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IDAHO PERSONNEL  
COMMISSION

JUL 17 2009

FILED

IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

DIANE FLOYD-MILLER,	)	
	)	
Appellant,	)	IPC NO. 08-21
	)	
vs.	)	DECISION AND ORDER ON
	)	PETITION FOR REVIEW
IDAHO DEPARTMENT OF JUVENILE	)	
CORRECTIONS,	)	
	)	
Respondent.	)	
_____	)	

This matter came for hearing on Petition for Review on June 23, 2009. The Petition for Review concerns the January 14, 2009 Preliminary Order of Hearing Officer John C. Lynn ("Hearing Officer") holding that given the undisputed facts, the Idaho Personnel Commission ("Commission" or "IPC") lacked jurisdiction and granting the Idaho Department of Juvenile Corrections' ("Respondent" or "IDJC") Motion for Summary Judgment. IDJC was represented by Karin D. Jones and Appellant Diane Floyd-Miller ("Appellant" or "Floyd-Miller") appeared *pro se*, with assistance from her husband Casey Miller.

I.

**FACTUAL AND PROCEDURAL BACKGROUND**

At times relevant to this matter, Appellant was an IDJC employee. On October 2, 2008, IDJC issued a Notice of Contemplated Action, notifying her of IDJC's contemplated disciplinary action of a one-week suspension without pay, based upon four incidents that occurred between July and September 2008. After consideration of Appellant's response to the Notice of Contemplated Action, IDJC issued a Letter of Discipline dated October 14, 2008, implementing a three-day (30-hour) suspension without pay. The Letter of Discipline provided a return to work date of October 22, 2008 "conditioned upon [Appellant's] agreement and adherence to a Corrective Action Plan to be outlined by [her] new supervisor . . ." Letter of Discipline, p. 2. Upon her return to work on October 22, 2009, the referenced Corrective Action Plan was set forth in a separate document of that date. See Affidavit of Diane Floyd-Miller in Support of Appellant's Opposition to Respondent's Motion for Summary Judgment, Exhibit 3. Appellant timely appealed to the IPC on October 27, 2008 and the matter was scheduled for a three-day hearing before the Hearing Officer on January 27-29, 2009.

IDJC subsequently reassessed the situation and made a determination that full litigation in a three-day hearing would not be an efficient allocation of IDJC resources and time, particularly given the nature of the underlying disciplinary action. See Affidavit of Karin D. Jones in Support of Respondent's Motion for Summary Judgment ("Jones Affidavit"), Exhibits A and B to Jones Affidavit. Therefore, IDJC decided to rescind the suspension that was the basis of the appeal. *Id.* at ¶ 3 and Exhibits A and B to Jones Affidavit. Pursuant to IDJC's rescission of Appellant's suspension, the IDJC: (1)

removed the October 14, 2008 Letter of Discipline from Appellant's personnel file; (2) requested that the Idaho Division of Human Resources ("DHR") remove the October 14, 2008 Letter of Discipline from its central file; (3) issued payment to Appellant to fully reimburse her for the amount deducted from her paycheck due to the suspension; and (4) reinstated Appellant's accruals of sick leave, vacation leave, and credited state service hours for the time period of the suspension. See Affidavit of Gina Hodge in Support of Respondent's Motion for Summary Judgment ("Hodge Affidavit"), ¶ 2 and Exhibits A and B to Hodge Affidavit. The Corrective Action Plan ("CAP") remained in place.

IDJC then provided a proposed Stipulation to Dismiss the Appeal noting that "[t]here is no longer a disciplinary action to form the basis of the [a]ppeal". Jones Affidavit, Exhibits B and C to Jones Affidavit. Appellant refused to stipulate to dismissal; therefore IDJC filed its Motion for Summary Judgment with the Hearing Officer on December 29, 2008, seeking dismissal of the appeal on the basis that the IPC lacked jurisdiction over the matter as there was no longer a disciplinary action to form the basis for the appeal. See Memorandum in Support of Respondent's Motion for Summary Judgment; Preliminary Order, p. 3. In response, Appellant primarily argued that the IPC should retain jurisdiction because the CAP was still in place and should be rescinded as well and she should be able to continue the appeal on this basis. See Appellant's Opposition to Respondent's Motion for Summary Judgment; Preliminary Order, p. 4.

