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IDAHO PERSONNEL
COMMISSION

OCT 22 2010

FILED

IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

KYLENE F. JENKINS,

Appellant,

vs.

IDAHO STATE LIQUOR DIVISION,

Respondent.

IPC NO. 09-22

DECISION AND ORDER ON
PETITION FOR REVIEW

This matter is on petition for review from the March 12, 2010 decision ("Preliminary Order") of Hearing Officer Dennis Love (hereinafter "Hearing Officer") granting summary judgment in favor of the Idaho State Liquor Division ("ISLD") and upholding Kylene F. Jenkins' ("Appellant" or "Jenkins") termination from classified service. The Hearing Officer held that, based upon substantial and competent evidence in the record, including undisputed facts, ISLD had established proper cause as a matter of law under IPC Rule 190.01 for Jenkins' dismissal.

The Idaho Personnel Commission (hereinafter "Commission") heard oral argument in this matter on Friday, September 17, 2010. Attorneys DeAnne Casperson represented Jenkins and Brian B. Benjamin represented ISLD.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Jenkins was employed at ISLD from 2002 to 2009. She was initially hired as a temporary clerk for Idaho State Liquor Store # 208 ("Store # 208"), located in Idaho Falls, Idaho. Affidavit of Kylene F. Jenkins ("Jenkins Aff."), ¶ 3. She was promoted to a Manager 1 position and ultimately to Manager 2 at Store # 208 on January 14, 2007. Id. She held this position at the time of her dismissal.

Jenkins was terminated from this position by then Superintendent Dyke Nally's letter of discipline dated November 4, 2009. Affidavit of Margo Edmiston ("Edmiston Aff."), Attachment 6. While there was additional conduct providing an alleged basis for her termination, the Hearing Officer upheld Jenkins' dismissal on the basis of just two separate incidents: (1) Jenkins' involvement surrounding a strip tease performed at the liquor store she managed; and (2) Jenkins' conduct in allowing her husband, Vern Jenkins, to work at the store off the clock.

A. Facts Established by Pleadings and Affidavits in the Record

The record and, predominantly the multiple affidavits filed before the Hearing Officer, clearly show undisputed facts relevant to the basis for discipline of Jenkins in this matter.

1. After-Hours Birthday Party on November 29, 2008

On November 29, 2008, Jenkins and several subordinate employees held a birthday party for Liquor Store Clerk Myrna Broncho ("Broncho") after work at Liquor Store # 208. (Jenkins Aff., ¶¶ 16-26). Prior to the birthday party, Jenkins had discussed with subordinate employee Lisa (Canton) Morgan ("Lisa Morgan") the possibility of

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hiring a stripper to perform at the party and also spoke with subordinate employee Nicole Johnson about this possibility. (Jenkins Aff., ¶¶ 16, 21).

Jenkins denies she was involved in actual hiring of the stripper¹, but acknowledges she was informed by Lisa Morgan within an hour before the party that Josh Morgan was planning to perform a strip tease. (Jenkins Aff., ¶¶ 14, 16, 23). Jenkins did not prevent the strip tease from occurring that evening. (*Id.* at ¶ 17); (Supplemental Affidavit of Kylene F. Jenkins (“Jenkins Supp. Aff.”), ¶ 8). To the contrary, even though she did not work that day, Jenkins had come to work that evening just to attend the birthday party. (Jenkins Supp. Aff., ¶ 7). Jenkins watched Josh Morgan’s strip tease, gave Broncho dollar bills to stuff in Josh Morgan’s bikini shorts, and took photographs of Josh Morgan stripping and of Lisa Morgan pulling down her pants. (Jenkins Aff., ¶¶ 24, 26 and Exhibits A & B to Jenkins Aff.) (photographs taken of strip tease and Lisa Morgan pulling down her pants); (Lisa Morgan Aff. ¶ 6; Josh Morgan Aff., ¶¶ 3-4; Affidavit of Myrna Broncho (“Broncho Aff.”), ¶ 8).

