

The Hearing Officer ordered Salisbury's reinstatement to his prior position at DHW or a comparable position with the State of Idaho for which he is qualified, together with back pay for all lost wages from the date of termination to reinstatement and a bridging of all benefits, including seniority, sick leave, vacation and retirement benefits. **Findings of Fact, Conclusions of Law, and Preliminary Order, p. 22. (hereafter "Preliminary Order")**. The Hearing Officer also found there was no reasonable basis in fact or law for DHW's disciplinary action and ultimately made a contingent award of attorney fees in the amount of \$18,540 pursuant to Idaho Code § 12-117 and IPC Rules 201.11 – 201.12. **Preliminary Order, p. 22; Amended Preliminary Order, (August 26, 2009).**

DHW petitions for review from the Hearing Officer's decision arguing that Salisbury's discharge is supported by substantial and competent evidence in the record and the Hearing Officer's findings of fact and ultimate decision are in error and not supported by substantial and competent evidence in the record. **Petition for Review, August 3, 2009.** DHW further timely petitions for review from the Hearing Officer's award of attorney fees predominantly asserting the Hearing Officer (and the IPC) lack the authority to award attorney fees pursuant to Idaho Code § 12-117 and applicable IPC rules based upon the Idaho Supreme Court's decision in Rammell v. Idaho State Department of Agriculture, 147 Idaho 415, 210 P.3d 523 (June 1, 2009) and the IPC's Decision and Order on Petition for Review in Floyd-Miller v. Idaho Dep't. of Juvenile Corrections, IPC Case No. 08-21 (Decision and Order on Petition for Review, July 17, 2009). **Respondent's Amended Petition for Review, September 28, 2009.**

Throughout this document, DHW's exhibits are referred to as "**Respt. Ex. ___**" and Salisbury's exhibits are referred to as "**App. Ex. ___**". References to testimony in the Transcript are referred to as "**Tr. Vol. ___, p. ___:___ - ___:___**" to signify: (1) which volume the testimony is found, (2) the page upon which the testimony is found and (3) on that page, which lines the testimony is found.

I.

PROCEDURAL BACKGROUND, ISSUES AND STANDARD OF REVIEW

Salisbury was employed at DHW from May 18, 1998 until his termination effective June 12, 2008. At the time of his termination he held the job title of Health Program Specialist. His duties and responsibilities are undisputed and are supported by evidence in the record. **Respt. Ex. I, X, p. 290.** Summarizing his numerous responsibilities, Salisbury's primary responsibility was supporting the Immunization Program which included managing the statewide Vaccines for Children program (VFC). **Id.** He was the first Coordinator for the VFC. **Tr. Vol. II, p. 381:22-24.** He was also a presenter or leader in various state and federal job-related activities including vaccine process presentations at national and local conferences including the Vaccines for Children Conferences. **Id at p. 379:21- p. 381:15.** He was involved in developing new activities related to improving the VFC and training providers throughout the state. **Id. at p. 381:22 – p.385:12.**

A. Disciplinary Process

Jane Smith, Division Administrator (Smith), issued a Notice of Contemplated Action ("NOCA") to Salisbury on Thursday, June 5, 2008, indicating she was contemplating his dismissal, and placed him on administrative leave. **Respt. Ex. A.**

Salisbury was given until Monday, June 9, 2008 to respond. If he chose to respond in person, he was to call Smith's office to schedule an appointment. If he chose not to respond, her decision would be made June 9, 2008. **Id.**

The NOCA was based on alleged violations of IPC Rules 190.01.b and e., specified as unacceptable performance and including failure to comply with Department policies and supervisory instructions, failure to complete work duties and failure to interact appropriately with clients and co-workers. **Id.** There were a number of alleged incidents or events set forth as examples of his unacceptable performance. They are as follows:

- Failure to complete VFC portion of the Annual Progress Report (Annual Report);
- Failure to follow protocol for two temperature incidents in first half of 2007;
- Unprepared for VFC meetings on December 12, 2007 and January 8, 2008;
- Orders for Gardasil vaccine marked for payment with State funds instead of federal funds;
- Undelivered order of vaccine for provider;
- Failure to create a desk manual;
- Statements/comments at Booster Shots conference in Coeur d' Alene in October 2007;
- Public and inappropriate challenging of decisions by Smith and DHW at Immunization Summit on November 1, 2007;
- Resistant to using new systems;
- Discussing his work status (alluding he was going to be fired) with DHW business clients/partners.

