

IDAHO PERSONNEL COMMISSION
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IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

CARL J. PETERSON,)	
)	
Petitioner/Appellant,)	IPC NO. 04-20
)	
vs.)	DECISION AND ORDER
)	ON PETITION FOR REVIEW
IDAHO DEPARTMENT OF CORRECTION,)	
)	
Respondent.)	
_____)	

THIS MATTER CAME FOR HEARING ON PETITION FOR REVIEW on April 26, 2005. Appellant Carl J. Peterson (“Appellant” or “Peterson”) was represented by Scott Chapman. Respondent Idaho Department of Correction (“Department”) was represented by Jeremy Chou. After a hearing on the matter, Hearing Officer Edwin L. Litteneker (“Hearing Officer”) granted the Department’s summary judgment motion and upheld Peterson’s termination. **WE AFFIRM.**

I.

FACTS AND PROCEDURAL BACKGROUND

A. Facts

The facts are straightforward and undisputed. Peterson was terminated effective July 9, 2004 from his position as a correctional officer at the North Idaho Correctional Institution in

Cottonwood, Idaho. At the beginning of his employment, Peterson was given Department Policy Number 217. *Affidavit of Gary Charland* (“Charland Aff.”), *Exhibit D*. Peterson acknowledged that he received and read Policy Number 217, among others by signing a Policy Receipt Statement on November 3, 2000. *Charland Aff., Exhibit E*. Department Policy Number 217 stated that 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 interest such as . . . **[c]harging unauthorized personal long-distance telephone calls to the Department.**” *Charland Aff., Exhibit D*, p.4 (emphasis added).

On or about May 17, 2004, Peterson’s supervisors asked if he was making personal long distance phone calls at the Department’s expense and in contravention to Department Policy and Peterson admitted he had. *Charland Aff., Exhibit A, Notice of Contemplated Action (“NOCA”)*. On June 16, 2004, the Department issued a NOCA based, in part, on Peterson’s admission. *Id., NOCA*, p.1. Peterson responded to the NOCA again admitting he violated Department Policy Number 217 regarding the unauthorized long-distance telephone calls: “[the conduct in question is making long distance phone calls while at work. I admit that I made long distant [sic] phone calls at work.”. *Charland Aff., Exhibit B, Response of Carl J. Peterson to NOCA dated June 24, 2004*.

In his response, Peterson indicated he didn’t know this was a violation of policy: “These phone calls were to my home, which does not make it right, but I was not aware that this is a violation of policy.”). *Id.* However, as discussed above, Peterson acknowledged receipt of the policy at issue on November 3, 2000 and in so doing acknowledged an understanding that he was “accountable for knowing the content of these policies and following procedures outlined as necessary.” *Charland Aff., Exhibit E, Policy Receipt Statement*.

As evidenced by the NOCA (*Charland Aff., Exhibit A*) and the Department's Letter of Termination (*Charland Aff., Exhibit C*), the Department also alleged Peterson's past pattern of unprofessional behavior as a separate and additional basis for his termination and examples of misconduct in late 2002 and in the first half of 2003, for which Peterson was disciplined (three-day suspension without pay) were provided. *Charland Aff., Exhibit G.*

B. Procedural Background

As stated above, the Department issued a NOCA to Peterson on June 16, 2004 and Peterson responded to the NOCA on June 24, 2004. *Charland Aff., Exhibits A & B.* The Department considered the facts and circumstances regarding Peterson's conduct and decided it had probable cause to terminate Peterson's employment. *Charland Aff., Exhibit C.* Peterson timely appealed his termination to the Personnel Commission on August 12, 2004 and the case was assigned to the Hearing Officer. On September 17, 2004, the Department submitted a motion for summary judgment, primarily based upon Peterson's admission to violating Department Policy Number 217. The Hearing Officer initially denied the motion after oral argument.

At hearing in this matter, Peterson had intended to offer evidence that his making personal calls as well as other similarly situated employees had been historically condoned, if not allowed, and that Peterson had been singled out for disparate treatment because no other employees had been disciplined for this same conduct. On October 26, 2004, the Department moved in limine to exclude any evidence of violations of the long-distance phone call policy (Department Policy No. 217 as discussed above) by other employees. The Hearing Officer granted the motion in limine and also reconsidered the Department's motion for summary

judgment, granting it as well and upholding Peterson's termination. *Hearing Officer's Order dated November 18, 2004 ("Order")*. Peterson timely appealed the Hearing Officer's decision to the full Commission on December 23, 2004.

II.

ISSUE

Whether the Hearing Officer erred in granting the Department's Motion in Limine.