2. Vern Jenkins’ Work at Store #208 on October 7, 2009

Vern Jenkins is Appellant’s husband and has been employed at ISLD as a temporary clerk assigned to work at a different state liquor store, Store # 203 in Idaho Falls, since February 2006. (Jenkins Aff., ¶ 27); (Affidavit of Vern Jenkins (“Vern Jenkins Aff.”), ¶ 3). He was not scheduled to work at Store #208 (managed by Appellant) on October 7, 2009, or ever. (Jenkins Aff., ¶ 32); (Vern Jenkins Aff. ¶ 9).

¹ Lisa Morgan and Josh Morgan testified via affidavit that Jenkins more actively arranged for and paid for the strip tease (Lisa Morgan Aff. ¶P 6-7); Affidavit of Josh Morgan (“Josh Morgan Aff”). However, for purposes of evaluating the evidence and the Hearing Officer’s granting of summary judgment in favor of ISLD, the Commission (as the Hearing Officer did) construes alleged facts in a light most favorable to Jenkins and accepts her affidavit claim that she didn’t hire or pay the stripper.

On October 7, 2009, Broncho reported to ISLD Human Resource Officer Margo Edmiston ("Edmiston") that a liquor company sales representative, Steve Heffner, had seen Vern Jenkins, working as a clerk at Store #208 on October 7, 2009. ("Edmiston Aff."), ¶ 10). As a result of this information, District Manager Bob Meline obtained the video tapes from the security system at Store #208. (Meline Aff., ¶ 6). Evidently, Vern Jenkins came to Store # 208 to have lunch with Appellant and do some shopping at a local gun shop. (Vern Jenkins Aff., ¶¶ 7-8). On this day, Broncho, was scheduled to work but had called in sick and Appellant was without help that afternoon. (Jenkins Aff., ¶¶30-31). The video tapes for October 7th total 1 hour 20 minutes footage, stemming from the time Vern Jenkins arrives at Store # 208 until he leaves. (Meline Aff., Attachment 4) (CD copy of video tapes from security system).

For the first roughly 20-25 minutes he was there, the only thing Vern Jenkins visibly did that could be construed as working as a clerk was straighten a few bottles on the shelves. (Id.) Mostly during this time, however, it appears he just stood around and talked with Kylene Jenkins, at least when he was visible on the security system video. (Id.) After that, the visual evidence shows Vern Jenkins more consistently positioned behind the sales counter and conducting 18 or 19 sales transactions for a little under an hour (45-50 minutes). (Id.) Thereafter, Vern Jenkins prepared to leave by gathering his jacket and bag from Kylene Jenkins work desk and appears to be waiting to have a last word with her, as she is helping customers. (Id.) While he appears to be waiting, ISLD Deputy Superintendent Larry Maneely arrives and engaged Kylene Jenkins in conversation. Vern Jenkins then left the store. (Id.); (Vern Jenkins Aff. ¶ 18). Vern

Jenkins was not compensated for his time and he offered this work voluntarily and without request. (Id., ¶¶10,13); (Jenkins Aff., ¶ 35); (Meline Aff., ¶ 8).

B. Appeal to Idaho Personnel Commission

Jenkins timely appealed to the Commission on December 3, 2009. ISLD filed a motion for summary judgment with supporting affidavits on February 11, 2010 and Jenkins responded in opposition on February 22, 2010. In responding, Jenkins acknowledged much of the underlying behavior. Specifically, Jenkins admitted she discussed with employees the possibility of hiring a stripper for Broncho's party; that she was aware that a stripper would be performing at the party at least an hour beforehand; that she did not stop the strip tease from taking place; that she attended the strip tease and took photographs. (Jenkins Aff. ¶¶ 16-26. and Exhibits A & B to Jenkins Aff.). She also acknowledged that Vern Jenkins did, in fact, perform work duties at the store on October 7, 2009 and had not been compensated. (Jenkins Aff. ¶¶ 30-35).

After consideration, the Hearing Officer issued his Preliminary Order on March 12, 2010 granting summary judgment finding that ISLD had established by a preponderance of the evidence that Jenkins had engaged in the misconduct described above, justifying termination of her employment pursuant to Rule 190.01.a., b. and e. Appellant timely filed her petition for review with the Commission on April 9, 2010.

