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IDAHO PERSONNEL COMMISSION
STATE OF IDAHO

)	
)	
TERRY JACOBS,)	
)	
Petitioner,)	
)	IPC NO. 98-04
)	
vs.)	
)	DECISION AND ORDER
)	ON PETITION FOR
DEPARTMENT OF CORRECTION,)	REVIEW
)	
Respondent.)	
_____)	

THIS MATTER CAME ON FOR HEARING ON THE PETITION FOR REVIEW on February 12, 1999. Petitioner Terry Jacobs (Jacobs or Petitioner) was represented by F. Michael Burkett, Jr.; Respondent Department of Correction (Department) was represented by Paul R. Panther. The petition for review involves the hearing officer's decision dated September 4, 1998. WE AFFIRM.

I.

BACKGROUND AND PRIOR PROCEEDINGS

A. Facts.

Petitioner Terry Jacobs is a classified employee of the Department. In October, 1997 at the time the issues leading to this appeal arose, Jacobs was a food service officer at a Department facility. At that time he was the third most senior of the eight employees in the food service division. It appears that in the food service division, shift assignments are based on a seniority bidding system. On October 17, 1997, Jacobs was assigned to the swing shift. As a less preferable shift, the swing shift was usually left to the employees with the least seniority.

1. *December 5 Problem Solving Request*

On December 5, 1997, Jacobs filed a request for problem solving, seeking resolution of a number of issues. Issues relevant to this appeal were limited to the shift change, the denial of his seniority, and an investigation which Jacobs alleged had been conducted without notice. Included with Jacobs' problem solving request was a list of individuals that Jacobs believed had information pertinent to the resolution of his concerns, and a request for physical and documentary evidence pertaining to the alleged investigation.

On December 15, 1997, the problem solving meeting was held. The record is unclear as to who was present. Individuals that Jacobs had asked to be present were not allowed to attend, nor was the physical and documentary evidence he requested provided.

Warden Paskett issued his response to the problem solving meeting on December 17. In pertinent part, his response noted that:

1. Jacobs' shift change was made for reasons of institutional need;
2. The seniority bidding policy upon which Jacobs relied did not apply to food service staff, only to security staff, but even if it were applicable, the policy allows seniority to be suspended based on institutional need;

3. Jacobs had not been investigated by the Department; and,
4. Deputy Warden Miller did not make statements that Jacobs was involved in an improper sexual relationship with another employee.

Jacobs disagreed with Warden Paskett's decision regarding his problem solving request, and on January 5, 1998, filed an "Objection and Request for Review by the Director." Director Spalding responded to Jacobs' requested review by memo dated January 21, 1998.

Director Spalding supported the restructuring of the food service division which resulted in the rearranging of shifts. The director noted that while such shift changes could negatively affect individual employees, institutional needs must remain the primary focus of decision-making. The director also pointed out that it is a job requirement of the food service officer position to be willing to work various shifts and various days. Director Spalding also noted that the seniority policy for shift bidding was only applicable by its terms to security staff.

Director Spalding also reaffirmed Warden Paskett's determination that there was no evidence that Jacobs had been under formal investigation regarding an improper relationship with another employee.

This decision by Director Spalding concluded the Petitioner's December 5, 1997 problem solving request.

2. December 30 Problem Solving Request

On or about December 12, 1997, Petitioner Jacobs was issued a letter of reprimand¹. The reprimand arose from the discovery in September, 1997, that three knife blades were missing from the kitchen inventory. The subsequent review revealed that Jacobs and

another employee, food service officer Susan Isaac, had known since March, 1997 that an inmate had hidden a security key which accessed the knife box. This information was not reported by Jacobs and Isaac until October 1997. The letter of reprimand issued to Jacobs is not in the record, but is referenced in Petitioner's second request for problem solving.

On December 30, 1997, Jacobs filed a second request for problem solving². This request pertained to the letter of reprimand. Petitioner asked that the reprimand be rescinded.

By memo dated January 27, 1998, Phyllis Blunck, Personnel Manager, notified Jacobs that the Director's response to Jacobs' first problem solving request addressed all the issues raised in his second request, including the letter of reprimand and would not be pursued further by the Department.

B. Appeal to Personnel Commission.

Jacobs filed two timely appeals with the IPC on February 25, 1998. The first appeal was from Director Spalding's January 21, 1998 final decision regarding his December 5 problem solving request. The appeal alleged that Director Spalding's final decision was arbitrary and without basis in law or fact, deprived Jacobs of a right or benefit to which he was entitled by law, and was a violation of Idaho Code § 67-5315 and Department policies. The second appeal was regarding the Department's response to his December 30, 1997 problem solving request. The appeal alleged that the denial of Jacobs' December 30

¹ Neither the actual date of the letter of reprimand, nor the date it was received is in the record. Other documents in the record suggest the reprimand was dated December 12 or December 16.