Salisbury denied the allegations in an 11 page response dated June 5, 2009.

Respt. Ex. C. On June 12, 2008 one week after issuing the NOCA, Smith issued Salisbury a letter terminating his employment effective that same day. **Respt. Ex. D.** The letter of termination set forth certain conclusory statements that allegedly represent what Salisbury said during his meeting with Smith on June 9, 2009. First, the letter of termination informs Salisbury that "[o]verall you admitted that you were not meeting your

supervisor's performance standards and acknowledged that many of the incidents described in the Notice did occur". **Id, p. 36, second paragraph.** Secondly, the letter of termination provides that when Salisbury met with Smith on June 9, 2008, "[Salisbury] attributed [his] lack of performance primarily to two factors . . .". **Id, p. 36, third paragraph.** Salisbury adamantly refuted these attributed statements, as to admitting any lack of performance, (or clarified the context) in a further communication contained in the record at **Respt. Ex. E.** and further plead his case. While the NOCA wasn't issued until June 5, 2008, testimony from Dieuwke Spencer, Bureau Chief ("Spencer") shows that the discussion concerning Salisbury's dismissal began late in 2007 and the decision was made to proceed with the NOCA in January 2008, some six (6) months prior to actual issuance. **Tr. Vol. II, p. 277:18- p. 278:9; Tr. Vol. II, p. 279:16- p. 280:11.**

B. ISSUES

1. Did DHW prove by a preponderance of the evidence that proper cause existed for terminating Salisbury pursuant to IPC Rules 190.01.b and 190.01.e.?
2. Is an award of attorney fees and costs warranted?

C. 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 15.04.01.201.06. 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 15.04.01.190.01, exist by a preponderance of the evidence.

On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, any transcript submitted, and briefs submitted by the parties. I.C. § 67-5317(1). Findings of fact must be supported by substantial and 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).

Zweigart v. Idaho State University, IPC No. 08-13 (Decision and Order on Petition for Review, July 30, 2009).

II.

FACTUAL FINDINGS AND DISCUSSION

After reading the briefs of the parties and having reviewed the pertinent exhibits and reviewing the transcript support for Hearing Officer's findings, we see no reason to reverse the Hearing Officer's decision. The nature of the allegations in conjunction with the termination process makes the termination seem manufactured and certainly suspect.

It is clear from review of the Hearing Officer's Preliminary Order that she felt the same way after conducting the hearing and considering the testimony of the witnesses. We elaborate on the allegations below, but find that the Hearing Officer's findings of fact are supported by substantial and competent evidence in the record.

1. Annual Progress Report

Salisbury was to complete the VFC Program Management portion of the Annual Progress Report (Annual Report) to be submitted to the Centers for Disease Control ("CDC") on February 29, 2008, with a copy to Rebecca Coyle, his immediate supervisor,

by February 22, 2008. **Respt. Ex. A., p. 2.** DHW alleges Salisbury did not complete this task. Substantial and competent evidence in the record supports the Hearing Officer's factual finding that Salisbury had completed the VFC portion on or about January 24, 2008, right before he went on Family Medical Leave, but was waiting on additional information relating to the Medicaid portion. **Respt. Ex. T; Tr. Vol. II, p. 400:24 – p. 401:23.** He wasn't able to electronically save the data for the Annual Report due to a system problem (this also prevented anybody from accessing the Annual Report electronically), so he had printed it out and left it next to his in-box in plain view for anybody to see. **Id at p. 402:3 – p. 403:1; App. Ex. 21, pp. 237-38.**