II.

ISSUES

Whether the Hearing Officer appropriately granted summary judgment upholding ISLD's termination of Jenkins.

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 may allow motion and discovery practice and may conduct an evidentiary hearing before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, 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 15.04.01.190.01, exist by a preponderance of the evidence. IDAPA 15.04.01.201.07.

On a petition for review to the Idaho Personnel Commission, the Commission conducts a review of the record, any transcripts submitted, and briefs submitted by the parties. I.C. § 67-5317(1). 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).

Williams v. Idaho Dep't of Correction, IPC Case No. 08-25 (Decision and Order on Petition for Review, August 12, 2010).

Summary judgment should be rendered when the pleadings on file, together with any affidavits, show that 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 v. Dep't of Health and Welfare, IPC Case No. 04-26 (Decision and Order on Petition for Review, January 5, 2006); Kaufold v. Idaho Personnel Commission, IPC Case No. 96-06 (Hearing Officer Order Granting Summary Judgment, November 6, 1996).

IV.

DISCUSSION

The Hearing Officer granted summary judgment upholding Jenkins' dismissal on the basis of two separate incidents: (1) Jenkins' involvement relating to allowing a strip tease to be performed at the liquor store she managed; and (2) Jenkins' conduct in allowing her husband to work at the store off the clock on October 7, 2009. We must decide whether there is substantial and competent evidence in the record, particularly

via the multiple affidavits, to support the Hearing Officer's granting of summary judgment in favor of ISLD on these issues. Where there is more than one basis alleged supporting discipline, any one violation when proven and constituting proper cause, supports whatever level of discipline was imposed, including dismissal. The IPC does not review the level of discipline imposed. Arnold v. Dep't. of Health and Welfare, IPC Case No. 04-26 (Decision & Order on Petition for Review, January 5, 2006).

A. The Hearing Officer Correctly Held That Jenkins' Involvement With a Strip Tease That Took Place at the Liquor Store She Managed Constituted Proper Cause for Discipline

The Hearing Officer appropriately concluded that ISLD had proper cause to discipline Jenkins based upon her involvement with a strip tease that occurred on November 29, 2008 at the liquor store she managed. In his Preliminary Order, the Hearing Officer held as follows:

I find that Ms. Jenkins was the manager of ISLD Store #208 and that as the manager, Ms. Jenkins had a duty to the ISLD to operate the store responsibly, in accordance with ISLD policies and procedures, and to maintain good order and discipline. She had been provided a copy of ISLD's Harassment-Free Workplace Policy and Resolution Procedure.

Ms. Jenkins admits that she participated in planning for a stripper to perform at Ms. Broncho's birthday party at Store #208; that she participated in warning at least one of the employees of Store #208 a week earlier that such a performance might occur; and that she permitted the strip tease to occur at the store, attended, took pictures of the strip tease, and encouraged others to participate.

In light of her duties as manager of Store #208, I find this behavior by Ms. Jenkins to have been irresponsible, negligent, unbecoming a state employee and detrimental to good order and discipline.

(Preliminary Order, p. 6).

Jenkins asserts that the Hearing Officer erred by: (1) finding that no genuine issue of material fact existed with respect to particular factual issues; (2) purportedly

failing to address an alleged “pattern and practice” among managerial employees; and (3) finding that Jenkins subjected ISLD to potential liability for sexual harassment or otherwise violated the agency’s rules. (Appellant’s Memorandum, pp. 10-23). We address each assertion in turn.

1. **The Hearing Officer Correctly Held That No Genuine Issue of Material Fact Precluded Summary Judgment on the Issue of Jenkins’ Association with the Strip Tease**

Jenkins first argues that the Hearing Officer incorrectly found that no genuine issue of material fact exists with respect to certain factual issues related to the strip tease incident. Simply put, Jenkins argues the undisputed facts do not support the Hearing Officer’s findings that she participated in planning for a stripper to perform and that she participated in warning another employee (Nicole Johnson) of the possibility of a stripper performance and encouraged others’ participation.

