderance of the evidence that Campa violated a policy, statute or rule cited in the LODA.
2. Whether the Hearing Officer erred in refusing to award attorney fees to Campa.

III.

STANDARDS OF REVIEW

A. General Standard of Review

The standard 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. Idaho Code § 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 Idaho Code § 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. Idaho Code § 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. Idaho Code § 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).

B. Standard When Credibility Determinations Are a Major Factor

Where credibility is crucial, and first-hand exposure to witnesses may strongly affect the outcome, the IPC may not override a Hearing Officer's credibility determination unless it identifies a cogent, articulable reason for doing so. *Dep't of Health and Welfare v. Sandoval*, 113 Idaho 186, 190 (Ct. App. 1987) (*Sandoval I*). It is within the IPC's discretion to determine how much weight to give to evidence. *Dep't of Health and Welfare v. Sandoval*, 116 Idaho 983, 985 (Ct. App. 1989) (*Sandoval II*).

IV.

BASES FOR TERMINATION

A. The Legal Bases for Termination Stated in the LODA

The LODA makes a lengthy recitation of factual allegations, then states generally that the facts "appear to have violated" the following:

Policy 217 (Ethics and Standards of Conduct)

First, Policy 217.05.01.00 states, in part:

As a representative of the State of Idaho and the Department of Correction, each employee will demonstrate the highest standards of integrity, honesty, objectivity, impartiality and professionalism to promote public confidence, understanding, and trust in the Department and its employees.

Each employee shall, whether on or off duty, in uniform or not, conduct him/herself in a manner that will not discredit or embarrass the Department or the State of Idaho.

Second, Policy 217.05.02.00 states, in part:

An employee shall not engage in any activity which might compromise the mission or the orderly conduct of the Department.

An employee shall not engage in any other activity which is deemed detrimental to good conduct and order of the Department or which might compromise the employee's ability to perform or properly discharge his/her duties.

An employee shall cooperate in and maintain confidentiality of any investigation into alleged illegal activities or violation of department policies.

An employee shall not engage in any business, transaction or activity of any nature which is in conflict with the proper discharge of the employee's duties and with the public such as:

Using his/her position to secure special privileges or exemptions for self or others.

Policy 201 (Respectful Workplace)

IDOC relied on the following portion of Policy 201 in the LODA:

General harassment is unnecessary and unwanted behavior, action, or language towards an employee by using disparaging remarks, intimidating, or taunting that to a reasonable person creates a demoralizing and uncomfortable work environment. The unwanted behavior can be a one-time occurrence, or an ongoing series of intimidation, either subtle or direct. It does not have to be illegal. It is the degree of violation that determines the severity of the consequences.

Policy 141 (Computer, Electronic Mail, and Internet Use)

Computers are for business use only, and staff should not expect their e-mail communications, documents or other information to be private and should not use the e-mail system for matters that are not intended for public disclosure.

Idaho Code § 67-5309(n)

A rule for the disciplinary dismissal, demotion, suspension or other discipline of employees only for cause with reasons given in writing. Such rule shall provide that any of the following reasons shall be proper cause for the disciplinary dismissal, demotion or suspension of any employee in the state classified service:

1. Failure to perform the duties and carry out the obligations imposed by the state constitution, state statutes and rules of the employee's department, or rules of the administrator or the division.

5. Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the employee's department.

...

7. Careless, negligent, or improper use or unlawful conversion of state property, equipment or funds.

IDAPA 15.04.01.190.01 (Rule 190)

a. Failure to perform the duties and carry out the obligations imposed by the state constitution, state statutes, or rules of the agency or the Division of Human Resources and Idaho Personnel Commission.

e. Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the agency.

g. Careless, negligent, or improper use or unlawful conversion of state property, equipment, or funds. (4-5-85)

B. The Factual Bases for Termination Stated in the LODA

In general, the LODA alleged that during the investigation Campa was "inconsistent and deceptive" in several ways. (Respt. Ex. 5). Predominantly, this appears to be the "factual" basis for termination. The LODA alleged that Campa had violated IDOC policies, DHR rules, and a statute, but did not specify how the facts amounted to a violation. *Id.* While, not in itself a due process violation, this lack of clarity creates unnecessary confusion in interpreting IDOC's arguments.

