

IDAHO PERSONNEL COMMISSION
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IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

IDAHO DEPARTMENT OF)	
HEALTH AND WELFARE,)	
)	
Petitioner/Appellant,)	IPC NO. 04-26
)	
vs.)	DECISION AND ORDER
)	ON PETITION FOR REVIEW
STEVEN ARNOLD,)	
)	
Respondent.)	
_____)	

This matter came for hearing on Petition for Review on November 8, 2005. The Idaho Department of Health and Welfare (hereinafter "Department") was represented by Deputy Attorney General Melissa Vandenberg and Appellant Steven Arnold (hereinafter "Arnold") represented himself. The petition for review concerns Hearing Officer David E. Wynkoop's (hereinafter "Hearing Officer") decision dated February 11, 2005 holding that the Department did not prove by a preponderance of the evidence that it had proper cause to terminate Arnold and ordered his reinstatement.

I.

BACKGROUND AND PRIOR PROCEEDINGS

A. Facts

Arnold was employed by the Department from June 1976 until his termination on

November 26, 2004. At the time of his dismissal, Arnold was a developmental specialist senior at the Idaho State School and Hospital (“ISSH”). Arnold’s job duties required he work flexible hours in order to observe client care at various times of the day or night; therefore, he did not have a fixed work shift. Arnold was also entitled to take extended breaks during his workday. Arnold generally stayed at the ISSH worksite during his extended breaks because of a relatively long commuting time to his home.

The Department’s reasons for Arnold’s dismissal were as follows: During the month of October 2004, Arnold was discovered using the Department-provided Internet for alleged excessive personal use. During a 28-day period in October, Arnold also visited a number of sexually inappropriate web pages, accessing and viewing several sexually oriented photographs, including photographs that were sexually provocative or pornographic in nature, while browsing the Internet.

After receiving a WebMarshal report from the Department’s Division of Information Technology, the Department initiated an investigation of Arnold’s Internet use. A WebMarshal report is a detailed report listing all of the employees’ Internet activity during a specified period, and includes the Internet address (URL) of every single location or page that appeared on the employee’s screen and includes the length of time the employee spent on the identified Internet addresses and the amount of bandwidth (KB) used while the employee accessed and viewed the website.

According to the WebMarshal report, Arnold spent a significant amount of time viewing and accessing non-business related websites, including the following: Yahoo! Launch, Yahoo! Personals, and a variety of sport celebrity web pages. Arnold also

allegedly viewed and accessed sites with “obscene, pornographic . . . or sexually oriented material,” including but not limited to the following sites:

<http://famouspersons.com/pamela-anderson/index.html>

<http://www.annanicolesmith.org>

<http://www.celebrity-girls.net>

See Exhibit 7 sections 5 and 7 (c) and Exhibit 14.

As part of the Department’s investigation, Arnold was interviewed on November 8, 2004 by Tom Oblinsky, Human Resource Specialist, Scott Den Hartog, Human Resource Specialist, and Gwen Chavarria, Quality Commitment Supervisor. During this interview Arnold made several admissions regarding his Internet use, including but not limited to using the Department-provided computer and Internet to view and access non-business related material as well as inappropriate material. See Exhibit 1, Notice of Contemplated Disciplinary Action, p. 2. Further, Arnold told Mr. Oblinsky, Mr. Hartog, and Ms. Chavarria that he “was testing the system”; in essence, testing to see what could get through the Department’s WebMarshal program and Internet filters. *Id.*

Arnold was provided a notice of contemplated disciplinary action (“Notice”) on November 12, 2004. Arnold, with his representative, first responded to the Notice to Guy Tidwell, Clinical Director, and Scott Den Hartog on November 17, 2004. Arnold responded a second time to Barbara Hancock, ISSH Administrator, and again to Mr. Hartog, at Ms. Hancock’s request, on November 24, 2004.

Again, during both meetings, Arnold confirmed the use of the Department’s resources (Department provided computer Internet) inappropriately, and had, in fact, viewed sexually oriented material. Arnold stated he was not viewing the materials for sexual reasons but, rather, stated that he “enjoyed looking at beautiful women.” He also

admitted that he was not “testing the system” as he alleged earlier. He also expressed his regret for having viewed the inappropriate material and that if given another opportunity he “would not do it again.” Exhibit 3, Affidavit of Scott Den Hartog.

