

IDAHO PERSONNEL COMMISSION
P. O. Box 83720
Boise, Idaho 83720-0066
Phone: (208) 854-3080

IDAHO PERSONNEL
COMMISSION

JUN 08 2010

FILED

IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

JOHN SURLINE)

Appellant,)

vs.)

IDAHO STATE POLICE)

Respondent.)

IPC NO. 09-25

DECISION AND ORDER
ON PETITION FOR REVIEW

This is a petition for review from the February 24, 2010 Findings of Fact, Conclusions of Law and Preliminary Order ("Preliminary Order") of Hearing Officer David E. Wynkoop (hereinafter "Hearing Officer") on the sole issue of attorney fees and costs.

PROCEDURAL BACKGROUND

On November 23, 2009, Idaho State Police ("ISP") Director Colonel G. Jerry Russell, terminated John Surline's ("Surline") employment at ISP for performance issues pursuant to IDAPA 15.04.01.190.01 a. b. and d. (IPC Rule 190.01). Surline, acting pro se, timely filed petition for review with the Idaho Personnel Commission ("IPC") on December 24, 2009. The Hearing Officer conducted a prehearing conference with the parties on January 20, 2010, setting a February 9, 2010 deadline for disclosure of

**DECISION AND ORDER
ON PETITION FOR REVIEW - 1**

witnesses, exhibit lists and prehearing memorandums and setting a hearing date for February 23, 2010. Scheduling Order and Order Governing Proceedings (January 20, 2010) (“Scheduling Order”).

Surline agreed with the February 23, 2010 hearing date at the pre-hearing conference, but Surline did not comply with this Scheduling Order, providing neither a witness or exhibit list, nor a prehearing memorandum. Preliminary Order, p. 2. At approximately 5:00 p.m. on February 22, 2010, the evening before the hearing, the Hearing Officer received a telephone message from a caller who did not identify himself, stating that he wanted to cancel his hearing for tomorrow. No request for continuance, withdrawal of appeal or any document was received from Surline. Surline did not appear at the February 23, 2010 hearing in person or through counsel. ISP requested to proceed with hearing and present evidence. *Id.* The request was granted.

In his Preliminary Order the Hearing Officer found that ISP had shown just cause for discipline by a preponderance of the evidence and upheld the termination. *Id.* at p. 6. The Hearing Officer found Surline acted without a reasonable basis in fact or law in his petition for review to the IPC, warranting an award of attorney fees against him in favor of ISP, but also realized the IPC had no authority to award attorney fees in light of *Rammell v. Idaho State Department of Agriculture*, 147 Idaho 415, 210 P.3d 523 (2009), and *Floyd-Miller v. Idaho Department of Juvenile Corrections*, IPC No. 08-21 (Decision and Order on Petition for Review, July 17, 2009). Preliminary Order, p. 7.

ISP timely filed Respondent’s Appeal on March 18, 2010, requesting the IPC reverse the Hearing Officer’s denial of attorney fees and seeking an award of fees and costs by the IPC or, in the alternative, that the IPC remand to the Hearing Officer for

additional findings on attorney fees and costs. The appeal is based upon the passage into law of H 421 on March 4, 2010, which amended I.C. § 12-117 to provide the IPC with authority to award attorney fees and costs and which was given retroactive effect to cases filed or pending as of May 31, 2009¹. Respondent's Appeal (March 18, 2010).

ISSUE

Should an award of attorney fees and costs be awarded against Surline in this matter?

DISCUSSION

The purpose of Idaho Code § 12-117 is to serve as a deterrent to groundless or arbitrary action in administrative proceedings and to provide a remedy for persons who have incurred unfair and unjustified financial burdens while defending against groundless claims. *Canal/Norcrest/Columbus Action Committee v. City of Boise*, 136 Idaho 666, 671, 39 P.3d 606, 611 Idaho (2001). Under Idaho Code § 12-117, a prevailing party is not automatically entitled to receive attorney fees and costs; rather, the IPC may award attorney fees and costs to a prevailing party only in cases where the non-prevailing party has acted without a reasonable basis in fact or law in the matter. This “without a reasonable basis” standard exists so that parties can take action in administrative proceedings, including, in Surline’s case, exercising of statutory rights to appeal disciplinary actions, without being subject to automatic awards of attorney fees and costs

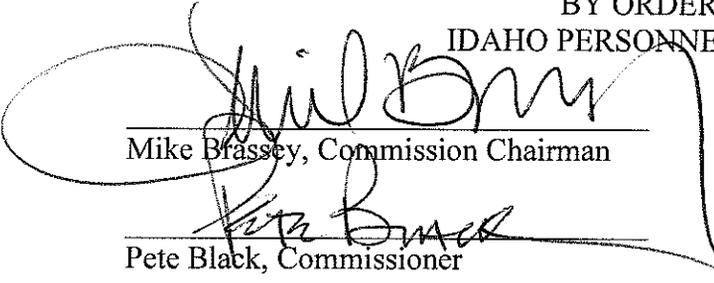
¹ As a preliminary procedural note, in light of the passage into law of H 421 and retroactive application thereof as described above, the IPC again has the statutory authority to award attorney fees and costs. Therefore, our decision in Floyd-Miller v. Idaho Dep't. of Juvenile Corrections, IPC No. 08-21 (Decision and Order on Petition for Review, July 17, 2009) is overruled solely to the extent it rendered invalid and of no force and effect the IPC’s rules on procedure for award of attorney fees and costs set forth at IDAPA 15.04.01.201.11, 201.12 and 202.08 (IPC Rules 201.11, 201.12 and 202.08).

should they not prevail, as long as there is a reasonable basis in fact or law for such action.