We disagree, but even if we didn’t, it would be immaterial. It is irrelevant that Jenkins “discussed the possibility of a stripper” with Lisa Morgan or spoke with Nicole Johnson about the possibility of having a stripper. (Jenkins Aff. ¶¶ 16, 21). These admissions, which we find are supported by Jenkins own affidavit testimony, are clearly the basis for the Hearing Officer’s phrasing of his findings to the effect that she “participated in planning for the stripper to perform” and that she “participated in warning” another employee (Nicole Johnson) of the possibility. Preliminary Order, p. 6.

Jenkins is arguing semantics, here. Further, it does not matter. In upholding the granting of summary judgment in favor of ISLD, we focus on the undisputed, undeniable, admitted facts regarding the actual strip tease that took place that night.

Jenkins admits she knew prior to the event that the strip tease was going to occur, yet she did not prevent the strip tease from taking place, but instead attended the event with her employees and even took pictures of the strip tease in progress. (Jenkins Aff., ¶¶ 16-17, 21-26 and Ex. A); (Lisa Morgan Aff., ¶¶ 6-7); (Broncho Aff., ¶¶ 7-9.) Jenkins admits, in her Affidavit, that she had “discussed the possibility of a stripper at Ms. Broncho’s birthday celebration;” that she became aware “that Lisa Morgan had found a stripper for the party [at] roughly 8:30 p.m. on November 29, 2008;” that “[t]he birthday party took place at approximately 9:30 p.m.,” and that she “did not attempt to cancel the plans Lisa Morgan made for the strip-tease.” (Jenkins Aff., ¶¶ 16-17, 21-26).

Jenkins attached as an exhibit to her Affidavit “the pictures [she] took during the strip-tease.” (Id. at ¶ 24 and Ex. A.) Jenkins acknowledges that the antics at the party included the male stripper stripping to his “bikini shorts,” as well as employee Lisa Morgan “pull[ing] down her pants in front of Ms. Broncho,” all photographed by her. (Id. at ¶¶ 25-26 and Ex. A.) Jenkins also gave Broncho dollar bills to stuff in Josh Morgan’s bikini shorts. (Lisa Morgan Aff. ¶ 6; Josh Morgan Aff., ¶¶ 3-4; Affidavit of Myrna Broncho (“Broncho Aff.”), ¶ 8).

These significant facts are undeniable, undisputed and provide justification for discipline under Rule 190.01. They are admissions. Jenkins, as a state store manager, knew about the strip tease and did nothing to prevent it; instead she did actively participate in it, and her behavior is reasonably construed as encouraging participation by those in attendance. It is reasonable to characterize the taking of photographs and provision of dollar bills to Broncho as active participation and encouragement of others

to participate in the strip tease. In fact, we find the simple fact that Jenkins knew about the strip tease at Store # 208 and allowed it to occur supports a finding of just cause for discipline. A showing of just cause for discipline is only buttressed by her admitted participation and encouragement of those in attendance.

We agree and adopt the Hearing Officer's conclusion: "One of any manager's duties as an agent is to make decisions and exercise judgment in the best interests of her employer." (Preliminary Order, p. 7.). "In light of her duties as manager of Store #208, I find this behavior by Ms. Jenkins to have been irresponsible, negligent, unbecoming a state employee and detrimental to good order and discipline." (Preliminary Order, p. 6); see IPC Rule 190.01 (b), (e). The relevant facts established by the pleadings, admissions and affidavits of record show no genuine issue of material fact and we find as a matter of law, that based upon the undisputed facts, ISLD has proven just cause for discipline.

2. The Hearing Officer Did Not Err in Holding that Alleged Past Actions by Other Employees Were Irrelevant

Jenkins testified in her Affidavit that she "believed that it was acceptable to have parties with strippers at the store". (Jenkins Aff., ¶ 19). She bases this belief on what she deems in briefing to be the establishment of a "pattern and practice" among ISLD managerial employees relating to strip teases. Jenkins claims that the Hearing Officer "failed to address the fact that the pattern and practice among the Dispensary's managerial employees led Jenkins to believe an after-hours, on-premises birthday party with a striptease as a joke was not a violation of the Dispensary's employee policies."