Following a January 7, 2009 hearing on the Motion for Summary Judgment, the Hearing Officer issued his Preliminary Order on January 14, 2009 granting IDJC's Motion for Summary Judgment and dismissing the appeal for lack of jurisdiction. See

Preliminary Order. Appellant timely filed her Petition for Review at the IPC on February 9, 2009. As set forth in the Discussion section below, she alleges jurisdiction exists for her claims, plus she seeks an award of attorney fees and costs, which were not awarded by the Hearing Officer.

## II.

### ISSUES

- A. **Did the Hearing Officer err in granting IDJC's Motion for Summary Judgment on the grounds that the IPC lacks jurisdiction over this matter?**
- B. **Did the Hearing Officer err in not awarding attorney fees and costs to Appellant?**

## III.

### STANDARD OF REVIEW

On petition for review to the Idaho Personnel Commission, the Commission reviews the record, briefs submitted by the parties and any transcript provided of any evidentiary hearing below. Idaho Code § 67-5317. The governing statute and IPC rules provide that the Commission, on petition for review, shall consider the record established before the Hearing Officer and do not allow retrial of the matter through introduction of documents, exhibits, or other evidence not part of the record before the Hearing Officer. *Karr v. Division of Veterans' Services*, IPC No. 01-19, pp. 2-3 (Order Denying Appellant's Motion to Augment Record, December 2, 2002). Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). The Commission exercises 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. Idaho Code § 67-5317(1).

Summary judgment is appropriate before the IPC when the record establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fry v. Idaho Dep't of Correction*, IPC No. 94-38 (Decision on Petition for Review, May 13, 1996). Summary judgment should be rendered when the pleadings on file, together with any affidavits, show that there is no genuine issue of material fact. *Kaufield v. Idaho Personnel Commission*, IPC No. 96-06 (Hearing Officer Order Granting Summary Judgment, November 6, 1996).

#### IV.

#### DISCUSSION

##### **A. Appellant's Pre-Hearing "Notice and Petition" Regarding Representation and Intervention**

On June 12, 2009, the IPC received for filing a Notice and Petition submitted by Appellant's husband, Casey Miller, setting forth his intent to represent Appellant in legal matters including on Petition for Review in this matter. He also alleges his status and seeks to be an "intervenor" under IDAPA 04.11.01.156 (OAG Rule 156). See NOTICE AND PETITION filed June 12, 2009. The IDJC filed Respondent's Objection to Notice and Petition Regarding Representation of Appellant on June 19, 2009. The IPC treated the NOTICE AND PETITION as a motion and heard oral argument from the parties on this matter at the outset of the Petition for Review hearing on June 23, 2009. The motion was denied.

Mr. Miller's petition/motion to intervene under OAG Rule 156 in this matter, (IPC Case No. 08-21) is untimely. The IPC questions whether Mr. Miller has a separate

direct and substantial interest in this matter and Mr. Miller did not set forth such interest in his petition as required by IDAPA 04.11.01.351 (OAG Rule 351). Nonetheless, even if a direct and substantial interest were shown, Mr. Miller's petition to intervene was not timely filed pursuant to IDAPA 04.11.01.352 (OAG Rule 352), which requires filing of such a petition "at least fourteen (14) days before the date set for formal hearing or prehearing conference [in proceedings before the Hearing Officer], whichever is earlier, unless a different time is provided by order or notice". OAG Rule 352.