² There is some confusion concerning the date of filing of this problem solving request. Counsel for Petitioner notes the date as December 26, but the document itself is dated December 30. For purposes of this memorandum, the second request shall be denominated the December 30 request.

problem solving request was arbitrary and without basis in fact or law, deprived Jacobs of a right or benefit to which he was entitled by law, subjected Jacobs to discipline without due process, and was a violation of Idaho Code § 67-5315 and Department policies. Both appeals were consolidated as IPC No. 98-04 and assigned to hearing officer Bergquist.

The Department filed a motion to dismiss on July 17, 1998. The motion was briefed by both parties. The hearing officer issued his Order Granting Motion to Dismiss on September 4, 1998.

Jacobs filed a timely petition for review.

II.

ISSUE

There is really only one issue to be decided in this matter: Did the hearing officer err in dismissing Isaac's appeal for lack of jurisdiction? The primary issue raises several subsidiary issues:

1. Was Petitioner's December 5, 1997 problem solving request handled in accordance with applicable statutes, rules, and policies?
2. Did the Department deny Petitioner access to the problem solving process?
3. Is problem solving as established by Idaho Code § 67-5315 a "right and/or benefit" to which Petitioner is "entitled by law?"

III.

STANDARD AND SCOPE OF REVIEW

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

When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 28.01.01.201.06. That is, the burden of proof is on the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.

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

Soong v. Idaho Dep't of Health and Welfare, IPC No. 94-03 (February 21, 1996), *aff'd* Case No. CV 96-00106 (Dist. Ct. 2nd Dec. 6, 1996) (footnote omitted). This case presents only issues of law over which we exercise free review.

IV.

ANALYSIS

A. Preliminary Matters.

Along with its briefing on the petition for review, the Department filed a motion seeking to supplement the excerpt of record provided by Petitioner. The documents included in the request to supplement were, with two exceptions, included in the record created before the hearing officer and are thus before the Commission. There is a long line of authority which holds that the Commission is precluded from taking further evidence on petition for review. *Fridenstine v. Idaho Dep't of Admin.*, IPC No. 95-12 (Aug. 23, 1996), citing

IDAPA 28.01.01.202; *Leone v. Idaho Dep't of Correction*, IPC No. 95-06 (June 25, 1996), citing *Sarbacher v. Lewis-Clark State College*, IPC No. 95-03 (Sept. 15, 1995); *Bowen v. Idaho Dep't of Fish and Game*, IPC No. 94-21, p. 3, n. 2, (Decision and Order on Remand, Feb. 27, 1996), citing *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (Dec. 15, 1995), *Department of Health and Welfare v. Sandoval*, 113 Idaho 186, 188 n. 2, 742 P.2d 992, 994 n. 2 (Ct. App. 1987), I.C. §§ 67-5316, 67-5317.

For the reasons stated above, the Commission denies the Department's request to supplement the record.

B. December 5 Problem Solving Request.

The hearing officer correctly determined that the Commission lacked jurisdiction to hear an appeal of Jacobs' December 5 problem solving request.

It is well settled law that:

As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them . . .

Washington Water Power Co., v. Kootenai Environmental Alliance, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979) cited in *Sheets v. Idaho Department of Health and Welfare*, 114 Idaho 111, 113, 753 P.2d 1257, 1259 (1988). Appeals to the Commission are limited by statute. Pertinent to this appeal, Idaho Code § 67-5316(1)(b) provides that an employee may appeal the failure of an appointing authority to grant a right or benefit to which the employee is entitled by law.

The statutory scheme creating the problem solving and due process procedures recognized that not every issue which was appropriate for problem solving would be appealable. Because very few problem solving procedures will involve a right or benefit to which an employee is entitled by law, very few problem solving outcomes will be appealable.

Jacobs claims that he was denied a right or benefit because he was not allowed to present witnesses or introduce physical or documentary evidence at his problem solving meeting. The hearing officer rightly noted that nothing in Idaho Code § 67-5315, IPC Rule 200, or Department policy *entitles* an employee to present witnesses or introduce evidence during a problem solving. The Department's problem solving policy (Department of Correction Policy 203(4)(c)(2)) suggests that the decision maker "should take into account" the preference of the employee in deciding who shall be present at the meeting. This permissive language is in contrast with the mandatory language found in Idaho Code § 67-5315, IPC Rule 200.04, and Department policy which entitles an employee to representation by a person of their choice at the later stages of the problem solving process.

Problem solving is not and was not intended to be a quasi-judicial *hearing*. It is a simple process designed to encourage dispute resolutions by more informal means.

The procedure shall contain a statement from the department head encouraging employees to use the procedure for any nondisciplinary, job-related matters, and encouraging the employee, supervisors, and upper-level managers and administrators to resolve the matter at the lowest management level possible within the organization.

IPC Rule 200.04. Jacobs' problem solving request led to a problem solving meeting, was given full consideration by Warden Paskett, and was reviewed and considered by Director Spalding who issued a final decision, all in accordance with applicable statutes, rules and policies. Petitioner agrees that the matters which were the subject of the problem solving, in and of themselves, do not fall within the rights and benefits language. Jacobs received the full benefit of the problem solving process, but not the outcome which he sought. Petitioner was denied no right or benefit to which he was entitled.