On petition for review, IDOC submits that the Hearing Officer committed error in his findings of fact and conclusions of law relating to the following factual bases which it pursued at the hearing.¹

1. Inconsistent and deceptive statements about his ownership interest in the Depot Bar;
2. Employment of IDOC employees at the Depot Bar;
3. Interference with the investigation;
4. Using his position to secure special privileges or exemptions for self or others; and
5. Threats, intimidation, and retaliation.

¹After the hearing, IDOC stated that it was dropping one basis for termination: Employment of IDOC employees at Campa's personal residence. (Respt. Post Hearing Memorandum, p. 5). Also, while misuse of IDOC computers was an allegation pursued at the hearing, the Hearing Officer found no basis for discipline, and IDOC did not allege error to that finding on petition for review.

V.

DISCUSSION

After reading the parties' briefs and reviewing the relevant parts of the record, we see no reason to reverse the Hearing Officer's decision. This case turns largely on the question of witness credibility, and we may only reverse the Hearing Officer's findings if there is a cogent, articulable reason for doing so. *Sandoval I*, 113 Idaho at 190.

A. The Depot Bar

IDOC's factual basis for termination, as stated in the LODA, was that Campa was inconsistent and deceptive during the investigation about his ownership and level of interest in the bar. (Respt. Ex. 5, p. 1-2). Though not explicitly relied on by IDOC, the sole piece of evidence concerning Campa's "inconsistency" on the issue of ownership of the bar seems to be that Campa admitted that he was "technically" an owner, while at the same time maintaining that he does not think of himself as an owner. Campa's assertion that he was honest about this perception/belief was not refuted by any evidence IDOC provided.

IDOC did not provide an explanation as to how Campa had been inconsistent or deceptive, other than Sonnen's testimony that she believed that Campa's statements about the bar were not truthful, and that that was significant because "it goes to his integrity and honesty, and was a violation of Policy 217, Policy 220,² and Rule 190.³" (Tr. Vol. II pp.407-409). Thus, the basis for this allegation against Campa was that Sonnen did not think he was truthful. The record does not support this position.

The undisputed facts regarding Campa's involvement with the bar are as follows: Campa provided his supervisor, Warden Underwood, a written memo on July 1, 2009 that Campa's

² Policy 220 was not basis for termination in the LODA, nor was it introduced as an exhibit.

³ Sonnen's explanation for why this violated Rule 190 actually referred to Campa's alleged use of IDOC employees for personal reasons. Tr. Vol. II., p. 409:13-24.

brother, Adrian Campa, intended to open a sports bar in Pocatello, known as "The Depot." (App. Ex. A). The memo states that Campa would be involved in a "supporting role," but that his brother Adrian was the owner. *Id.* During the investigation, Campa stated that he and his brother jointly leased the building where the bar is located. (App. Ex. JJJ, p. 1). Because his brother was new to town and newly divorced, the building's owner had required Campa and his wife, Heather, to co-sign the lease with Adrian as additional security. *Id.* The building lease included the liquor license. *Id.* Ann Carol, the building owner corroborated these facts at the hearing. (Tr. Vol. III, pp. 707:9 - 709:1). Campa also stated that Adrian Campa put up all the money for the bar, and operates it on a day-to-day basis; Campa and his brother are members of a limited liability company named Sportakis LLC; the LLC owns the beer and wine license for the bar; Campa did not receive compensation for his involvement at the bar; Campa did claim a loss from the bar on his income taxes. (App. Ex. JJJ, p. 1; Tr. Vol. II, pp. 602:11-603:10). Adrian Campa testified consistently with these facts as well. (Tr. Vol. III, pp. 744:3-747:5).