First, the evidence provided in support of this "pattern and practice" consists of two affidavits dated March 3, 2010 from former employees reflecting on alleged events

that may have taken place long ago. (Affidavit of Jim Baugh); (Affidavit of Bette Olin) (“Baugh and Olin Affidavits”). Both speak to a stripper incident(s) at ISLD when Mike McAllister was Superintendent and do not mention even what year they occurred. The affidavits even required clarification by letter from Jenkins’ counsel dated March 4, 2010, to reflect it may not have been McAllister who received a certain strip tease as initially stated in the Baugh and Olin Affidavits. The reliability of this testimony is suspect.

Margo Edmiston disputed the content of the two affidavits (Supplemental Affidavit of Margo Edmiston in Support of Respondent’s Motion for Summary Judgment (“Edmiston Supplemental Aff.”), ¶ 7), but for purposes of summary judgment, the Hearing Officer appears to have accepted the content of the affidavits as fact (in favor of non-moving party), but afforded them little weight, and rightfully so. We question the competency of this affidavit testimony for purposes of opposing summary judgment. Even fully assuming the Baugh and Olin Affidavits as true, as we nonetheless do, we find them irrelevant in this matter. Regarding this issue, the Hearing Officer held:

Ms. Jenkins also objects that similar activities have occurred in other state facilities without negative consequences. Of course, Ms. Jenkins would not be privy to whether discipline was taken in any such other cases. However, whether or not there was discipline, while consistency of discipline is desirable, it is not an entitlement. If there is cause for discipline, the choice of discipline, if any, is within the discretion of the agency.

(Preliminary Order, pp. 7-8) (citing to Cheney v. Dep’t of Correction, IPC No. 97-15 (Decision & Order on Petition for Review, July 8, 1999), pp. 9-10.)

Jenkins acknowledges that “[d]iscipline is a discretionary function” retained by an agency . . . and that it is therefore impermissible to argue that discipline in one instance

is inappropriate because other individuals who engage in similar activities had not been disciplined" (Appellant's Memorandum, p.12) (quoting Peterson v. Idaho Dep't of Correction, IPC No. 04-20 (Decision & Order on Petition for Review, May 26, 2005), pp. 6-7). She suggests, however, that evidence of the purported actions of other employees more than 20 years ago is relevant to her knowledge of whether her own conduct violated ISLD's policies. (Appellant's Memorandum, pp. 12-13). In this case it is not.

It seems unreasonable to us that a state employee in a managerial capacity such as Jenkins, would not recognize that allowing a stripper to perform on the premises of a state liquor store with state employees in attendance and active participation in the incident might be something subjecting her to discipline and otherwise wholly inappropriate and contrary to good order and discipline at ISLD. IPC Rule 190.01(e).

While it is true that ISLD policy does not include an explicit provision stating that strip teases on State premises are prohibited, common sense dictates that such an action is inherently inappropriate, particularly for someone in a managerial position. As the Hearing Officer articulated:

Ms. Jenkins' assertion that she could not have known that her conduct was wrong because no one had given her a list of activities that were not approved in ISLD stores is also not persuasive. First, it is not reasonable, or likely even possible, for the ISLD to have to list all activities that are not approved in its stores. One of any manager's duties as an agent is to make decisions and exercise judgment in the best interests of her employer. It is enough for the Division to provide general guidance by means of policies, rules and guidelines and to expect good judgment from its managers in enforcing the same.

(Preliminary Order, p. 7.); Also See Zweigert v. Idaho State University, IPC Case No. 08-13, (Decision and Order on Petition for Review, July 30, 2009, p. 9).

We find that the Hearing Officer correctly concluded that it constituted “conduct unbecoming a state employee or conduct detrimental to the good order and discipline in the agency” for a manager to condone and participate in a strip tease held on State premises. An employee who engages in undisputed conduct that is “unbecoming a state employee or . . . detrimental to good order and discipline in the agency” can be disciplined pursuant to DHR Rule 190.01(e), regardless of whether that conduct also constitutes an explicit legal or policy violation.