After reviewing the information, ISSH Administrator Barbara Hancock dismissed Arnold for cause on November 26, 2004 for violation of IDAPA 15.04.01.190.01 (“Rule 190”), more specifically paragraph (e) “Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department” and paragraph (g) “Careless, negligent, or improper use or unlawful conversion of state property, equipment or funds.” Supporting alleged basis for this action was Arnold’s failure to follow Idaho State Executive Order 2001-12, ITRMC policies 1040, 1050, and 1060, and Idaho Department of Health and Welfare Human Resources policies and procedures section 2. See Exhibit 2, Notice of Dismissal, dated November 26, 2004, pp. 1-2.

B. Appeal to Personnel Commission.

Arnold filed a timely appeal to the IPC on December 30, 2004. In his notice of appeal, Arnold appeals the Department’s decision to dismiss him for “inappropriately using Department provided computers and Department provided Internet access.” Exhibit 5. Arnold further requests reinstatement and notes that he has been a long tenured employee at the Department and would like the IPC to “consider that the punishment for my misuse of the computer was too severe.” *Id.*

The matter was assigned to the Hearing Officer on January 7, 2005. The Hearing Officer set the matter for hearing on January 28, 2005; however, due to a

conflict in scheduling, the matter was eventually rescheduled for hearing on February 1, 2005. On January 31, 2005, the Department filed a motion for summary judgment with the Hearing Officer by facsimile, with supporting memorandum, exhibits, and affidavits attached.¹ At the hearing, the Hearing Officer first addressed the Department's motion for summary judgment, entertaining oral argument from the parties. The Department's position was there was no genuine issue of material fact because, based on several different admissions, Arnold was not contesting that his computer use was inappropriate but, rather, was only contesting the level of discipline given to him. After considering argument from the parties, the Hearing Officer reserved ruling on the Department's motion for summary judgment and proceeded with the hearing on the merits. *Id.*, pp. 20-25.

In issuing his decision on February 11, 2005, the Hearing Officer denied the motion for summary judgment, finding that Arnold's statements did not rise to a level of admission that the Department had grounds for disciplinary action based on his computer usage, and that material issues of fact existed with respect to proper cause for discipline. *Findings of Fact, Conclusions of Law and Preliminary Order*, pp. 2-3. The Hearing Officer further determined, after a full evidentiary hearing that the Department had not proved by a preponderance of the evidence that proper cause existed pursuant to Rule 190 for the Department's disciplinary action against Arnold and ordered his reinstatement. *Id.*, pp. 11-12.

II.

ISSUES

¹ The Hearing Officer did not receive the complete brief until the morning of the hearing and Arnold was hand delivered his copy of the complete brief on the morning of the hearing as well. *Tr.*, pp. 6-7.

1. Did the Hearing Officer err in Denying the Department's Motion for Summary Judgment?
2. Did the Department prove by a preponderance of the evidence that Arnold violated Idaho Code § 67-5309(n) and Rule 190.01e. & g?

III.

STANDARD OF REVIEW

The standard of review on disciplinary appeals to the Commission is as follows:

When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 29.01.01.201.06. That is, the burden of proof is on the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.

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

Soong v. Idaho Department of Welfare, IPC No. 94-03 (February 21, 1996), *aff'd*, 132 Idaho 166, 968 P.2d 261 (Ct. App. 1998).

IV.

DISCUSSION

A. Department's Motion for Summary Judgment

At the outset of the hearing, the Department filed a motion for summary judgment together with supporting memorandum and affidavits. As discussed above, the Hearing Officer heard oral argument from both parties and took the motion under advisement, then proceeded with the hearing on the merits. The Hearing Officer denied the motion in his decision. *Findings of Fact, Conclusions of Law and Preliminary Order*, pp. 2-3. On petition for review to the Commission, the Department asserts the Hearing Officer erred in denying its motion for summary judgment. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. The facts are to be construed in the light most favorable to the non-moving party, Arnold in this case.

It is the Department's position there was no genuine issue of material fact; but, rather, Arnold made several admissions concerning his inappropriate computer use and was only contesting the level of discipline given to him. However, the Hearing Officer disagreed. Rather, recognizing that Arnold was not represented by an attorney when making his statements or when drafting his notice of appeal, and taking into account Arnold's less than precise statements made under stress, the Hearing Officer found that Arnold's statements did not rise to the level of admissions proving Department grounds for discipline and found there were material issues of fact present. *Findings of Fact, Conclusions of Law and Preliminary Order*, pp. 2-3.