More importantly, however, this Commission lacks jurisdiction over Jacobs' appeal of the December 5 problem solving outcome because Jacobs' request for problem solving

was not timely. IPC Rule 200.04 requires the initial problem solving request be filed within “five (5) working days after being notified or becoming aware of a nondisciplinary matter which may be handled through the problem-solving procedure.” In this case, Petitioner learned of the shift change on October 17, 1997. His request for problem solving was not filed until December 5, 1997. Not including holidays and weekends, 34 work days (business days) elapsed from notice of the shift change to the problem solving request. An untimely request *may* be accepted and considered by the Department, but “the employee waives any right of review by the Commission by not complying with the time limit for filing.” IPC Rule 200.03. Even if the December 5 problem-solving process was fatally flawed, Petitioner waived any right to appeal when he waited thirty-four days to file his problem solving request.

C. December 30 Problem Solving Request.

Petitioner’s December 30 problem solving request was a result of the letter of reprimand which he received on December 16, 1997. A letter of reprimand is an appropriate subject for problem solving. It is non-disciplinary in nature and not otherwise precluded by Idaho Code § 67-5315. Petitioner contends that the Department declined to consider his request for problem solving, and that such a refusal constituted the denial of a right or benefit to which he was entitled by law. This raises two questions: Did the Department fail to provide Petitioner access to the problem solving process; and if so, is problem solving as established by Idaho Code § 67-5315 a “right and/or benefit” to which Petitioner is “entitled by law?”

Did the Department deprive Jacobs of access to the problem solving process when it chose not to consider his December 30 request? A careful review of the two problem

solving requests and Director Spalding's response shows that Jacobs was not denied access to the process. The issues raised in the first problem solving request were:

1. The shift change, which includes:
 - a. the issue of seniority bidding;
 - b. a claim that Deputy Warden Miller refused to meet to discuss the shift change;
2. An alleged investigation into Jacobs' relationship with a co-worker by Deputy Warden Miller; and,
3. That Deputy Warden Miller's actions caused rumors about Jacobs' relationship with a co-worker and resulted in a hostile work environment;

The issue raised in the December 30 problem solving request was:

1. The December 16, 1997 letter of reprimand;

The letter of reprimand was issued, and Jacobs' second problem solving request was filed, prior to Director Spalding's final decision on the December 5 problem solving request. It is clear from Spalding's letter that he considered all of the documents concerning both requests before making a final decision on his first request. The director's final decision addressed the following issues:

1. The shift change (Dec. 5, Issue 1), including:
 - a. seniority bidding (Dec. 5, Issue 1.a);
 - b. alleged refusal of Deputy Warden Miller to meet with Jacobs regarding the shift change (Dec. 5, Issue 1.b).
2. The alleged investigation concerning a relationship with a co-worker (Dec. 5, Issue 2.);

3. The alleged actions of Deputy Warden Miller leading to rumors of an improper relationship with a co-worker (Dec. 5, Issue 3); and,
4. Letter of reprimand (Dec. 30, Issue 1).

This list encompasses every issue that Petitioner raised in his two problem solving requests. When the Department reviewed the second request, it was clear that all those issues had been addressed along with the issues presented in the first request. To problem-solve the December 30 request in light of Director Spalding's comprehensive response would have been redundant.

In this case, and under these circumstances, Petitioner was not denied access to the problem solving process. Because Jacobs was not denied access to the process, we need not determine whether the process itself is a right or benefit to which the employee is entitled by law.

V.

CONCLUSION

The hearing officer correctly determined that, with regard to the December 5 problem solving, Petitioner had not been deprived of any right or benefit which would make the problem solving result appealable. We AFFIRM the hearing officer's decision for the reasons stated therein and upon the additional ground that Petitioner waived any right to appeal by failing to file the initial problem solving request within five days of receiving notice of the shift change.

We AFFIRM the hearing officer's dismissal of the appeal pertaining to Jacobs' second problem solving request, but for different reasons than those articulated by the hearing officer. The hearing officer dismissed because letters of reprimand are not disciplinary. In his Petition for Review, Jacobs argued that problem solving itself was a right

or benefit to which he was entitled by law and that he was entirely denied access to the process. Dismissal remains appropriate because the record is clear that Petitioner was not denied access to the process.

VI.

STATEMENT OF APPEAL RIGHTS

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers;
- (3) That the findings of fact by the commission do not as a matter of law support the decision. Idaho Code § 67-5318.

DATED this 10th day of March, 1999.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

/s/
Sherry Dyer, Chair

/s/
Peter Boyd

/s/
Ken Wieneke

/s/
Don Miller

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Decision and Order on Petition for Review in *Jacobs v. Dep't of Correction*, IPC No. 98-04, was delivered to the following parties by the method stated below on the 10th day of March, 1999.

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_____/s/_____
Val E. Rodriguez
Secretary to Executive Secretary

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