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. Peterson's Admitted Violation of Department Policy Number 217 Constitutes Proper Cause for Discipline.

The fact that Peterson's charging of unauthorized personal long distance calls to the Department is a violation of Department Policy Number 217 is not in dispute. The policy clearly states that 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 interest such as . . . **charging unauthorized personal long-distance telephone calls to the Department.**" See *Charland Aff., Exhibit D (emphasis added)*. Peterson freely admits he made the calls.

Violation of Department Policy Number 217 in this manner constitutes proper cause for discipline under I.C. § 67-5309(n)(1) and IDAPA 15.04.01.190.01a. ("IPC Rule 190.01a.") ("failure to perform duties and carry out the obligations imposed by the . . . rules of the department or the Division of Human Resources and Idaho Personnel Commission").

Peterson's violation of Department Policy 217 in this manner also constitutes proper cause for discipline pursuant to I.C. § 67-5309(n)(7) and IPC Rule 190.01g. ("improper use or unlawful conversion of state property, equipment, or funds."). Charging unauthorized long-distance telephone calls to the Department constitutes improper use of the Department's phone lines as well as conversion. Generally, "conversion is defined as a distinct act of dominion wrongfully asserted over another's personal property in denial of or inconsistent with rights therein." *Peasley Transfer and Storage Co. v. Smith*, 132 Idaho 732, 743, 979 P.2d 605, 616 (1999). Peterson wrongfully used Department phone lines to make unauthorized long-distance phone calls and the costs were charged to the Department.

Once a single violation is established whereby proper cause has been demonstrated by a preponderance of the evidence, the Personnel Commission cannot second-guess an agency's imposed level of discipline. *Cheney v. Department of Correction*, IPC No. 97-15 (Decision and

Order on Petition for Review, July 8, 1999). Even 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; Whittier v. Idaho Dep't of Health and Welfare*, IPC No. 98-03 (Decision and Order on Petition for Review, September 24, 1999) (affirmed *Whittier v. Idaho Dep't of Health and Welfare*, 137 Idaho 75, 44 P.3d 1130 (2002)).

B. The Hearing Officer Did Not Err in Excluding Evidence That Other Employees Had Violated Department Policy Number 217 and Were Not Disciplined.

Peterson's sole argument on appeal to the Commission is that he should not have been disciplined for violating Department Policy Number 217 because there were many other similarly situated employees that made personal phone calls to their respective home phone numbers and were not disciplined. *See Peterson's Notice of Appeal*, paragraph 3 at p. 2; *Appellant's Brief*, p. 2. Therefore, Peterson alleges the hearing officer erred in excluding evidence that other employees had violated Department Policy Number 217 and were not disciplined. Peterson's argument lacks merit.

As a classified state employee, Peterson could not be disciplined without proper cause, but once that proper cause is established, as here, the Commission's inquiry ends and Peterson may be disciplined. Just because others may have violated the same rules or policies does not provide Peterson with immunity from his admitted violations; said violations constituting proper cause for discipline.

The Commission has addressed this issue in past decisions. Specifically, the Commission has held that "consistency is a laudable goal, but it is not an entitlement. The DOC's policy on discipline is just that: a policy; it is not a statute, and it confers no substantive rights." *Cheney* at p. 9. Further, in *Cheney*, the Commission recognized that "[d]iscipline is a discretionary

function retained by the agency – in this case, the DOC.” *Id.* The Commission dutifully recognized its function was “to ensure that proper cause is duly proven. It is not this commission’s function to impose its views regarding appropriate type of discipline upon agencies that may have management concerns and exigencies that are beyond our expertise or understanding.” *Id.* at p. 10.

Pursuant to applicable Office of the Attorney General rule 600 (IDAPA 04.11.01.600), the “presiding officer, [hearing officer] with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible . . . on a basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho.” Here, the hearing officer essentially found Peterson’s proffered evidence concerning other employees’ alleged violations of long distance phone call policy to be irrelevant. The hearing officer correctly recognized that “evidence of policy and procedure violations by other Department of Correction employees does not constitute a basis to determine that the Department of Correction did not have cause to discipline Mr. Peterson.” Order dated November 18, 2004 at p. 2. Based on this determination, the hearing officer correctly held that the nature of discipline imposed upon Peterson should be left up to the Department:

The appellant’s significant argument was that the appellant has been singled out for selective enforcement of the Department of Correction’s rules and regulations.

It is the hearing officer’s conclusion that based upon the acknowledgement of the appellant as to violations of the Department’s policy and procedure there is cause to discipline the appellant. The nature, severity and circumstances of the discipline are best left to the agency and not to be second-guessed by the hearing officer.

Id.