It appears the Hearing Officer chose to proceed on the side of caution. The Hearing Officer decided to allow Arnold to fully present his case and perhaps expand and explain statements (alleged admissions forming the factual basis for the Department's motion) he made during the due process procedure and in his Notice of Appeal. The other significant factor influencing the Hearing Officer's decision to proceed with hearing was the rather sudden presentation of the motion. The Department filed the motion the day before the hearing and the Hearing Officer did not receive all the relevant documents until the next morning at the hearing. Further, Arnold was first presented with the motion and its supporting documentation at the hearing.

The Idaho Rules of Administrative Procedure of the Attorney General on contested cases ("OAG Rules") apply to Commission appeals to the extent they are not inconsistent with the Commission's statutes or practice. See Commission Rule 201.01. IDAPA 04.11.01.260 and IDAPA 04.11.01.565 (OAG Rules 260 and 565) allow for filing of prehearing motions and OAG Rule 565 provides that a party answering the motion "will have fourteen (14) days from the time of filing . . . in which to respond". To allow for such response, as required by OAG Rule 565, it appears that a-rescheduling of the hearing scheduled for that day would have been necessary.

Under the circumstances, with the Department's last minute filing of the motion for summary judgment, neither the Hearing Officer nor Arnold had any real chance to adequately consider the motion and its supporting documentation, and the Hearing Officer chose to proceed with the evidentiary hearing scheduled for that day. Given the sudden filing of the motion on the day before the hearing and service to Arnold at the hearing, it appears the Hearing Officer could have summarily denied the motion.

However, the Hearing Officer considered argument from the parties and in the interest of ensuring due process, reserved ruling on the motion, instead proceeding with the hearing. The Commission defers to the discretion of the Hearing Officer in his procedural disposition of the motion and further agrees that, construing the facts in light most favorable to Arnold, there were issues of fact, specifically regarding Arnold's intent, requiring further review via hearing. The Hearing Officer did not err in denying the motion for summary judgment.

B. Proof of Cause for Discipline

The essence of the question before the Commission is whether the Department established proper cause for Arnold's termination by a preponderance of the evidence and whether the Hearing Officer's findings of fact and conclusions of law are supported by substantial competent evidence.

The Department's allegations of Arnold's inappropriate computer use can be set forth in three categories:

- 1) Use of the Department computer during work time for non-work purposes;
- 2) Excessive personal use of the Department provided computer; i.e. excess of occasional personal use;
- 3) Use of the Department computer to view pornographic or sexually oriented material.

The most prominent issue involved in this matter was whether Arnold viewed "pornographic or sexually explicit" or "obscene, pornographic, profane, or sexually oriented material" using the state owned computer and Internet in violation of the Governor's Executive Order 2001-12, paragraphs 5 and 7 (a) and (c) and the corresponding ITRMC policy 1050. See Exhibits 7 and 9. If proved by a

preponderance of the evidence, Arnold's viewing of pornographic, sexually explicit, obscene, or sexually oriented material certainly qualifies as a violation of Commission Rule 190.01(e) and (g). It is undisputed that Arnold was aware of the Executive Order and the ITRMC policy involved.

After a one day hearing, the Hearing Officer issued his Findings of Fact (Findings of Fact, Conclusions of Law and Preliminary Order, pp. 4-6) and ultimately determined the Department did not prove by a preponderance of the evidence that Arnold knowingly or intentionally used his Department computer to view prohibited pornographic or sexually oriented material and content. *Id.*, p. 11.

In so finding, the Hearing Officer correctly recognized that, to the extent Arnold viewed pornographic or sexually oriented pictures using his Department computer, such activity violates state and Department usage policies even if conducted on Arnold's personal non-work time. The Hearing Officer further found that Arnold did admit visiting sites such as PamelaAnderson.com, celebrity.com, and annanicole.com, and while submitting that pornography and sexually oriented material is a subjective notion, did acknowledge and find that several images viewed by Arnold were of nude or topless women which were indeed pornographic or sexually oriented. *Id.*, p. 10. The Hearing Officer also correctly noted that an element of intent needs to be present on the part of Arnold in viewing pornographic or sexually oriented material and the Hearing Officer made the finding that the Department had not proved by a preponderance of the evidence that Arnold had knowingly and intentionally used his Department computer to view pornographic or sexually oriented material. *Id.*, p. 11.