Campa explained during his interview with Callicut that, while he was "technically" an owner, his involvement was limited because the intent was simply to help his brother. (Respt. Ex. 9, pp. 190-192). While he denied that he "owned and operated the Depot Bar" in his response to the NOCA, (App. Ex. JJJ), Campa explained that he does not consider himself an owner because his brother Adrian owns and operates the bar, whereas Campa is not involved in operating the bar on a day-to-day basis. *Id.* Campa stated that when Adrian is out of town, he fills in for Adrian. *Id.*

In its Brief on Review, IDOC attempts to clarify its theory of the case by claiming Campa was untruthful in his statements that he did not consider himself to be an "owner" of the bar, when, in reality, he was legally an owner because he was a member of the LLC, he had co-signed the lease, and he had declared a business loss on his income taxes. (Appellant's Brief on Review ("App. Brief")). These factors may be relevant indicia of legal ownership; however,

as IDOC concedes, Campa's ownership was not the relevant issue – his *statements* about his perception of his involvement with the bar were. *Id.* at p. 14. IDOC argues that the evidence about Campa's ownership in the bar undermine his *credibility*, apparently implying that Campa was lying about his *belief* that he was not an owner because the facts so clearly point to ownership. *Id.* at p. 14, n. 2. Thus, the real question is whether Campa was untruthful when he told investigators that he *did not consider himself to be the owner*.

On this issue, the Hearing Officer found that Campa had disclosed his level of involvement to the investigator, that Underwood confirmed that Campa had notified him about the bar, that Ann Carroll's testimony was consistent with Campa's statements that he co-signed the lease as a favor to his brother, and that Campa's brother Adrian, and wife Heather, testified that Campa did not receive any income from the bar. (Preliminary Order pp. 7-9). Based upon these findings, which are supported by the record, the Hearing Officer found that IDOC did not prove by a preponderance of the evidence that Campa violated Rule 217. *Id.* at p. 9.

We find no error on the part of the Hearing Officer in this finding. In addition to his statements to investigators and his written response to the NOCA, Campa testified that he had told the truth to investigator Callicut. (Tr. Vol. II, p. 521-523). He disclosed the nature of his involvement to investigator Woolf. *Id.* at pp. 510-511. He testified that he was truthful in his written response to the NOCA. *Id.* at pp. 540:1-11. He also stated that he was not deceptive or contradictory during the investigation. *Id.*

On cross examination, Campa stated that he is technically an owner, but that his brother Adrian owns the bar because Adrian gets all the proceeds and put all the money down. (Tr. Vol. II, p. 602:6-16). Campa's statements to investigators, his written statement, and his testimony were all consistent on this point – he does not think of himself as the owner of the bar. The testimony of Adrian, Heather, and Ann Carroll all corroborated the facts that Campa relied on for

his belief that he was not an owner. IDOC did not prove by a preponderance of the evidence that Campa was deceptive or inconsistent in his statements about his involvement with the bar.

B. Employment of IDOC Employees at the Depot Bar

The NOCA alleged that “it is common knowledge amongst PWCC staff that the Depot Bar employs PWCC staff members” and that “several witnesses had seen PWCC staff members act as bouncers and that they were employed as bouncers for the Depot Bar and received different forms of compensation.” (Respt. Ex. 4). Once again, IDOC’s legal theory is murky. On the one hand, the LODA states that the basis for termination was that Campa was “inconsistent and deceptive.” (Respt. Ex. 5). In its Brief on Review, IDOC reiterates that making purportedly inconsistent statements about whether IDOC employees worked at the bar constituted a violation. (App. Brief at p. 19). On the other hand, IDOC spent a great deal of time presenting evidence and argument that three IDOC employees were “employed” or “worked” at the Depot Bar, which distracts from the real issue – whether IDOC established by a preponderance of the evidence that Campa was inconsistent or deceptive, and that such conduct constituted a violation.

