

RICHARD BARRETT, CHAIR
IDAHO PERSONNEL COMMISSION
700 West State Street
P.O. Box 83720
Boise, Idaho 83720-0066
Telephone: (208) 334-3345

BEFORE THE IDAHO PERSONNEL COMMISSION

CAROL MAY,)	
)	
Appellant-Petitioner,)	IPC No. 96-01
)	
v.)	DECISION AND ORDER ON
)	PETITION FOR REVIEW
IDAHO DEPARTMENT OF HEALTH)	
AND WELFARE,)	
)	
Respondent.)	
_____)	

I.

INTRODUCTION

On petition for review from the decision of the Hearing Officer, Edwin L. Litteneker, presiding. Appellant-petitioner Carol May (May) appeared through her counsel of record, W.B. Latta, Jr., Boise, Idaho. Respondent Idaho Department of Health and Welfare (DHW) appeared through it's counsel of record, Edward C. Lockwood, Deputy Attorney General, Coeur d'Alene, Idaho, and Marcy J. Spilker, Deputy Attorney General, Lewiston, Idaho (on the brief).

May petitions for review from the decision of the Hearing Officer, entered June 28, 1996, in favor of DHW. In his decision, the Hearing Officer ruled that the Department proved proper cause to suspend May without pay for a period of three days under Rule 190.01.b (negligence in performing duties), I.D.A.P.A. 28.01.01.190.01.b. For the reasons set forth below, we AFFIRM.

II.

BACKGROUND

This case arises from a series of events which culminated in the death of a young child. The Hearing Officer's decision contains detailed factual findings, which we summarize below:

May was and is employed by DHW as a licensed social worker in the Family and Children's Services Division in Coeur d'Alene. Her job involves screening, intake and initial assessment of child protection complaints for the Child Protection Intake Unit (CPIU).

On August 31, 1995, Joan Mael (one of May's co-workers) received a walk-in referral from a person claiming to be the baby-sitter of two girls, ages 5 and 3. The baby-sitter reported bruises, marks, and welts on both children, as well as a concern that the mother was cruel to the older girl. Mael interviewed the baby-sitter, and she recorded the interview on DHW's Family Critical Event Form.

On September 1, 1995, Mael presented the subject referral at the morning staff meeting. After the meeting, Supervisor Phil Owens categorized the referral as a priority II (the second-highest priority level on a scale of I to IV). Owens also assigned the referral to May for investigation at approximately 11:00 a.m. that day, and he soon thereafter placed the referral in May's mailbox.

May picked up the referral that afternoon between 2:00 p.m. and 3:00 p.m. May testified that she discussed the referral with co-workers that afternoon, although the conversation was not recorded in her case notes, and she could not remember the names of the co-workers.

On Tuesday, September 5, 1995 (after the Labor Day weekend), May began her investigation. She found no one home at the reported residence. She also believed that the residence was empty, finding the garage stripped and boxes stacked outside, although she made no notes of these findings in her case notes. She did not contact the baby-sitter, who reportedly lived adjacent to the children's residence. The next day she tried to contact a person suggested by the baby-sitter during the referral interview, no one was home, and she left a message which was never returned. May also testified that she attempted to locate a current address for the family on the department's computer system, but she did not record this in her case notes. No further investigation was conducted by May.

On September 21, 1995, the Kootenai County Sheriff's Office contacted May to report that the younger child was hospitalized in critical condition, that the older child had been removed from the home and placed with an out-of-state relative, and that the mother and mother's boyfriend were suspects in a criminal investigation related to the injuries. The younger child eventually died from her injuries.

An investigation was conducted by DHW into the events leading up to the young girl's death. Among the conclusions or results reached, DHW determined that the referral should have been categorized as a priority I¹, that May did not make reasonable efforts to locate the family, that the referral should have been reviewed by a supervisor within 48 hours, and that department policy should be clarified to assure that response time begins when a referral is received.

¹ The prioritization of the referral is not an issue with respect to the discipline imposed upon May.

On September 28, 1996, department representatives met with May and her representative. May reported no information beyond which was discussed with Regional Director Michelle Britton on September 21, except her claim that she checked the computer system for a new address. Department representatives subsequently met with others in CPIU to gather facts related to the investigation, learning that priority II cases are generally reported to law enforcement officials, but that May had not taken steps to determine if Mael or Owens had done so, and that May herself did not contact law enforcement at any time.

On October 19, 1995, department representatives again met with May. Britton explained at that time that she was contemplating the disciplinary action of suspension without pay for three days based upon May's failure to notify law enforcement officials and her inadequate follow-up on her initial attempts to investigate the referral. May was also given an opportunity to respond to the contemplated action, the basis given, and the underlying allegations. DHW made the decision to suspend May without pay for three days on October 20, 1996.