With respect to Mr. Miller's motion to represent Appellant in this proceeding, applicable IPC Rules do not allow such representation. Mr. Miller correctly cites OAG Rule 202 as allowing such representation; however, IDAPA 15.04.01.201.01 (IPC Rule 201.01) expressly renders OAG Rule 202 inapplicable to IPC proceedings because it is inconsistent with the Commission's practice on appeals before hearing officers and petitions for review before the IPC. IPC Rule 201.01. Instead, IPC Rule 201.08 provides that [i]ndividual parties may represent themselves (pro se) or be represented by an attorney". IPC Rule 201.08. Mr. Miller is not an attorney.

After denial of the motion, Appellant was provided with the opportunity to postpone the Petition for Review hearing should she require or desire additional time to prepare or seek an attorney's representation. Appellant declined this invitation and Petition for Review hearing proceeded with Appellant acting *pro se*.

**B. The Hearing Officer Did Not Err in Concluding that the IPC Lacks Jurisdiction Over this Matter**

The Hearing Officer correctly concluded, as a matter of law, that the IPC lacked jurisdiction over this appeal. The IPC does not have the ability to evaluate or pass

judgment on or otherwise issue an order on the substantive issues raised in this matter by the Appellant because it does not have the power to do so. Appellant's main contention, as succinctly and quite capably argued by Appellant at the Petition for Review hearing, is that the CAP constitutes an appealable action and should have been rescinded along with the disciplinary suspension. While the IPC originally exercised jurisdiction over Appellant's appeal of a disciplinary suspension, pursuant to Idaho Code § 67-5316(1)(a), the IDJC subsequently rescinded the suspension. Preliminary Order, pp. 2-3; Hodge Affidavit, ¶ 2 and Exhibits A and B to Hodge Affidavit. There is no longer a disciplinary action to form the basis of the appeal; thus, the IPC no longer has jurisdiction. *Id.*; *see also* Idaho Code § 67-5316(1). Neither does the IPC have jurisdiction over the tangential issues raised by Appellant in briefing on Petition for Review, as discussed in more detail below.

Appellant has not disputed the material factual findings, supported in the record, that the IDJC took the following actions with respect to the former disciplinary suspension that previously formed the basis of this appeal: (1) the IDJC removed the Letter of Discipline from Appellant's personnel file; (2) the IDJC requested that DHR remove the Letter of Discipline from its central file; (3) the IDJC issued payment to Appellant to fully reimburse her for the amount deducted from her paycheck due to the suspension; and (4) the IDJC reinstated Appellant's accruals of sick leave, vacation leave, and credited state service hours for the time period of the suspension. See Petition for Review; Preliminary Order, pp. 3-4; Hodge Affidavit, ¶ 2 and Exhibits A and B to Hodge Affidavit. However, Appellant disagrees with various aspects of this conclusion, each of which is addressed below.

**1. The CAP is Separate from the Disciplinary Suspension and is Not an Action Over Which the IPC Has Jurisdiction**

Appellant's main and overriding assertion, very capably stated at oral argument, is that the Hearing Officer incorrectly determined that the IPC lacks jurisdiction over Appellant's attempted appeal of the CAP upon which she was placed upon her return to work. See Petition for Review, pp. 3-9. Specifically, Appellant argues that "the Hearing Officer has taken a very narrow view of the IPC's jurisdiction," pursuant to Idaho Code § 67-5316(1), and asserts that the CAP is part of the suspension and/or is an "adverse action" over which the IPC should exercise jurisdiction. *Id.* at 4, 6-9. These arguments fail as a matter of law.

Taking "a very narrow view of the IPC's jurisdiction" was an appropriate approach on the part of the Hearing Officer. See *id.* at 4. As discussed above, the IPC is a tribunal of limited jurisdiction, based entirely on the PSA. Preliminary Order, p. 5; *Sheets*, 114 Idaho 111, 753 P.2d 1257. The PSA explicitly provides that "[a]ppeals shall be limited to" the four subsections set forth in Idaho Code § 67-5316(1). Idaho Code § 67-5316(1) (emphasis added). Appellant's attempts to expand the boundaries of the IPC's jurisdiction beyond the categories delineated in Section 67-5316(1) are untenable.