- 1. IDOC has not established that Campa violated any policy, rule, or statute with respect to any employing of IDOC employees at the Depot Bar.**

As expressed above, the LODA does not state with particularity which facts violated which of the policies, rules, or statutes that it cites. While an agency might clarify such a weakness through the hearing process, connecting facts with alleged violations, IDOC did not do that sufficiently here. *Fridenstine v. Idaho Dep’t of Admin.*, 133 Idaho 188, 192 (1999) (due process includes post-termination procedures). It was IDOC’s burden to establish a violation by a preponderance of the evidence.

Campa stated that IDOC employee Gary Williams had voluntarily provided advice to Campa about installing a grease trap. (App. Ex. JJJ). Williams confirmed this to be true and also testified that he did not do so while “on the clock at the PWCC” or use any PWCC or IDOC property in connection with that. (Tr. Vol. III, pp. 718:21-719:23). He did not even drive a state vehicle to The Depot. *Id.* at p. 719:24-720:1. Campa corroborated and maintained this position consistently. (Tr. Vol. II, pp. 557:22-559:9).

With respect to Greeson’s testimony as to an elaborate scheme to compensate Greeson with beer and tips to work as a bouncer at The Depot Bar, Adrian and Tony Campa both denied this. (Tr. Vol. III, pp. 752:23-753:13; Tr. Vol. II, pp. 562:24-565:25). Adrian indicated that he did provide Greeson with free beer here and there and that he did card people sometimes, but unequivocally denied the existence of any established compensation arrangement. (Tr. Vol. III, pp. 752:2-753:13). He did provide Greeson with a cell phone that Adrian got from Tony, but denied it had anything to do with any bouncing arrangement. *Id.* at pp. 754:1-755:23. The Hearing Officer found Adrian and Tony Campa to be credible, and that Greeson was not credible. (Preliminary Order at p. 11). There is support in the record for the Hearing Officer’s credibility findings and absent a cogent reason, the IPC will not overturn such findings.

Lastly, Campa stated that he had mentioned to IDOC employee Shawn Trevino that Adrian needed help at the bar on New Year’s Eve 2009 and that Adrian paid Trevino on two occasions. (App. Ex. JJJ, p. 2). IDOC argues that this is inconsistent with Trevino’s testimony at the hearing that it was Campa who gave him the money. (App. Brief, p. 19). However, at the hearing, Campa testified that while he physically paid Trevino, it was with money Adrian provided and directed for that purpose. (Tr. Vol. III, p. 616:16-616:23). As far as he was concerned, Adrian paid Trevino. Incidentally, this is consistent with Campa’s perception that his brother owned and operated the bar, not Campa.

The LODA did not cite any additional evidence, but instead generally asserted that all of Campa's statements regarding Williams, Greeson, and Trevino were "inconsistent and deceptive." (Respt. Ex. 5). IDOC failed to prove its case by a preponderance of the evidence. IDOC points to nothing inconsistent about Campa's statements regarding Williams, and Campa, reasonably explained payment of Trevino, at least to the Hearing Officer's satisfaction. Finally, as mentioned above, the Hearing Officer found Greeson not credible and found Tony and Adrian Campa to be credible regarding Greeson's activity at the bar. Again, the IPC will not overturn the Hearing Officer's credibility determinations without an articulable and cogent reason.

2. **IDOC has changed its factual basis for termination from the theory set forth in the NOCA and LODA.**

In testimony at the hearing and in its Brief on Review, IDOC offers a different theory than arguably presented in the NOCA and LODA, and asserts that, simply by *employing IDOC employees at the bar* Campa violated "IDOC Policy." (App. Brief, pp. 17-18). This theory presupposes that IDOC proved by a preponderance of the evidence that Campa did, in fact, employ one or more of these individuals, but even if it were true, IDOC fails to identify any policy, rule, or statute this conduct violated. *Anderson, supra*.