The Hearing Officer reasoned that when Arnold visited the websites mentioned above, 30 to 50 pictures would pop up on his full screen, each one about one square inch in size, and that Arnold testified he would click out of the screen as soon as he realized there were inappropriate pictures appearing. *Id.*, pp. 9-10. Further, the Hearing Officer recognized Arnold had not previously been warned about or disciplined for computer misuse of this nature and that this tended to support his assertion he did not knowingly or intentionally engage in the prohibited activity. *Id.*, p. 11.

The Commission agrees with the Hearing Officer that intent is a necessary element with respect to whether Arnold improperly viewed the pornographic and sexually oriented websites and material using his Department computer. While Executive Order No. 2001-12, (Section 7c) does not expressly include words signifying a requirement of intent, the Commission finds such an element is reasonably implied. Corresponding ITRMC Policy 1050, Policy Section D provides “If a user **accidentally** connects to a site that contains sexually explicit or otherwise offensive material, he/she must disconnect from that site immediately and report the incident to their supervisor”. Exhibit 9, p. 2. (emphasis added). ITRMC Policy 1050 then goes on to strictly prohibit “[v]iewing or distributing obscene, pornographic, profane, or sexually oriented material”. Provision of protocol upon **accidental** connection to sexually explicit material on the internet suggests, at least implicitly, that some element of intent is required when it comes to viewing or distributing such material on state owned equipment.

Based on full review of the record and transcript in this matter, the Commission is satisfied the Department showed by a preponderance of the evidence that Arnold did intentionally view and visit pornographic or sexually oriented material and websites.

The fact that Arnold had not been previously warned about or disciplined for viewing pornographic or sexually oriented material and/or websites is irrelevant as to whether Arnold in fact intentionally viewed said material. It is undisputed Arnold was well aware of the state and ITRMC policies as well as Executive Order 2001-12, which distinctly prohibits such activity. See Tr., p. 188, Ls. 6-8.

In response to the question of whether he recalled anyone in staff meetings or other meetings discussing the Department's policies regarding Internet use, Arnold further admitted that "Sue [Broetje, Quality Assurance Director of Idaho State School and Hospital] during one of our meetings said, just a remainder (sic), Barb [Barbara Hancock] is telling everybody to remind them just to be careful with the Internet and that was pretty much all that was said." See Tr., p. 191, Ls. 20-25; Tr., p. 192, Ls. 1-3. When asked what he thought Ms. Broetje meant by this warning, Arnold stated "just what she said, just be careful with using the Internet. And pornography and the gambling were two big issues that I think people were having, and so in fact that was – I think gambling was one of those that was brought to light." See Tr., p. 192, Ls. 7-12.

There was definitely knowledge on Arnold's part as to prohibited activity and the fact he had not been previously warned about or disciplined for prohibited activity is irrelevant as to showing intentional violation of the Executive Order 2001-12 and ITMRC Policy 1050. Noticeably missing from the Hearing Officer's findings of fact and analysis, is hearing testimony that strongly supports the Department's assertions concerning Arnold's viewing of pornographic or sexually oriented material.

In reviewing the exhibits, the evidence shows that on Friday, October 22, 2004, at approximately 12:47 p.m., Arnold began searching for, linking to, and viewing

photographs of Pamela Anderson. See Exhibit 14, pp. 69-70. He spent approximately 3 minutes and 5 seconds viewing these photographs, some of which contained near-nude and sexually provocative photographs of Ms. Anderson. See Exhibit 14, p. 70, and Exhibit 21. Later that same day, at approximately 1:10 p.m., Arnold visited www.celebrity-girls.com, and then another site entitled <http://femmes.chez.tiscali.fr> in search of Anna Nicole Smith. See Exhibit 14, p. 71, at 13:11:01 p.m., and Exhibit 22.