In attempting to find authority outside Section 67-5316(1) for the IPC's jurisdiction over this matter, Appellant first points to Idaho Code § 67-5309(n), which provides that the administrator of DHR shall create a rule that "the disciplinary dismissal, demotion, suspension, or other discipline of employees" must be based upon one of the reasons set forth in that provision. Idaho Code § 67-5309(n). Section 67-5309(n) does not provide that "other discipline of employees" can be appealed to the IPC. The only

provision of the PSA that grants jurisdiction to the IPC is Section 67-5316(1). Furthermore, the relevant DHR Rule, enacted pursuant to Section 67-5309(n), does not even characterize a performance improvement plan, such as the CAP at issue here, as a “disciplinary action.” IDAPA 15.04.01.190.01 (DHR Rule 190.01). Instead, the Rule relates only to “[d]ismissal, suspension, demotion, or reduction in pay.” *Id.*

Appellant also attempts to rely upon DHR Rule 010.04, which defines an appeal as “[a]ny written request for relief from dismissal, demotion, suspension or **other adverse action** filed with the Commission by an employee, appointing authority, or applicant.” Petition for Review, p. 4 (emphasis in original), *quoting* IDAPA 15.04.01.010.04. This DHR definition does not confer jurisdiction on the IPC beyond that set forth in Idaho Code § 67-5316(1). In fact, the definition is entirely consistent with the Hearing Officer’s “narrow view” of the IPC’s jurisdiction, as the term “other adverse action” refers only to the type of action that can be appealed under Idaho Code § 67-5316(1)(b), (c), or (d). Similarly, Appellant relies upon a brochure posted on the IPC website, which indicates that “[a]ppeals must be received by the Commission within 35 days of the **adverse action**.” Petition for Review, p. 5 (emphasis in original). Again, an “adverse action” can encompass anything that is appealable under Idaho Code § 67-5316(1), but the IPC’s jurisdiction is explicitly limited to appeals arising only from the type of actions delineated therein.

Finally, Appellant states that the CAP was inextricably linked to the disciplinary suspension that previously formed the basis of this appeal and should therefore be appealable to the IPC. Appellant further asserts that if the suspension is truly rescinded, the CAP should be rescinded as well. See Petition for Review, pp. 6-8.

From review of the record, it is clear the CAP is, indeed, based upon the same written warnings and employee action that formed the basis of the disciplinary suspension that was appealed, and then ultimately rescinded by IDJC.

However, the fact that the CAP is based upon the same subject matter as the rescinded suspension isn't relevant to the determination of whether the IPC has jurisdiction to review the CAP, or order the CAP rescinded as requested by Appellant. Even where the disciplinary suspension and the CAP are both based upon the same subject matter, they maintain independence from one another as completely different employer actions, one always appealable to the IPC (the disciplinary suspension), the other not (the CAP implementation).

As discussed previously, for purposes of this appeal, the IPC's jurisdiction is limited to: (1) appeals of disciplinary dismissals, demotions, or suspensions; or (2) appeals of the failure of an appointing authority to provide a right or benefit to which the employee is entitled as a matter of law, following completion of the IDJC's problem solving procedure. Idaho Code § 67-5316(1)(a), (b). A performance improvement plan, such as the CAP at issue here, is not a disciplinary dismissal, demotion, or suspension. Idaho Code § 67-5316(1)(a). Simply because the CAP was implemented upon her return to work from the suspension does not transform this otherwise un-appealable, (although disciplinary) personnel action into something it is clearly not: a dismissal, demotion, or suspension. While the CAP is certainly something within the parameters of IDJC's problem solving procedure, it is not appealable to the IPC under Section 67-5316(1)(a). Nor has Appellant provided any evidence that being placed on a performance improvement plan deprived her of a right or benefit to which she was

entitled by law under Idaho Code § 67-5316(1)(b). *Id.* The IPC does not have jurisdiction over Appellant's claim regarding the CAP and hence it does not have the power to consider or grant the relief Appellant requests.