Rather, IDOC simply cites both Woolf's and Sonnen's testimony about their concerns with Campa employing IDOC employees outside of IDOC. (App. Brief, pp. 17-18). It is actually Campa, (not IDOC, whose burden it is), who sets forth what appears to be a potentially applicable policy (Policy 217) relating to outside employment in his briefing. See Respondent Campa's Reply Memorandum at p. 19. We agree with Campa that even had IDOC adequately complied with due process notions, it fails to prove that employment of IDOC employees violates that policy because it is clearly qualifies the prohibition about using employees "*during*

working hours” in connection with outside employment. Again, IDOC did not identify what policy was violated and leaves the IPC guessing what that is.

The posture of the case seems similar to *Idaho Department of Correction v. Weirum*, IPC NO. 97-03, in which an investigative report was the sole basis for disciplinary action. On appeal to the IPC, however, IDOC went to great lengths to avoid relying on the investigation and instead pointed to documentary evidence and hearing testimony to support its arguments. As the IPC explained in that case, this novel approach “turns the appeal process on its head” because it would allow an agency to discipline an employee, then use the appeal process to try to obtain evidence to support the disciplinary action. *Id.* at 11.

In this appeal, IDOC relies solely on Sonnen’s and Woolf’s testimony to explain why “employing” IDOC employees violates an unspecified IDOC policy. Frankly, the fact that IDOC fails to specify the policy or even rule or statute that is violated can end our inquiry. However, the IPC questions whether the NOCA and LODA even provide actual “employment by Campa of IDOC employees at The Depot Bar” as an allegation of misconduct upon which it based its termination. As stated above, this legal basis for discipline appears to be raised for the first time at the hearing in the form of Sonnen’s testimony. The LODA, as cryptic as it is, suggests the basis for discipline is that Campa was inconsistent and deceptive regarding employment of IDOC employees at the bar: that he lied about it. This is very different from an allegation that actual employment violates any IDOC policy.

Although an appointing authority need not provide the employee with every piece of evidence prior to termination, the appointing authority must provide notice and basis of the evidence, so that the employee can have an opportunity to meaningfully respond before the appointing authority takes disciplinary action. *Whittier v. Dept of Health and Welfare*, 137 Idaho 75, 81 (2002). Here, it is questionable, a stretch, in fact, whether IDOC provides any notice that

the actual employment of IDOC employees at The Depot Bar is a basis for discipline in the LODA. Even considering the post-termination process as part of the due process afforded to Campa, IDOC cannot raise new bases for discipline outside bases set forth in the LODA. That violates due process, as discussed above. Even disregarding that, IDOC fails to articulate how there was a policy violation subjecting Campa to discipline.

C. Interference with the Investigation

The NOCA claimed that Campa had admitted speaking to witnesses during the investigation. (Respt. Ex. 4, p. 3). Further, the NOCA states that “it has been revealed” that Campa discussed the specifics of the investigation with witnesses and that he coached witnesses about how to respond to certain questions. *Id.* Campa denied this allegation, stating that two witnesses came to him after being interviewed, and he told them not to worry. (App. Ex. JJJ, p. 3). He also stated that he did not disclose the details of his interview with any staff members. *Id.* The LODA stated that Campa’s statements on this issue were “inconsistent and deceptive” and were contradicted by unnamed witnesses. (Respt. Ex. 5, pp. 1-3).

IDOC alleges that interfering with the investigation was a violation of Policy 217 which requires employees to maintain confidentiality of investigations. (App. Brief. at 7). In support of this contention, IDOC cites Terry Greeson’s testimony at the hearing that Campa coached him on what to say to investigators. *Id.* at 11-12. The Hearing Officer found, however, that Greeson was not a credible witness because he admitted lying in his first two interviews with investigators. (Preliminary Order, pp. 11, 13). Further, Greeson testified at the hearing that he received 10% of the tips on the night that he was a bouncer but admitted that he never told that fact to investigators. (Tr. Vol. II, pp. 325:16-325:25; 347:14-349:8). Aside from Greeson’s testimony, IDOC offered no other evidence that Campa had coached him during the investigation. It was within reason for the Hearing Officer to reject Greeson’s testimony as not

credible. In the absence of an articulable, cogent reason for this Commission to discard this finding, the IPC accepts the Hearing Officer's credibility determinations.