Testimony at the hearing shows that Arnold “was actually kind of shocked” by what he saw at these websites. See Tr., p. 158, Ls. 3-5. In fact, he was so shocked that instead of reporting this to his supervisors he, on the following Monday, October 25, 2004 at 2:14 p.m., opened a website entitled www.annanicole.com and then another site entitled www.annanicolesmith.org. See Exhibit 14, p. 75. He spent about a minute combined at these two sites viewing several photographs of Ms. Smith, some of which were nude, near-nude and, certainly, sexually provocative photographs. See Exhibits 24 and 43 (pp. 5-8), 48 (pp. 5-9), 49 (pp. 5-9), 50 (pp. 6-9).

Later that same day, Arnold conducted a Yahoo search for porn stars Jenna Jamison and Asia Carrera. See Exhibit 14, p. 79, and Exhibits 27-29. Arnold also admitted in his testimony, contrary to the Hearing Officer’s findings, that “I clicked on a few of the pictures, but they were not – my intentions were not of the sexually – like the full naked pictures.” See Tr., p. 172, Ls. 6-15.

Arnold’s claim that he did not intentionally view sexually oriented material and/or pornography is not credible. Although Arnold denied that he would ever have gone to websites with “porn stars,” he immediately contradicted himself by stating “the only one of Jenna Jamison is associated with porn, but there was no picture – was there – there

are no pictures of her . . . “ See Tr., p. 168, Ls. 10-12. When asked whether he did search for a known porn actress, Jenna Jamison, Arnold replied “I – I probably clicked on her name but it wasn’t to look at pornography.” See Tr., p. 168, Ls. 20-23. The Commission questions what purpose, exactly, he had then. In fact, when asked why he would have “clicked” on Ms. Jamison’s name then, if not to look at pornography, Arnold answered “I don’t know.” See Tr., p. 168, Ls. 24-25; Tr., p. 169, L. 1.

Beyond this evidence in the record, the Hearing Officer asked numerous questions of Arnold, the responses to which, clearly show Arnold’s specific intent to view the sexually provocative and inappropriate material. For example, the Hearing Officer asked “how in the world [Arnold] could have got that far into these kind of pictures by accident,” and Arnold replied:

Probably, by you know clicking on more pictures than I should have. I – it may be – I don’t know what to tell you, sir. I – the only thing (sic) think of is just they just appeared from those thumbnail sketches from thumbnail pictures that came up. Because I noticed when I looked – you know, I would look through them, I’d see several of them, and then I would look through that and I’d say, oh, that’s inappropriate.

See Tr., p. 180, Ls. 7-18.

During further examination by the Hearing Officer, Arnold was asked how he got from fully-clothed photographs in introductory pages of a website to nude, near-nude, and sexually provocative photographs of Anna Nicole Smith. Arnold’s response was “I could have yeah. And, that’s probably what happened,” when asked whether he “continue[d] to click,” see Tr., p. 180, L. 25; Tr., p. 181, Ls. 1-25; Tr., p. 182, Ls. 1-4. When asked why he kept going, Arnold answered: “I can’t tell you that and, that’s why I was admitting that I was wrong by doing that, by going further I guess, although I wasn’t

looking for sexually explicit or pornography I wasn't going that far." See Tr., p. 182, Ls. 9-16.

In reviewing Arnold's temporary Internet files located in Exhibits 43-50, particularly those listed earlier concerning Anna Nicole Smith, the Commission does not find Arnold's feigned ignorance and lack of intent to view inappropriate or sexually provocative material to be credible. While there are also many pictures of a non-sexual nature in Exhibits 43-50, most certainly there is no shortage of sexually oriented and provocative pictures contained therein. Department IT employee Jeff Baroli testified that in order for the photographs to be in Arnold's temporary Internet files,

Mr. Arnold would have had – those pictures would have had to appear on Mr. Arnold's computer screen. That's how they got into this – this – by either clicking on the picture, enlarging the picture to his screen, or by simply coming part of a – several pictures on the screen. But they had to appear on the screen to get here.

See Tr., p. 116, Ls. 2-9.

Also, Arnold testified that "No, I didn't deny that" when asked whether he ever denied what was in the WebMarshal report (Exhibit 14) was his Internet activity. See Tr., p. 162, Ls. 19-25; Tr., p. 163, Ls. 1-2.