At some point after February 22, Salisbury met with Coyle to request permission for medical leave for February 28-29, which she granted. Coyle did not mention the Annual Report, nor did she inquire about its progress for the February 29 deadline. **Id at p. 403:5-19; Tr. Vol. I, p. 152:13-17, p. 153:22- p. 154:1.** When Salisbury called Coyle while on medical leave on the 28th or 29th to check whether there was anything pressing to take care of or anything he needed to know (a general check-in call), she simply said "No". **Tr. Vol. II, p. 461:3-12.** Further, Coyle testified she didn't call Salisbury to ask about the Annual Report because "she did not have his telephone number readily available" and did not know if others did. **Tr. Vol. I, p. 154:6-20.**

Historically, reminders had been emailed out as to due dates for the report and checking status. The staff worked together. **Tr. Vol. III, p. 558: 1-12; Respt. Ex. C, pp. 24-25.** The facts suggest that Coyle was waiting for him to fail by missing the Annual Report deadline of February 29 and thereby adding it to the list of alleged indiscretions

included in the NOCA. In any event, the evidence in the record does not support a finding of a Rule 190.01b. or 190.01e. violation on Salisbury's part.

2. Two Temperature Incidents in First Half of 2007

DHW alleged Salisbury didn't follow correct protocol in reporting two temperature incidents to the Quality Assurance Specialists (Q/A Specialists) by inputting it into the VACMAN system. **Preliminary Order, p. 6.** Yet, the evidence shows formal protocol was not followed on every temperature incident and many times it was handled by Salisbury and/or Q/A Specialist, alone without input in the VACMAN system. **Tr. Vol. I, p. 233:16-23.** Also, while it was Salisbury's custom and practice to enter the incidents into VACMAN or its predecessor REMEDY, there were multiple crashes of the system and a significant amount of data was lost. **Tr. Vol. 413:1-24; Preliminary Order, p. 7.**

Most significantly, the two alleged incidents occurred in May and June 2007, more than a year before the NOCA was issued. Prior to that time, Salisbury was never formally reprimanded for the alleged incidents. Salisbury found out these allegations were being used as part of the basis for his discharge when he read the NOCA. There was no showing that the Q/A Specialists were negatively impacted by the alleged failure of Salisbury to enter them into VACMAN or REMEDY. Given the multiple crashes of the system, and the old nature of the alleged incidents, DHW has not met its burden of proof that he failed to do so, let alone shown that it constituted a just cause for discipline.

3. Unprepared for VFC meetings on December 12, 2007 and January 8, 2008

DHW alleged Salisbury was unprepared for two monthly VFC meetings with Coyle and Spencer. Specifically DHW alleged Salisbury did not prepare and submit

monthly status reports for these meetings and that this impeded the ability of Spencer and Coyle to effectively review and discuss VFC status with him. **Respt. Ex. A, p. 3-4.** It is clear from the testimony in the record (Coyle, Spencer and Salisbury) that the purpose of the meetings was to discuss the monthly status reports which were based upon Monitoring and Replenishment reports received from the CDC. **Tr. Vol. II, p. 339:17- p. 341:15; Tr. Vol. 425: 6-9.** The Monitoring and Replenishment reports often had errors and, more importantly, were not generally supplied until **after** monthly scheduled status report meetings. **Respt. Ex. H, p. 105, Interrogatory 1-2** show the varied arrival dates of the Monitoring and Replenishment reports Salisbury used for the VFC meetings. While there is disagreement on whose initial idea it was, it is agreed the times for these VFC meetings were moved to later in each month because of the Monitoring and Replenishment report issues. **Tr. Vol. II, p. 339:17- p. 340:20.** Salisbury testified he asked Coyle whether they should have the December 12, 2007 meeting prior to the time set for the meeting because he didn't have the Monitoring and Replenishment reports and also because of an impending vaccine recall that was pushing to the forefront that day. He testified that Coyle said it could be postponed. **Tr. Vol. II, p. 409:17- p. 410:16.**

While this is disputed by Coyle (**Tr. Vol. I, p. 176:17- p. 177:12**), it appears the VFC meetings at issue were worthless to conduct where the reports upon which they were based were not yet in Salisbury's possession. In effect, there wasn't anything to discuss. **Tr. Vol. II, p. 426:20- p. 427:1.** It is not reasonable to suggest or allege that Salisbury was negligent or inefficient in performing his duties on this basis.