## **2. The IPC Lacks Jurisdiction Over Appellant's "Retaliation" Claim**

Appellant asserts that IDJC allegedly retaliated against her for reporting purported policy violations by: (1) issuing written warnings to her; and (2) giving her the Notice of Contemplated Action regarding her suspension while she was "in front of juveniles." Petition for Review, pp. 2-3. First, the disciplinary action at issue – the three-day suspension – has been rescinded by the IDJC. The IPC does not have jurisdiction over the allegations/actions upon which Appellant has based her claim of retaliation, and therefore, does not have jurisdiction over said claim.

The Hearing Officer correctly articulated that:

The IPC is a limited tribunal, the jurisdiction of which depends entirely on the Personnel System Act ("PSA"), Idaho Code §67-5301 *et seq.* (*Sheets v. Idaho Dept. of Health and Welfare*, 114 Idaho 111, 753 P.2d 1257 (1988)). The IPC has authority to determine whether it has jurisdiction over an appeal (*Fry v. Dept. of Correction*, IPC No. 94-38 (May 13, 1996), *aff'd* 131 Idaho 169, 953 P.2d 609 (1998)).

Idaho Code §[67]-5316(1) states, in pertinent part:

(1) Appeals shall be limited to the following:

- (a) Any classified employee who has successfully completed the entrance probationary period may, after completing the departmental due process procedure, appeal a disciplinary **dismissal, demotion or suspension.**
- (b) Any classified employee may, after completing the departmental problem-solving procedure, appeal the failure of an appointing authority to provide a right and/or benefit to which the employee is entitled by law.

Preliminary Order, p. 5 (emphasis in original).

Appellant's "retaliation" claim is based upon: (1) the issuance of written warnings; and (2) the fact that the Notice of Contemplated Action was allegedly given to her "in front of juveniles." Petition for Review, p. 3. Mere written warnings and the nature of IDJC's delivery of the Notice of Contemplated Action do not constitute "a disciplinary dismissal, demotion or suspension," over which the IPC has jurisdiction. Idaho Code § 67-5316(1)(a) (emphasis added).

As the Hearing Officer noted:

*King* [v. *Dept. of Corrections*, IPC No. 98-22 (1999)] stands for the following:

Idaho Code §67-5316(1) does not vest this Commission with jurisdiction to hear appeals on every action taken by an agency against an employee, even when the agency may have acted wrongfully or illegally. The remedy for non-disciplinary claims of discrimination, retaliation by agencies against employees or constructive discharge remains, as it always has, with the courts.

(*Id.* at pp. 7, 8.)

Similarly, arbitrary agency conduct does not by itself invoke the jurisdiction of the IPC.

Preliminary Order, pp. 7-8 (emphasis added), *citing to Stroud v. Dep't of Labor & Indus. Servs.*, 112 Idaho 891, 736 P.2d 1345 (Ct. App. 1987).

Neither is Idaho Code § 67-5316(1)(b) applicable as a basis upon which Appellant could raise her alleged retaliation claim. See Section 67-5316(1)(b). Appellant did not produce any evidence in the record below that demonstrated either of these issues involved "the failure of an appointing authority to provide a right and/or benefit to which the employee is entitled by law. *Id.* Thus, the IPC cannot exercise jurisdiction over these issues under Section 67-5316(1)(b), which provides for jurisdiction only where "after completing the departmental problem-solving procedure,

[the employee] appeal[s] the failure of an appointing authority to provide a right and/or benefit to which the employee is entitled by law." *Id.* (emphasis added).