Overall, full review of the record and transcript in this matter provides ample evidence that Arnold did intentionally view what would be considered "obscene, pornographic, profane, or sexually oriented material". In fact, Arnold repeatedly admitted that he viewed some "inappropriate" material while browsing the Internet. Further, the Hearing Officer correctly found that among images viewed by Arnold were "images of nude or topless women which were pornographic or sexually oriented." See Findings of Fact, Conclusions of Law and Preliminary Order, p. 10. In light of the

evidence in the record the Commission finds, as a matter of law, the Department proved proper grounds for discipline by a preponderance of the evidence.

Once proper cause for discipline has been shown, the law is clear that the Commission (and its hearing officers) have no authority to second-guess the choice of discipline imposed. Therefore, there is no legal basis for the argument the discipline was too harsh. The Commission addressed this argument in *Webster v. Department of Health and Welfare*, IPC No. 96-14 (November 14, 1997):

Webster argues that even if grounds for discipline exist, dismissal was inappropriate and excessive under the facts of her case. As specified by statute (Idaho Code § 67-5309(n)) and rule (IDAPA 28.01.01.190.01), any of the listed can justify dismissal. In this, as in any other disciplinary matter, DHW had a choice as to the type of discipline it wished to impose and it chose dismissal. So long as . . . DHW proved, by a preponderance of the evidence that it had “proper cause” to impose discipline, this Commission will not second guess the Department’s choice of discipline.

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

The Department has proven a factual basis for the imposition of discipline on Arnold by a preponderance of the evidence, at least with respect to proving Arnold intentionally viewed obscene, pornographic, profane, or sexually oriented material on his Department computer. On the other hand, given Arnold’s flexible work schedule and lack of evidence presented at the hearing and in the record concerning whether Arnold was on work time or on personal time during the 28 day period in October, the Department has not met its burden with respect to proving by a preponderance of the evidence that Arnold exhibited excessive personal use of his Department-provided computer or showed excessive use of his computer during work time for non-work

purposes; nor was there sufficient evidence shown of any violation of ITRMC policy 1040, concerning Arnold's e-mail use.

However, where there is more than a single basis alleged, any one violation when proven and constituting proper cause supports whatever level of discipline the state agency decides to impose, up to and including dismissal. See *Cheney v. Department of Correction, IPC No. 97-15* (Decision and Order on Petition for Review, July 8, 1999); *Whittier v. Idaho Department of Health and Welfare, IPC No. 98-03* (Decision and Order on Petition for Review, September 24, 1999) (*aff'd Whittier v. Idaho Department of Health and Welfare, 137 Idaho 75, 44 P.3d 1130* (2002)). Having established Arnold intentionally viewed sexually oriented material on his Department computer by a preponderance of the evidence, the Department has demonstrated proper cause for imposing discipline up to and including termination.

At oral argument before the Commission on petition for review, the parties informed the Commission Arnold had been rehired recently, and upon DHR record review, the Commission takes judicial notice that Arnold's rehiring was effective September 12, 2005. He now holds the same position, although reclassified, with the same job duties and supervisors. He is currently serving his entry probationary period. DAG Vandenberg stated the Department had faced the same type of situation with another Department employee after Arnold's termination and had decided to reexamine its zero-tolerance policy practice relating to viewing of sexually explicit material on the internet. Choosing to suspend this other employee, the Department acknowledged that, in retrospect, it would rather have suspended Arnold for two weeks without pay instead

of terminating his employment. Therefore, in the interest of fairness, the decision was made to rehire Arnold.

However, in so doing, the Department did not concede just cause was lacking for Arnold's termination. As stated above, under the Personnel Act, the Commission only reviews whether just cause has been established by a preponderance of the evidence for the imposition of discipline whatever level of discipline that may be. It cannot revisit the level of discipline administered. In reaching this decision, the Commission has not considered Arnold's rehiring and the reasons given for his rehiring because it has no bearing on whether there was just cause for discipline, but rather, only sheds light on the appropriate level of discipline - an area the Commission has no jurisdiction to visit.

V.

CONCLUSION

Based upon the foregoing, the Hearing Officer's decision is reversed. The Department has demonstrated there was proper cause for discipline by a preponderance of the evidence and Arnold's termination is upheld.

IT IS SO ORDERED.

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 5th day of January, 2006.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

Mike Brassey, Commission Chair

Pete Black, Commissioner

Clarisse Maxwell, Commissioner

John Cowden, Commissioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following parties by the method stated below on this ____ day of _____, 2006.

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