4. Gardasil Orders with State Funds and Undelivered Order for Provider

Salisbury mistakenly ordered Gardasil with state funds two times, instead of federal funds as required, once in December 2007 or early January 2008 and another time “[i]n the spring of 2007”. **Respt. Ex. A, p. 4; Respt. Ex. D, p. 26. Preliminary Order, p. 8.** The problem with these allegations is that they are simply honest mistakes on Salisbury’s part. Evidence in the record shows he had a staggering workload, not to mention he faced significant time away from work on FMLA during the time period. Two times this mistake was made concerning 440 orders of the Gardasil vaccine out of orders totaling 600,000 vaccines per year. **Tr. Vol. I., p. 184:5-15.** Further, both errors were corrected without loss of state funds; the internal controls policing the ordering of vaccines worked as they should. This does not rise to the level of inefficiency or negligence in performance of duties under Rule 190.01b, but, rather, shows an unreasonable lack of tolerance for infrequent human error.

Overall, the same line of thinking is relevant to the provider complaint with respect to an undelivered vaccine order in March 2008. **Respt. Ex. A, p. 4.** Salisbury testified about this incident, explaining in detail how it happened. **Tr. Vol. II, p. 438:3 – p. 447:1.** There is no evidence in the record of any other single provider complaint rising to the Program Manager (Coyle) level in Salisbury’s ten years serving as the VFC Coordinator and Coyle testified she knew of no other. **Tr. Vol. I, p. 193:4-21.** Coyle also acknowledged that with over 300 provider offices in the state of Idaho that one such complaint didn’t necessarily make Salisbury incompetent. **Id. at p. 193:22 – p. 194:9.**

The mistake was due to the fact that there were two orders in question and there was a mix-up between a brand new clinic and an existing clinic with the same name which had also placed an order. **Id at 440-442.** When Salisbury realized the mistake, he placed an emergency order, but due to CDC's practice of changing prices at that time, he had to place it again within a few days. **Id at p. 443:8 – p. 445:2.** Ultimately, the provider was upset because the clinic ran out of vaccine and called Coyle. Salisbury offered to pick up vaccine from the Central District Health Department and deliver it to the provider but Coyle did not let him. Instead, she had a Q/A Specialist do that and included that "impact" in the NOCA. **Id. at 446:5- p. 447:1.**

We agree with the Hearing Officer that this doesn't rise to a level of negligence or inefficiency under Rule 190.01b. **Preliminary Order, p. 17.** Instead, it shows an unreasonable lack of tolerance of human error, particularly given Salisbury's workload, and it suggests there was a quick rush to judgment on DHW's part to add this incident to the growing list of alleged indiscretions included in the NOCA as grounds for discipline.

5. Failure to complete Desk Manual

The Hearing Officer's factual findings on this allegation are supported by substantial and competent evidence in the record. **Preliminary Order, p. 10.** DHW contends he failed to complete a desk manual detailing his work processes or to cross-train co-workers, a task he had been assigned for two years. **Respt. Ex. A, p. 5.**

First, as for the cross training, co-worker Rebecca Munsey testified that she had been cross-trained on some of Salisbury's duties so she could handle them during his time out of the office. **Tr. Vol. III, p. 608:9- p. 609:4; p. 612:14- 613:4.** With respect to

the desk manual task, there is testimony in the record that while the desk manual task had been established as part of his prior performance evaluation in 2006, his prior supervisor cancelled/postponed this requirement agreeing it would have to wait until the VMBIP process was implemented. The VMBIP process would change the way things were done and affect the completion of the desk manual. **Tr. Vol. II, p. 447:2 – p. 449:18.** When Coyle asked about the desk manual, Salisbury explained this and she said “Ok”, nothing more. **Id at p. 450:2-25.** Nothing in the record indicates that this task was re-established by Coyle, his current supervisor, and he wasn’t told to get working on it. **Id. at p. 452:8-12.** Yet it was added to the list of allegations as alleged proof of his failure to meet performance standards a few months later as if it was expected to be accomplished during the prior performance period. **Tr. Vol. I, p. 198:4-p. 200:5.** This isn’t a reasonable basis for discipline under Rule 190.01b. or e.