Finally, alleged behavior of other employees, even the Superintendent, many years ago and long prior to Jenkins’ employment at ISLD is irrelevant to the issue of whether Ms. Jenkins herself engaged in “conduct unbecoming a state employee or conduct detrimental to good order and discipline in the agency.” See Cheney, IPC No. 97-15, p. 9 (holding that “consistency of discipline is a laudable goal, but it is not an entitlement). As the IPC stated in May v. Idaho Department of Health & Welfare, IPC No. 96-01 (Decision & Order on Petition for Review, January 7, 1997):

We pass no judgment on whether other employees should have been disciplined, were disciplined, or should have received any certain level of discipline—those issues are not within our power. . . . [T]he fundamental question . . . is whether the department proved, by a preponderance of the evidence, that *May* is properly subject to Rule 190 discipline.

May, IPC No. 96-01, p. 11, n.4. “[O]nce that proper cause is established, as here, the Commission’s inquiry ends and [Jenkins] may be disciplined.” Peterson, IPC No. 04-20, p. 6.

- 3. Whether The Undisputed Conduct At Issue Constituted Proper Cause For Discipline Is Not Dependent Upon A Finding Of Actual Sexual Harassment Or Even “Potential” Sexual Harassment.**

Jenkins additionally argues that “[t]he Hearing Officer erred by finding Jenkins exposed the Dispensary to *potential liability* as a result of the birthday party and joke of the ‘striptease.’” (Appellant’s Memorandum, p. 14). Jenkins further disputes the conclusion that exposing ISLD to potential liability for sexual harassment should support a finding of proper cause for discipline, arguing that “[a] *claim* of sexual harassment does not necessarily mean the alleged harasser or discriminator has done something inappropriate.” (Appellant’s Memorandum, p. 14.) She offers the example that an employee who has been accused of discrimination could then be subject to dismissal simply due to the accusation. (Id.)

Jenkins misses a significant distinction. In the case at hand, the undisputed facts demonstrate that Jenkins has, in fact, “done something inappropriate.” (Id.) This is not a case of disputed allegations of discrimination or harassment being raised against an employee, but is a situation where the employee has **admitted** to the subject conduct.

The Hearing Officer appropriately held:

Ms. Jenkins objects because the party was after hours, no one was forced to attend, everyone seemed to be having a good time, no one who attended appeared to have been offended and no one had told her it is inappropriate for a stripper to perform in a state-owned facility. These objections are unavailing. **Ms. Jenkins had no guarantee that store employees who attended the party would not be offended by the strip tease. Even if it is true that Ms. Broncho and the other employees were not actually offended, and even voluntarily participated in and enjoyed the event, any one of them could just as easily have filed a claim against ISLD and Ms. Jenkins for sexual harassment.** Ms. Jenkins’s objection amounts to an assertion that such a claim would not be meritorious. However, she misses the point. Meritorious or not, if such a claim were to be filed, it would be expensive and inconvenient to defend. Hence, Mr. [N]ally’s observation that by her conduct, Ms. Jenkins subjected the state to *potential liability*, a conclusion I find to be substantiated by the evidence in the record before me and about which there is no genuine issue of material fact.

(Preliminary Order, pp. 6-7) (emphasis added).

Whether any claim of sexual harassment is brought and whether any claim has merit is irrelevant. In fact, going further, the question of whether the undisputed conduct at issue constituted proper cause for discipline is not dependent upon a finding of actual sexual harassment or even “potential” sexual harassment. See Mills v. Idaho Transportation Dept., IPC No. 00-39 (Decision and Order on Petition for Review, August 2002) (Finding employee’s conduct exposing department to potential Title VII claim is “conduct detrimental to good order and discipline in the department” in violation of Rule 190.01e. – employee’s conduct (telling sexual jokes) does not have to constitute Title VII harassment in order to be properly subject to discipline under Rule 190 and/or the department’s Workplace Harassment policy).