**3. *The IPC Lacks Jurisdiction to Consider the Factual Allegations that Supported the Rescinded Disciplinary Suspension***

Appellant additionally argues that the IPC should exercise jurisdiction over her disagreement with the factual allegations that supported the rescinded disciplinary suspension, including prior written warnings she had received during her employment. See Petition for Review, pp. 6-7, 9. In making this argument, Appellant asserts that the IDJC's rescission of the suspension "forces the Appellant to admit guilt without a hearing or due process." Petition for Review, p. 1. This is not accurate. The IDJC has withdrawn the disciplinary action at issue, thereby removing any determination of just cause for suspension or "guilt" from the equation relating to the rescinded suspension.

The mere fact that the written warnings and the factual allegations contained therein were used to support the disciplinary suspension does not confer jurisdiction over those issues now that the suspension no longer exists. It is the disciplinary action itself that supports an appeal, not the underlying allegations. If there is no disciplinary action, there is no IPC jurisdiction. To hold otherwise would be to hold that the IPC exercises jurisdiction over any mere written warnings, letters of reprimand, or employer personnel decisions with which an employee disagrees, regardless of whether those warnings or decisions result in an actual appealable disciplinary action. Again, the IPC's jurisdiction is confined to those issues delineated in Idaho Code § 67-5316(1), which does not include written warnings or factual allegations outside the confines of an existing disciplinary demotion, suspension, or dismissal.

## **B. The IPC Does Not Have Authority to Award Attorney Fees**

Appellant argues the Hearing Officer erred in not making a finding for attorney fees and costs and argues she is the prevailing party since IDJC rescinded the disciplinary suspension. While Appellant is correct that the Hearing Officer did not address or make any findings on attorney fees in this matter, this, ultimately, isn't in error. The existing IPC Rules provide for the award of attorney fees and costs; specifically, IPC Rules 201.11, 201.12, and 202.08. The statutory basis for the awarding of attorney fees by the IPC cited in the IPC Rules is Idaho Code § 12-117. See *Sanchez v. Idaho Department of Correction*, IPC No. 96-17 (Decision and Order on Petition for Review, December 9, 2004), affirmed *Sanchez v. Idaho Department of Correction*, 143 Idaho 239, 141 P.3d 1108 (2006). The Idaho Supreme Court recently held that administrative officers and agencies do not have the authority to award attorney fees under Idaho Code § 12-117, expressly overruling the Court's decision in *Stewart v. Department of Health and Welfare*, 115 Idaho 820, 771 P.2d 41 (1989), which previously provided such authority. *Rammell v. Idaho State Department of Agriculture*, --- P.3d. --- 2009 WL 1507748, Idaho, (June 1, 2009). Therefore IPC Rules 201.11, 201.12, and 202.08 exceed the statutory authority of the IPC and are invalid and of no effect.

Further, Appellant is *pro se*. Even if the IPC had authority to award attorney fees, the long standing rule in Idaho is that *pro se* litigants cannot recover attorney fees. *Swanson & Setzke, Chtd. v. Henning*, 116 Idaho 199, 201, 774 P.2d 909, 911 (Ct. App. 1989).

V.

**CONCLUSION**

The Hearing Officer was correct in finding a lack of IPC jurisdiction with the rescission of the disciplinary suspension forming the basis of the appeal. Further, although the Hearing Officer made no finding on entitlement to attorney fees and costs, the IPC lacks the required statutory authority to award attorney fees and, even if the IPC had such authority, Appellant is pro se and not entitled to such an award.

This appeal is hereby dismissed for lack of IPC jurisdiction.

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;

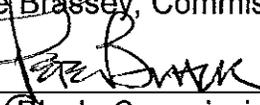
(2) That the commission has acted without jurisdiction or in excess of its powers;

(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 7<sup>th</sup> day of July 2009.

BY ORDER OF THE  
IDAHO PERSONNEL COMMISSION

  
\_\_\_\_\_  
Mike Brassey, Commission Chairman

  
\_\_\_\_\_  
Pete Black, 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 20th day of July 2009.

FIRST CLASS MAIL

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