May grieved her suspension, including an impartial review. She then filed an appeal with the IPC. The matter was tried before a Hearing Officer, and May now seeks further review from the Commission.

III.

STANDARD AND SCOPE OF REVIEW

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

When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery

practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. I.D.A.P.A. 28.01.01.201.06. That is, the burden of proof is on the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and I.D.A.P.A. 28.01.01.190.01, exist by a preponderance of the evidence.

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

Soong v. Idaho Dep't of Health and Welfare, IPC No. 94-03 (February 21, 1996), *aff'd* Case No. CV 96-00106 (Dist. Ct. 2nd Dec. 6, 1996) (footnote omitted).

IV.

ANALYSIS

We address the following issues raised by May on petition for review:

1. Whether May was afforded Constitutional Due Process before DHW made the decision to suspend her without pay;
2. Whether the Hearing Officer applied the correct standard of review;
3. Whether May's suspension constituted improper disparate treatment if other employees did not receive similar discipline; and
4. Whether the negligence finding is supported by substantial, competent evidence.

A. May Received Constitutional Due Process.

May urges that she was denied Constitutional Due Process because the department failed to give her all of the evidence it had or relied upon before making the decision to impose legal discipline.² May's argument is that she was entitled to the actual evidence, in the form that it existed, as opposed to notice of the evidence that the department was relying upon. She also claims, in circular fashion, that the department did not give her an adequate opportunity to respond because it did not decide to impose the three-day suspension until after it met with her on October 19, 1996. We hold that the department complied with the minimal requirements of Constitutional Due Process.

This Commission has previously explained the minimal requirements of Constitutional Due Process (procedural, not substantive, in nature) in the public employment law area, relying primarily upon *Arnzen v. State*, 123 Idaho 899, 854 P.2d 242 (1993), *cert. denied*, 114 S. Ct. 877 (1994), and *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). In *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995), we held that the appellant received Due Process where:

[p]rior to [the date the Department made the decision to discipline him], the record establishes that Hansen received notice of disciplinary action, which set forth in detail DOC's allegations against Hansen and the substance of the evidence supporting those allegations.

Id. at 12. The *Hansen* case explains that a classified state employee is not entitled to a full evidentiary hearing before a decision to discipline is made, but instead is entitled to: (1) notice of the contemplated action; (2) notice of basis of such action; (3) notice of the

² By "legal discipline" or "Rule 190 discipline," we refer to those disciplinary measures enumerated in IPC Rule 190: dismissal, suspension without pay, demotion, or reduction-in-pay. I.D.A.P.A. 28.01.01.190.01.

substance of the evidence supporting such action; and (4) an opportunity to respond to the notice before a decision is made.

May's argument is contrary to *Hansen*, and it is also contrary to the United States Supreme Court's holding in *Loudermill*:

[The pretermination hearing applicable to classified public employees] need not definitively resolve the propriety of the discharge. It should be an *initial check against mistaken decisions* -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

...

The tenured public employee is entitled to oral or written notice of the charges against him, *an explanation of the employer's evidence*, and an opportunity to present his side of the story.

Loudermill, 470 U.S. at 545-46, 105 S. Ct. at 1495 (emphasis added). The Court also explained that the pretermination opportunity to respond "need not be elaborate," *i.e.*, "something less' than a full evidentiary hearing is sufficient prior to administrative action." *Id.* at 545, 105 S. Ct. at 1495.

The record supports the Hearing Officer's findings and conclusions that May received adequate notice and an opportunity to respond before October 20, 1995.³ She

³ It is undisputed that the decision to suspend May occurred on October 20, 1995. (Exhibit K; Findings of Fact 24-26; Respondent's Brief at 9; Appellant's Brief at 5.) See *Arnzen, supra* (the decision to terminate, for purposes of Constitutional Due Process, occurred on the date the letter was written by the appointing authority to the employee saying that he was terminated). There is also no dispute that May met with department representatives on October 19, 1996 (after a number of prior meetings during the course of the investigation), and the notes taken at this meeting indicate that the department was "considering a 3 day suspension." (Exhibit L.) Val Millard, the Human Resources Specialist for Region I, DHW, testified that May was told a suspension was being considered at this time. (Tr. p. 195.) At the hearing, the following exchange occurred between May and the department's attorney:

Question from Department Attorney: Would you agree with what Ms. Britton stated that, during the course of this meeting, she told you that she was considering suspending you for three days?