6. Booster Shots Conference and Immunization Summit

DHW alleges that in October 2007, while giving a presentation at the Booster Shots Conference in Coeur d’ Alene, Salisbury made objectionable statements to providers regarding HPV vaccine availability. It is also alleged that on November 1, 2007 at the Immunization Summit, Salisbury publically and inappropriately challenged decisions made by Smith and DHW related to the securing of funding for HPV vaccine in Idaho. **Respt. Ex. A., p. 5.**

These allegations related to Salisbury’s public comments at two particular conferences don’t constitute negligence, inefficiency or incompetence under Rule 190.01b, nor has DHW proven insubordination under Rule 190.01e. The accounts are conflicting as to the substance of Salisbury’s comments at the Booster Shots

conference, and why they were so inappropriate. Salisbury indicates Coyle objected to his mentioning (in response to a question about HPV vaccine availability) that “part of the reason is the actual dollar cost of the vaccine”. **Respt. Ex. C., p. 29; Tr. Vol. II, p.453:20- p. 454:2.** Salisbury had never been instructed not to discuss the price of the HPV vaccine (**Tr. Vol. II, p. 456:1-6**) and he didn’t go into specifics, although the price of the vaccine was common knowledge among providers in attendance. **Id at p. 454:3-18.** After being subsequently instructed not to discuss vaccine cost again, he never did. **Id at p. 456: 7-10.**

There also appears to be different focus in testimony at the hearing by DHW witnesses on this allegation than there is reflected in the NOCA and as reflected during discovery leading up to the hearing. At the hearing, Coyle testified that it was objectionable and against DHW policy for Salisbury to allude to DHW “decision units” as being involved in making decisions as to the availability of the HPV vaccine, although she doesn’t recall his exact words. **Tr. Vol. I, p. 205:2- p. 206:10.** There is no reference to Salisbury’s “alluding to” a “decision unit” in the NOCA or otherwise in the exhibits introduced into evidence at the hearing. **See Respt. Ex. A, p. 5.** In response to discovery requests, DHW made no mention of “decision units” in relation to Salisbury’s comments at the Booster Shots Conference. **Respt. Ex. H, p. 107 (Question and Answer to Interrogatory No. 5).** If that was the big problem with his comments at the Booster Shots Conference, we wonder why it wasn’t included in the specific allegation and in response to a request for the specifics in discovery. DHW didn’t even mention “decision units” in its Brief on Petition for Review to the IPC or at oral argument before the IPC.

As to the Immunization Summit incident, the testimony shows Salisbury questioned Smith at the Summit as to whether there was any chance of getting funding for the HPV vaccine in the future. His exchange with Smith was in follow-up a question/statement from Jeff Kingsbury, CDC to the effect of: "Are you all aware that this means that not all girls will get the vaccine because it's not a universal vaccine; and are you okay with that"? **Tr. Vol. I, p. 210:8- 211:3; Tr. Vol. II, p. 456:15 p. 457:6.** While Salisbury acknowledged afterwards that it was inappropriate to raise the question at the Summit, he didn't feel he was challenging or criticizing Smith or DHW as DHW alleges in the NOCA, and he testified that the incident was not described this way when it was addressed with him over the next few days. **Id at p. 457:8-19; Tr. Vol. III, p. 518:19-5.** DHW's characterization of this incident became more strongly described and serious in the NOCA and at the hearing. **Id.**