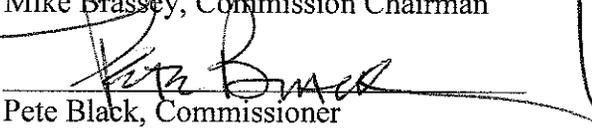
This standard is difficult to reach. Section 12-117 requires a showing that a non-prevailing party's claims are frivolous, unreasonable, groundless, or in bad faith. *Boise Tower Associates, LLC v. Timothy J. Hogland*, 147 Idaho 774, 784, 215 P.3d, 494, 504 (2009). We must be cautious to avoid deterring pro se appellants from exercising statutory rights under the Personnel System Act. In the present matter, we are even more wary because the IPC lacked the statutory authority to award fees at all under § 12-117 throughout the underlying appeal before the Hearing Officer. *Rammell* was legislatively overruled after the scheduled hearing date and after the Hearing Officer issued his Preliminary Order.

In this case, it is indeterminable whether Mr. Surline had a reasonable basis in fact or law on the merits of his appeal, since he did not present a case in his defense. The Commission cannot assume Surline lacked a reasonable basis in fact or law for exercising his statutory right to bring the appeal simply because he failed to appear and present his case. Therefore, we find that Surline's failure to appear at the hearing in this particular case does not warrant an award of attorney fees and costs against him, and we decline to so award.

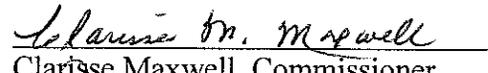
BY ORDER OF THE
IDAHO PERSONNEL COMMISSION



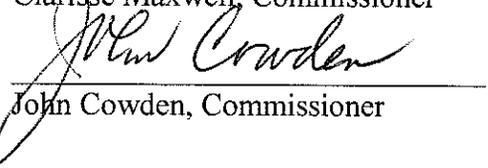
Mike Brassey, Commission Chairman



Pete Black, Commissioner



Clarisse Maxwell, Commissioner



John Cowden, Commissioner

DISSENT

The Hearing Officer found it was unreasonable for Surline to appeal this matter, request an evidentiary hearing and then fail to appear at the hearing without good cause. He found that it resulted in substantial ISP staff and attorney time and effort to prepare for the hearing. Preliminary Order, p. 7. Further, the Hearing Officer found Surline did not provide adequate notice of any withdrawal of his appeal. An anonymous telephone message left at the Hearing Officer's office at approximately 5:00 p.m. the day before the hearing is clearly unreasonable and there was no written notice of appeal withdrawal or motion for continuance. *Id.* Surline did not even contact ISP's attorney to seek withdrawal or a continuance or provide any other notice of intent to forego further appeal.

However, while finding that an award of attorney fees and costs was warranted, the Hearing Officer correctly declined to award attorney fees and costs because at the time the Preliminary Order was issued, there was no authority to do so. *Rammel, Floyd-Miller, supra.* As stated above, with the passage of H 421 on March 4, 2010, Rammel was legislatively overruled and the IPC has, once again, the statutory authority to award attorney fees and costs and such authority has been expressly applied retroactively to May 31, 2009, and applies to this matter.

Generally, pro se appellants are given great leeway in pursuing their statutory rights to appeal disciplinary actions taken against them by their state agency employers within the jurisdiction of the IPC. Certainly, it is the policy of the IPC to allow for pro se appellants to have their "day in court" and this Commission has always been lenient in allowing for this.

However, there must be a minimum standard of behavior and action in exercising an appellant's statutory right under the Personnel System Act. As a general matter appellants (pro se and not) should participate in the process and actually show up to the hearing to tell their side of the story, or, at the very least reasonably communicate with agency counsel and the Hearing Officer regarding withdrawal of appeal and facilitation of dismissal thereof where there was no longer a desire or intent to pursue the appeal. Surline did not do this. He simply appealed, requested an evidentiary hearing, agreed to the date, and then failed to show up or provide adequate prior notice of his lack of intent to go forward with the hearing. This is unreasonable and without basis in fact or law.

An award of attorney fees and costs against Surline under § 12-117 is entirely appropriate in this case, if not just to discourage pro se appellants from doing what Surline did. All the majority opinion has done is condone, if not encourage, pro se appellants to not show up to the scheduled hearing and, in so doing, avoid any possibility of suffering an award of attorney fees and costs against him/her.

I find that Surline's inaction in this particular case warrants an award of attorney fees and costs against him, and in so finding, I would set a minimum bar for pro se appellants in filing and bringing appeals to the IPC. While not discouraging or deterring exercise of statutory rights under the Personnel System Act, I would set forth a minimum standard of behavior of at least showing up at the hearing or more timely and effectively communicating with agency counsel and the Hearing Officer if there is a lack of desire to further pursue an appeal as the hearing date approaches. Surline did not do either and I would award reasonable attorney fees and costs against him in this particular case.

I respectfully dissent.



Evan Frasure, Commissioner

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 8th day of June, 2010.

FIRST CLASS MAIL

Cheryl E. Meade
Deputy Attorney General
Idaho State Police
700 S. Stratford Drive
Meridian, Idaho 83642

John Surline
3312 Snowflake Way
Boise, ID 83706



Jeanette Hunt
Secretary, Idaho Personnel Commission