The other piece of evidence that IDOC relies on for the "interference with investigation" allegation is Ross Castleton's testimony at the hearing that Campa told Castleton to tell the investigator that he only stopped by Campa's house and did not actually do any work. (Respt. Post-Hearing Memo at 10). Campa denied this allegation. (Tr. Vol. II, p. 535:14-535:16). The Hearing Officer, therefore, was faced with conflicting testimony.

Rather than take the opportunity to be more specific on appeal to this Commission, IDOC instead argues that "the simple fact that Campa had conversations with witnesses while the investigation was ongoing" is a sufficient basis for finding that Campa violated Policy 217. (App. Brief at 14). To the contrary, however, this basis for termination was not stated in the LODA. Moreover, IDOC had only informed Campa that the basis for the investigation was that Campa had used Gary Williams's services at the Depot Bar while Williams was on IDOC's clock. Thus, neither Greeson's role at the bar, nor Castleton's work at Campa's residence were the subject of the investigation. Finally, Campa admitted talking to Borstelman, Castleton, Williams, and Greeson but testified that he did not discuss the investigators' questions, his answers, or the subject of the investigation. (Tr. Vol. II pp. 527:23-535:16).

This allegation is largely founded on credibility of the witnesses. The Hearing Officer found the credibility of witnesses IDOC offered to prove Campa interfered with the investigation to be wanting and accepted Campa's testimony. (Preliminary Order at pp. 10-11, 13). There is substantial and competent evidence to support the Hearing Officer's credibility determinations and, of course, the Hearing Officer had the added benefit of observing the demeanor of the witnesses in making his determinations. We accept the Hearing Officer's credibility findings.

D. Using Campa's Position to Secure Special Privileges or Exemptions for Self or Others

The NOCA stated that "it has been alleged" that Campa used his position to relieve staff of their shifts, and that Campa had denied that in his first interview. (Respt. Ex. 4). During the course of the investigation, according to the NOCA, witnesses had provided information to support this allegation. *Id.* Campa denied the claim in his written response to the NOCA, but stated that he had helped staff change their schedules and on one occasion asked the shift commander if it would be a problem to relieve an employee (Maw) on her birthday. (Respt. Ex. JJJ). He stated that he did not remember this single incident during his first interview but remembered it later. *Id.* The LODA claimed that Campa's ability to ask a shift commander if he could cover a shift was due to his position as deputy warden and that Campa's written statement was inconsistent with what he stated in interviews. (Respt. Ex. 5).

At the hearing, Lieutenant Magagna testified that Campa called him to ask him whether he could get a shift covered for Sergeant Maw the next morning. (Tr. Vol. I, p. 215:10-223:15). Sonnen testified that this conduct violated Policy 217 and Rule 190 because "there is a policy on how a staff person is to be relieved of duty ..." and that procedure wasn't followed. Sonnen believed that was not good role modeling. (Tr. Vol.II, p. 413:10-414:24). IDOC did not provide a copy of the leave policy that Sonnen refers to or even identify it. Thus, we are left with Sonnen's bald assertion that this conduct violated the alleged policy and that it violated Policy 217 and Rule 190, although it is not explained how violation of an unidentified procedure amounts to a violation of the ethics and standards of conduct policy. As the Idaho Court of Appeals made clear in *Anderson, supra*, where the record contains no evidence of a written policy or that the employee was trained or aware of an unwritten policy, the appointing authority has not met its burden. *Anderson*, 134 Idaho at 680.

Finally, in its Brief on Appeal, IDOC claims that Campa violated Policy 217, the ethics policy, by “using his/her position to secure special privileges or exemptions for self or others”. (App. Brief at 6). The only evidence offered in support of this allegation is Sonnen’s conclusion that relieving an employee of her shift constituted an abuse of power. *Id.* As Campa highlights in his reply brief, Policy 217 states that its purpose is to identify misconduct “which is detrimental to the good order and discipline of the Department.” (Respt. Reply Memo, p. 7). There was not ample evidence presented that requesting that an employee be relieved from her shift on her birthday was detrimental to good order and discipline, nor has IDOC proven this incident amounts to conduct which “is in conflict with the proper discharge of [Campa’s] duties and with the public interest” involving “using [Campa’s] position to secure special privileges or exemptions for self or others.” Policy 217.05.02.00.