While this incident may have triggered the ultimate decision to build justification for termination, Smith accepted Salisbury's apology, expressed her confidence that it wouldn't happen again, and did not direct any kind of discipline over the incident at the time. **Respt. Ex. Y, p. 301.** She acknowledged Salisbury's dedication to the VFC program. **Id.** It seems this indiscretion was dealt with at the time and he never did it again. Further, Smith, Coyle and Spencer ultimately did discipline Salisbury by "desking" him in February 2008, primarily as a result of these two conference incidents. He was taken off the Shot Smarts agenda, not approved to attend the National Immunization Conference and not given permission to attend the Shot Smarts "Give Me Five" Celebration where he was to be a guest of honor. **Respt. Ex. N, O; Tr. Vol. II, p.**

457:20 – p. 460:1. It doesn't seem appropriate, reasonable or justifiable for this incident to be raised again in the NOCA several months later.

7. Resistant to Using New Systems and Discussion of Work Status

DHW alleged a DHW employee complained that Salisbury was resistant to utilizing new systems such as IRIS (Immunization Reminder Information System) and that Salisbury made it uncomfortable for anyone who might need to work with him on a new system or new way of doing things. **Respt. Ex. A, p. 5-6.** Specifically, this employee attributed negative statements about IRIS to Salisbury to the effect "it is broken", "more cumbersome". **Id at p. 6.** The Hearing Officer succinctly dismissed these allegations simply because there was no competent evidence or testimony to support the claims. We agree with the Hearing Officer.

The unidentified employee did not appear at the hearing. Salisbury testified he thought there was a difference between being resistant and asking legitimate questions about programs like IRIS. **Tr. Vol. II, p. 463:3- p. 465:2.** He admits saying "IRIS is broken" at times, but he wasn't the only one and it evidently had its share of problems. Rebecca Munsey, Salisbury's co-worker, testified there was trouble with IRIS and that she would say it was broken or that it was "fussy". **Tr. Vol. III, p. 618:1-7.** Further, she testified others said the same, particularly referencing outside providers who would call and often ask "Is IRIS up and running"? **Id at p. 618:8- 23.** Salisbury testified that providers complained of how cumbersome IRIS was. **Tr. Vol. II, p. 466:25- p. 467:17.** Munsey further testified she had trouble with trying to enter data from IRIS at her end. **Id at p. 619:4-5.**

Perhaps Salisbury was slow to accept new systems at face value, like IRIS. But his concerns appeared to be focused on how to cope with that and finding a solution. **Tr. Vol. II, p. 466:11-24.** The evidence is not sufficient to show he was so critical or resistant to change that it would rise to a violation worthy of Rule 190.01b or e.

Even less significant is the charge of talking about his work status with outside "business partners" in April 2008. **Respt. Ex. A, p. 6.** DHW alleged two unidentified DHW employees were contacted by two unidentified business partners who inquired as to Salisbury's work status, indicating that Salisbury had alluded he was going to be fired. **Id.** There was no testimony from these unidentified business partners or the unidentified DHW employees and Salisbury denied this allegation. **Tr. Vol. III, p. 588:1-3.** Even more significantly, even if it had been proven by a preponderance of the evidence, and it clearly wasn't, talking about work status isn't in breach of any DHW policy and doesn't otherwise amount to insubordination. Even counsel for DHW admitted that this allegation, is, not itself, grounds for termination. **Tr. Vol. III, p. 591:23- p. 592:7.**

III. CONCLUSION

The Hearing Officer's findings on the allegations are supported by substantial and competent evidence. DHW has not met its burden of proving by a preponderance of the evidence that Salisbury violated IPC Rules 190.01.b. or 190.01.e. on any of the allegations. Therefore, pursuant to Idaho Code §67-5316(4), IT IS HEREBY ORDERED, THAT Salisbury shall be reinstated in the same position or a position of like status and pay at DHW. Salisbury is also entitled to all pay for the period of discharge and is entitled to all applicable state benefits to which he would otherwise been entitled.