This is correct interpretation of Personnel Commission law. In addition to *Cheney*, the Commission has also specifically addressed and rejected Peterson’s argument in this matter in

May v. Idaho Department of Health and Welfare, IPC No. 96-01 (Decision and Order on Petition for Review, January 7, 1997). In *May*, the Commission recognized that “[w]e 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*, p. 11 n.4. The Commission continued in *May* holding that “May’s argument concerning ‘disparate treatment’ misses the fundamental question, which is whether the Department proved by a preponderance of evidence that May is properly subject to Rule 190 discipline.” *Id.*

In his brief, appellant cites *Idaho Department of Correction v. Anderson*, 134 Idaho 680, 8 P.3d 675 (Ct. App. 2000) in support of his position that his alleged disparate treatment evidence is relevant. However, in that case, the appellant, Anderson, actually disputed he violated a policy. Anderson successfully sought to introduce evidence of other employees’ alleged violations and resulting discipline or lack thereof as probative to whether Anderson committed a policy violation in the first place. *Anderson*, 134 Idaho at 689. This case is distinguishable because there is absolutely no dispute that the Appellant violated Department Policy Number 217 with respect to unauthorized long distance telephone calls and charging them to the Department. This has been readily admitted. Therefore, evidence of other employees’ alleged violation of Department Policy Number 217 is not probative to the issue of whether Appellant himself violated that policy and was subject to discipline.

Further, the Idaho Supreme Court in *Anderson v. Spaulding*, 137 Idaho 509, 50 P.3d 1004 (2002), a section 1983 action, addressed a selective enforcement argument under factual circumstances more in line with the present case. In *Spaulding*, the plaintiff, setting forth an equal protection constitutional argument, urged the Court to adopt the theory that “selective enforcement based entirely upon subjective ill will on the part of a government official amounts

to a ‘arbitrary classification’ that fails the rational basis test.” *Spaulding*, 137 Idaho at 514 (citation omitted). The Idaho Supreme Court rejected this theory warning that “[t]o adopt the theory in this case would extend the courts too far into the morass of subjectivity in employment decisions.” *Id.* at 515.

Therefore, based on Commission precedent, as discussed, the hearing officer was correct in excluding Peterson’s proffered evidence and was correct in granting the Department’s Motion for Summary Judgment and upholding his termination. Taken in the light most favorable to Peterson, and assuming other employees also made unauthorized long distance phone calls in violation of Department Policy Number 217, this does not give Peterson free reign to do so.

Pursuant to Commission reasoning in *Cheney* and *May*, all state agencies and departments have the ultimate say as to who to discipline, what type of discipline is warranted, and how the discipline may be carried out. When a department chooses to discipline an employee, all that the law requires is proof that the department have probable cause to do so. Disciplinary actions or lack of action by the Department with respect to other employees is simply not relevant to whether Peterson, in fact, made the unauthorized long distance telephone calls which constitute probable cause for discipline.

In considering such evidence as proffered by Peterson to be irrelevant in IPC proceedings, the Commission is mindful to avoid opening the door to unlimited examination of employment personnel records. Recognizing Peterson’s “selective enforcement” defense in IPC proceedings would allow Peterson and others similarly situated to examine and inspect otherwise confidential employment records (under Idaho law) of other Department employees in order to determine whether said employees have violated any rules and whether they have been disciplined.

Where would it stop? Ruling that such evidence is relevant, appellants like Peterson would be allowed to essentially force witnesses – in this case other state employees – to testify under oath as to whether they have violated Department policy and DHR regulations and whether they were disciplined.

In response, theoretically, a state agency like the Department would be forced to present rebuttal testimony – through witnesses that have been punished in the past – that it has enforced the rules. Allowing a delving into other disciplinary actions by IPC appellants alleging selective enforcement would be allowing the review and second-guessing of otherwise confidential disciplinary decisions made by a state agency like the Department. This is precisely the reason the Personnel Commission only looks into whether there was cause for the disciplinary action and does not question the type of discipline issued once just cause has been proven.

For this reason, contrary to what Peterson argues, there is no “material issue of fact regarding whether or not the conduct on the part of Mr. Peterson should have resulted in his termination when multiple other employees’ same conduct did not”. *Appellant’s Brief*, p. 4. The Hearing Officer was correct in excluding the evidence and in granting the Department’s motion for summary judgment upholding Peterson’s termination. Peterson’s termination is affirmed.

V.

CONCLUSION

Based on the foregoing, Appellant Peterson’s termination is **HEREBY AFFIRMED**.

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 ___ day of May, 2005.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

Mike Brassey, Commission Chair

Don Miller, Commissioner

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 May 2005.

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