Regardless of whether the conduct at issue in this case was “welcome” or whether it constituted “sexual harassment,” the undisputed facts as established by Jenkins’ own admissions, provide ample support for the Hearing Officer’s finding that proper cause existed for Jenkins’ termination as a matter of law.

B. Vern Jenkins Assistance at Store # 208 on October 7, 2009.

Having upheld granting of summary judgment as set forth above in Section IV. A., we find ISLD has proven a basis for discipline constituting proper cause supporting ISLD’s termination of Jenkins. See Arnold v. Dep’t. of Health and Welfare, IPC Case No. 04-26 (Decision & Order on Petition for Review, January 5, 2006) (holding that where there is more than one basis alleged supporting discipline, any one violation when proven and constituting proper cause, supports whatever level of discipline was imposed, including dismissal).

However, for purposes of summary judgment, and construing the facts in a light most favorable to Jenkins, we set aside the Hearing Officer's granting of summary judgment on ISLD's allegation concerning Vern Jenkins' helping out at Store #208 on October 7, 2009. We would allow factual development as to whether Kylene Jenkins' acquiescence in Vern Jenkins', (another ISLD employee), assistance that afternoon under the circumstances, arises to the level of a violation of Rule 190.01a. or e. Further, it is alleged by Jenkins that it is common practice for ISLD employees and even non-employee spouses of ISLD employees to help out at their spouse's stores pulling bottles or bagging product. (Jenkins Aff., ¶ 29); (Vern Jenkins Aff., ¶ 16). Jenkins provides an example where district managers observed and directed his work off-the-clock at Store # 208. Specifically, Jenkins testified that the district managers were working at Store # 208 helping re-set the store after a remodel on approximately April 7, 2009 and Vern Jenkins was present. (Jenkins Aff., ¶ 28). The district managers saw Vern and asked him to help stock the shelves and move various items and fixtures, even though he wasn't on the clock. (*Id.*); (Vern Jenkins Aff., ¶ 14). It may well be that the district managers didn't know he was working uncompensated, as speculated by ISLD (See Supplemental Affidavit of Margo Edmiston, ¶11), but we believe Jenkins creates a material issue of fact as to what was expected or accepted as a matter of practice, irrespective of applicable ISLD policies (which she also testifies she never received). (Jenkins Aff. ¶ 33, 55). We, therefore, deny summary judgment on this allegation. However, again, because of our findings in Section IV. A., herein, Appellant's termination is upheld and this matter is not remanded.

C. Attorney Fees on Petition for Review

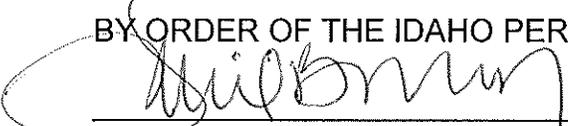
We decline to award attorney fees against Jenkins on Petition for Review. Having prevailed in part, we don't find Appellant has acted without a reasonable basis in fact or law in order to warrant an award of attorney fees and costs under Idaho Code § 12-117.

V.

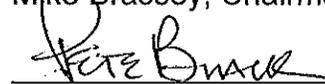
CONCLUSION

Upon review of the record and affidavits of the parties, we find sufficient basis and support for the Hearing Officer's conclusion that ISLD has shown by a preponderance of the evidence proper cause to discipline Jenkins based upon her involvement with a strip tease that occurred on November 29, 2008 at the liquor store she managed. The undisputed facts, many of which come directly from Jenkins' own supporting affidavits, including most importantly her own, provide basis for imposition of discipline under Rule 190.01(b), (e), as a matter of law. Based on the foregoing, summary judgment is granted and ISLD's termination of Appellant is upheld.

BY ORDER OF THE IDAHO PERSONNEL COMMISSION



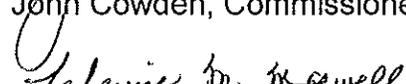
Mike Brassey, Chairman



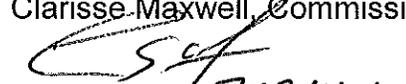
Pete Black, Commissioner



John Cowden, Commissioner



Clarisse Maxwell, Commissioner



Evan Frasure, Commissioner

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.

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 22nd day of October, 2010.

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