Answer from May: Yes. She said she was considering it.

received notice that the department was contemplating Rule 190 discipline (a three-day suspension without pay), and that her actions and inactions in the referral investigation, including her failure to contact law enforcement or see that others had done so, and her failure to take further steps after her initial efforts to locate the family, formed the substance of the allegations supporting the contemplated action. We affirm the Hearing Officers findings and conclusions that May received adequate Due Process.

B. The Hearing Officer Applied The Correct Standard Of Review And Burden Of Proof.

May urges that the Hearing Officer's decision should be reversed because: (1) in Conclusion of Law 8, the Hearing Officer ruled that the "department has articulated a rational basis for a three day suspension;" and (2) in Finding of Fact 20, the Hearing Officer found that May failed to show "prejudice or detriment" as a result of DHW's reliance on an investigation policy applicable to complaints regarding personnel, even though DHW had not received a complaint against May.

(Tr. p. 479.) There is also no dispute that the entire investigation and contemplated action was based upon May's actions and inactions relative to whether the same constituted negligence performance.

With respect to the other components of Constitutional Due Process, the record contains substantial and competent evidence to support the Hearing Officer's findings. May testified that the October 19, 1995 meeting included discussions about the standards of practice, policies and procedures, and that she recalled being told that she failed to notify law enforcement and appropriately follow through on the investigation. (Tr. p. 478.) Although she may not recall specifics, the record, including May's and the department representative's testimony, contains ample support for the Hearing Officer's findings.

Finally, with respect to the opportunity to respond component, May testified:

[My supervisor Mr. Britton] asked me -- she said, "What more can you tell me?" Which led me to believe that there was -- that she was weighing -- she would weigh anything else that came out into the meeting and then make a decision. So I had -- the anxiety level was up, but I felt like she was considering incoming data.

The IPC Rules mandate that the department, in a discipline case, carries the burden of proof by a “preponderance of the evidence.” That is, the department must prove at least one of the 17 proper cause reasons for discipline, as listed in Rule 190, by a preponderance of the evidence. I.D.A.P.A. 28.01.01.201.06. May urges that the Hearing Officer lowered this burden to a “rational basis” standard in Conclusion of Law 8. However, the Hearing Officer clearly recognized and applied the preponderance of the evidence standard in Conclusions of Law 2 and 8: “the department bears the burden of proof by a preponderance of the evidence to support disciplinary action against Carol May.” “The department has carried it’s burden of proof that Ms. May was negligent in her assigned duties.” Rather than lower the standard of review, Conclusion of Law 8 represents a ruling against May’s argument that she was disciplined more severely than other employees. Put another way, the Department proved that it was entitled to discipline May under Rule 190, and it also articulated a rational basis for imposing a three-day suspension as opposed to a dismissal, a five-day suspension, demotion, reduction-in-pay, etc. We hold that the burden of proof for Rule 190 discipline was not lowered or otherwise violated by the Hearing Officer.

May urges that the Department’s investigation policy was not technically applicable to her case because no formal complaint had been filed against her. Rather than a citizen filing a complaint against May, the Department initiated an investigation after a referral case ended with hospitalizations and a death. The Department countered that it’s use of the policy was as a guideline. In other words, May’s actions and inactions

(Tr. p. 480.) It is clear that May’s meetings with the department representatives, occurring both before and on October 19, 1996, provided her an opportunity to respond to the charges and evidence against her.

could have been investigated without reference to any written policy, but the Department chose to refer to the written policy for purposes of clarity and organization.

We reject May's argument. With respect to process or policy, the law requires that a classified state employee receive Due Process before being deprived of a property right. DHW's reference to its policy did not violate Due Process, and May brought forth no evidence that she was deprived of any contractual, statutory, or Constitutional right as a result of DHW's reliance on its written policy. Rather, the record shows that DHW chose to refer to the written policy even though May was not entitled to it -- DHW could have conducted an investigation on its own, without any written series of steps for May to follow or otherwise understand. The record supports the finding that May was not prejudiced by reference to the policy, and, more importantly, it shows that she received her fundamental rights (Due Process and access to the grievance procedure) before implementation of the suspension. The Hearing Officer's findings and conclusions are affirmed.

C. DHW's Decision To Impose A Three-Day Suspension On May Is Not Improper Disparate Treatment.

The thrust of May's disparate treatment argument is that other employees, including her supervisor, should have been disciplined. DHW urges that May was the *assigned social worker*; there was no other individual in the Department with primary responsibility over the case, and no one else was similarly situated. Furthermore, despite her claims of pretext or of being a "scapegoat," the record reflects nothing in the way of *evidence* to support her claims. There was no testimony that DHW found others equally

responsible, there was no evidence that DHW held any grudges or prejudices against May, and there was no evidence that DHW had any other motives for imposing legal discipline on May. DHW's explanation that discipline was imposed on May because she was the responsible, accountable, *assigned* social worker, is supported by the record, and the Hearing Officer's findings and conclusions are affirmed.⁴

D. The Record Supports The Hearing Officer's Findings And Conclusions That The Department Proved A Proper Cause Reason (Negligence) To Impose Rule 190 Discipline.