E. Threats, Intimidation, and Retaliation

The NOCA stated that Campa threatened, intimidated, and retaliated against PWCC staff and gave as an example a witness who was excluded from meetings and work-related activities after disagreeing with Campa. (Respt. Ex. 4). Campa responded that he had no idea who that person was or what the circumstances were. (App. Ex. JJJ). In the LODA, IDOC alleged that “witnesses have provided instances in which you have threatened, intimidated and retaliated against them. You have also harassed staff when they did not do what you asked outside of work.” (Respt. Ex. 5). IDOC did not address this issue in its Post-Hearing Memo or Brief on Review, although it did list the issue in its petition for review as one in which the Hearing Officer committed error. However, it is axiomatic that an appellant has the burden to point to specific errors in the record. An appellant waives an issue when it fails to provide argument or authority. *Anderson*, 134 Idaho at 689. In any event, the Hearing Officer’s findings of fact and conclusions of law on this issue set forth in the Preliminary Order are supported by

substantial and competent evidence in the record. Preliminary Order, pp. 15-16, ¶¶ 53-58; p.18-19, ¶ 10.

VI.

CONCLUSION

IDOC has not met its burden of proving by a preponderance of the evidence that Campa committed violations of IDOC policies or otherwise violated Rule 190. Therefore, pursuant to Idaho Code § 67-5316(4), IT IS HEREBY ORDERED, THAT Campa shall be reinstated in the same position or a position of like status and pay with IDOC. Campa is also entitled to all pay and benefits for the period of discharge.

VII.

ATTORNEY FEES

The law allows the prevailing party in an administrative proceeding involving a state agency reasonable attorney fees if the nonprevailing party is found to have acted "without reasonable basis in fact or law." I.C. § 12-117(1). Here, we find IDOC acted without a reasonable basis in fact or law. As explained in the discussion section, IDOC failed to provide sufficient evidence to support its allegations, changed the basis for its claims throughout the proceeding and at times testified to unnamed policies it claimed Campa had violated. However, we decline to award attorney fees to Campa because controlling law provides such an award against IDOC is not allowable under Idaho Code § 12-117.

VIII.

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). Further,

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:

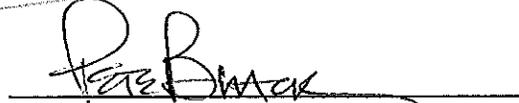
- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers; and
- (3) That the findings of fact by the commission do not as a matter of law support the decision.

Idaho Code § 67-5318.

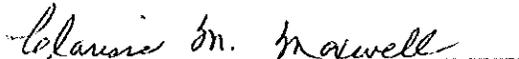
BY THE ORDER OF THE
IDAHO PERSONNEL COMMISSION



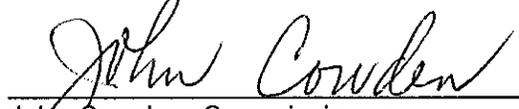
Mike Brassey, Chairman



Pete Black, Commissioner



Clarisse Maxwell, Commissioner



John Cowden, Commissioner

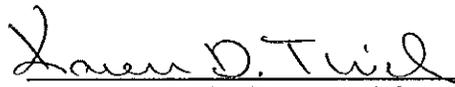
CERTIFICATE OF SERVICE

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 19th day of August, 2011.

FIRST CLASS MAIL

Gary L. Cooper
P.O. Box 4229
Pocatello, Idaho 83205

Mark A. Kubinski
Idaho Department of Correction
1299 N. Orchard, Suite 110
Boise, Idaho 83720


Secretary, Idaho Personnel Commission