IV. ATTORNEY FEES

The Hearing Officer initially found “there was no reasonable basis in fact or law for the actions of the Department of Health and Welfare as detailed in” her **Preliminary Order** and awarded reasonable costs and attorney fees to Salisbury. **Preliminary Order, June 29, 2009, p. 22.** We agree. However, less than a month before she made this award, the Idaho Supreme Court issued its decision in Rammell v. Idaho Department of Agriculture holding that administrative officers and agencies do not have the statutory authority to award attorney fees under Idaho Code § 12-117, expressly overruling its decision in Stewart v. Department of Health and Welfare, 115 Idaho 820, 771 P.2d 41 (1989) which previously provided such authority. Rammell, 147 Idaho 422-23, 210 P.3d, 530-31 (June 1, 2009). There is no other statutory basis for the IPC to award attorney fees. Upon recognizing this, the Hearing Officer reversed her award of fees. **Preliminary Order Regarding Award of Attorney’s Fees and Costs, July 28, 2009, p. 3.**

Upon subsequent motion by Salisbury to conduct a hearing on the issue of attorney fees as required by IPC Rule 201.11, the Hearing Officer conducted the required hearing and issued the **Amended Preliminary Order [On Attorney Fees]**, setting a contingent award of fees depending, in part, on “the actions of the legislature supporting or allowing an award of attorney’s fees in this matter.” **Amended Preliminary Order [On Attorney Fees], August 26, 2009, p. 8-9.** DHW argues that the Hearing Officer’s allowing for the hearing and the resulting **Amended Preliminary Order [On Attorney Fees]** amounts to a Motion for Reconsideration of her initial

Preliminary Order Regarding Award of Attorney's Fees and Costs, prohibited by IPC Rule 201.10.

We do not find that the Hearing Officer's conducting of the mandatory hearing and subsequent issuing of the **Amended Preliminary Order [On Attorney Fees]** is an impermissible Motion for Reconsideration. Simply put, the Hearing Officer recognized error in not conducting the hearing and, therefore, took the necessary action to correct the error. The resulting **Amended Preliminary Order [On Attorney Fees]** represents the Hearing Officer's decision after consideration of arguments presented at the required hearing. It is not reasonable or in the interest of efficiency to find, as DHW suggests, that Salisbury must petition for review to the IPC, whereupon the IPC would have to remand to the Hearing Officer for holding of the required hearing. This places form over substance.

DHW's predominant argument is that the IPC lacks the requisite statutory authority to award attorney fees after the Rammell decision was issued. The Idaho Legislature has subsequently passed House Bill 421 ("HB 421") and the Governor signed HB 421 into law on March 4, 2010, effective May 31, 2009. HB 421 amends Idaho Code § 12-117 to provide the IPC with the authority to award attorney fees and costs. Further, the Legislature clearly expressed its intent that HB 421 be given retroactive effect back to May 31, 2009, and apply to all cases filed and pending as of June 1, 2009. HB 421, Section 2. This matter was filed and pending as of June 1, 2009. Therefore, the IPC has the authority to consider and award attorney fees and costs to Salisbury in this matter.

We agree with the Hearing Officer and find that DHW acted without a reasonable basis in fact or law based upon our findings and conclusions detailed above. It seemed that DHW came to a point in late 2007 where it wanted to terminate Salisbury. The turning point very well may have been the November 1, 2007 "public questioning" of Smith and DHW decisions relating to seeking funding for HPV vaccine at the Immunization Summit.

From there, the timing of the various allegations going forward, as well as how old other allegations were, suggests DHW employed a shotgun approach of dredging up several allegations in order to collectively justify a discharge. No formal reprimand or warnings were issued prior to the NOCA and discharge. DHW relied upon incidents and/or documentation that occurred from March 2006 through April 2008 and the various allegations, singularly or even cumulatively, appear rather insignificant. While this isn't necessarily relevant from a strictly legal sense (any proven single breach of IPC Rule 190 is enough to justify termination; IPC doesn't review level of discipline), it puts into context the seemingly pretextual nature of the allegations.