Negligence under Rule 190.01.b requires a showing that a *duty* has been *breached*. In the present case, the Department alleged that May violated written policies and unwritten standards of practice, that those policies and practices are duties in the legal sense, and that May's violation thereof constituted a breach, and, thus, negligence in the performance of duties under Rule 190.01.b. The Hearing Officer agreed. For the reasons set forth below, we affirm the Hearing Officer's findings and conclusions on negligence.

1. Did May Have A Duty?

The Department produced two written documents, Exhibits I and J. Exhibit I is a memorandum entitled "Referral Response Priority Guide," and, with respect to "Priority II" cases (which was the assigned priority for the case at issue), it states: "Law Enforcement must be notified within twenty-four (24) hours." (Exhibit I at 4.) The memorandum also states that the child must be seen within two (2) working days and, if

⁴ We pass no judgment on whether other employees should have been disciplined, were disciplined, or should have received any certain level of discipline -- those issues are not within our power. May's argument concerning "disparate treatment" misses the fundamental question, which is whether the

not, reasons must be documented. Exhibit J is a manual entitled “Standards of Practice,” and it contains the same language as the memorandum with respect to Priority II cases. May does not dispute that the language in the memorandum and manual applies to her and constitutes a duty or standard of practice.

2. Did May Breach A Duty?

May’s argument is that she did not actually receive the case until 26 hours after the baby-sitter reported the potential abuse. Therefore, her argument goes, she was not responsible to contact law enforcement because the 24-hour period had already expired. Testimony from another Department social worker, however, indicates that the standard of practice was that if the period expired by the time the social worker received the referral from a supervisor, then the social worker would immediately contact law enforcement. (Tr. pp. 199-200.) Furthermore, it is undisputed that May *never contacted law enforcement*. The memorandum and the manual, which clearly establish policies and standards, provide ample support for the Hearing Officer’s findings and conclusions. The record establishes that May, being aware of reported bruises on young children, attempted to contact the family on a Tuesday, did not contact the baby-sitter or landlord when she discovered that no one was living in the apartment, and never followed up with law enforcement or determined if others had done so. May received the referral, made an attempt to contact the family after the holiday weekend, and thereafter basically sat on the case until some two weeks later when she received the call from the sheriff. Whether some degree of blame could be assigned to or shared with the DHW policies or other employees is beyond this appeal, but the record clearly establishes that May, the assigned

department proved, by a preponderance of the evidence, that *May* is properly subject to Rule 190

social worker, failed to contact law enforcement or any other individuals who might have known the whereabouts of the family after her initial attempts, and failed to conduct any investigation after her initial attempts. The evidence and testimony from department representatives and May supports the findings that May was negligent in performing duties under Rule 190.01.b., and, thus, subject to a three-day suspension without pay.

V.

CONCLUSION

This is a truly unfortunate and sad case involving the death of a young child. Although it is beyond this appeal to determine whether actions of DHW could have prevented this tragedy, the record in this case supports DHW's actions of imposing a three-day suspension without pay upon the assigned social worker who failed to contact law enforcement or determine if law enforcement had been contacted, and who did not follow through on the investigation after initially determining that the family had moved from the residence. The record is also clear that May received the requisite minimal Constitutional Due Process before DHW made the decision to suspend her. We also hold that the Hearing Officer recognized and applied the appropriate standard of review and burden of proof. We AFFIRM.

DATED this 7th day of January, 1997.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

/s/ _____
Peter Boyd, Vice Chair

discipline.

/s/ _____
Ken Wieneke

/s/ _____
Sherry Dyer

/s/ _____
Don Miller

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. I.C. § 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.

I.C. § 67-5318

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing DECISION AND ORDER DISMISSING APPEAL AND PETITION FOR REVIEW in *May v. Idaho Dep't of Health and Welfare*, IPC No. 96-01, was delivered to the following parties by the method stated below on the 7th day of January, 1997.

FIRST CLASS MAIL

W.B. Latta, Jr.
Attorney at Law
P.O. Box 2192
Boise, Idaho 83701-2192

STATEHOUSE MAIL

Edward C. Lockwood
Deputy Attorney General
Idaho Department of Health and Welfare
1118 Ironwood Drive
Coeur d'Alene, Idaho 83814

/s/ _____
Val Rodriguez