We have considered the factors set forth at IPC Rule 201.12 including the time and labor required, experience and ability of Salisbury's counsel, prevailing charges for an attorney of such experience for like work, as well as the result obtained. This matter had a lengthy hearing and required multiple briefs and substantial preparation. Salisbury's counsel demonstrated his level of experience and ability as well as the reasonableness of the hours worked and provided support for his fee rate. See Appellant's Memorandum of Attorney Fees and Costs, and supporting appendices, filed with the Hearing Officer on July 2, 2009 and contained in the administrative record

pleadings at No. 28. However, we agree with the Hearing Officer's reduction in such fee rate to \$300.00 per hour and adopt that finding. Salisbury has not contested this reduction.

There was no written objection filed as to the reasonableness of hours worked or the fee rate charged in proceedings before the Hearing Officer as required by Rule 201.11. DHW briefly set forth an argument that the amount and rate of fees was unreasonable and excessive because the IPC has never awarded more than \$150 per hour before. See Respondent's Amended Petition for Review, p. 6-7 (Filed with the IPC September 29, 2009). However, in briefing and oral argument to the IPC on petition for review, DHW has relied solely on the IPC's previous lack of authority on the issue of attorney fees.

While we question whether DHW has adequately preserved any issue concerning reasonableness of the amount of fees, even considering DHW's token argument, it is notable that the IPC has not had occasion to make an award of attorney fees and costs in nearly ten years. Further, while it may be the intent and desire for proceedings to be as summary and simple as possible in practice before the IPC, we acknowledge that over the last ten years this has not been the case, as a general matter. In fact, in highly contested cases, such as here, it is more customary to see proceedings go forward much like they do in litigation before the Idaho courts with scheduling conferences, discovery and motion deadlines, conducting of discovery, including interrogatories, requests for production and depositions, exhibit and witness lists and conducting of multiple day hearings. We find that \$300.00 per hour is not unreasonable or excessive given the nature of this case and prevailing rate for litigation

type services for Salisbury's counsel as demonstrated in his supporting memorandum and exhibits thereto.

Therefore, we adopt and hereby award to Salisbury the previously contingent award of attorney fees and costs of \$18,540.00 (\$300.00 hourly rate for 61.8 hours worked) as set forth by the Hearing Officer, such award based upon Appellant's Memorandum of Attorney Fees and Costs, supra.

Based on our findings above, attorney fees and costs are awarded to Salisbury on petition for review to the IPC pursuant to IPC Rule 202.08. Salisbury shall file a request for attorney fees and costs, with accompanying memorandum and affidavit in support not later than ten (10) working days after receipt of this decision. Objections to the award of attorney fees and costs on petition for review to the IPC shall be filed not later than ten (10) days after receipt of the request for attorney fees and costs. There will not be oral argument unless pursuant to IPC order at the IPC's sole discretion.

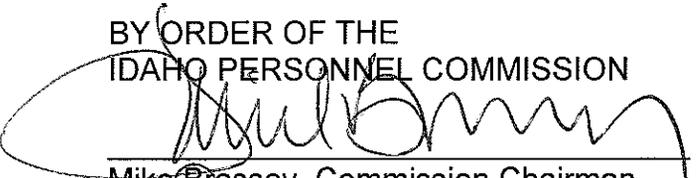
V.

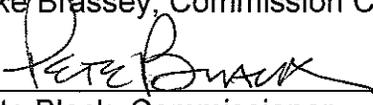
STATEMENT OF APPEAL RIGHTS

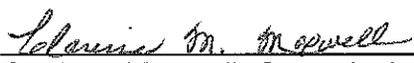
Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon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

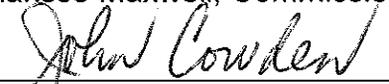
- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers;
- (3) That the findings of fact by the commission do not as a matter of law support the decision. Idaho Code § 67-5318.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION


Mike Brassey, Commission Chairman


Pete Black, Commissioner


Clarisse Maxwell, Commissioner


John Cowden, Commissioner


Evan Frasure, 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 6th day of April, 2010.

FIRST CLASS MAIL

Robert C. Huntley
The Huntley Law Firm, PLLC
P.O. Box 2188
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Deputy Attorney General
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450 W. State Street, 10th Floor
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Secretary, Idaho Personnel Commission