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IDAHO PERSONNEL  
COMMISSION

AUG 12 2010

FILED

IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

DAVID WILLIAMS,	)	
	)	
Appellant,	)	IPC NO. 08-25
	)	
vs.	)	DECISION AND ORDER
	)	ON PETITION FOR REVIEW
IDAHO DEPARTMENT	)	
OF CORRECTION,	)	
	)	
Respondent.	)	
_____	)	

This is on petition for review from the September 8, 2009 decision of Hearing Officer Edward C. Lockwood (hereinafter "Hearing Officer"). After a two-day hearing on August 11-12, 2009, the Hearing Officer found that the Idaho Department of Correction (hereinafter "IDOC" or "Respondent") had shown by a preponderance of the evidence that proper cause existed to terminate David Williams (hereinafter "Williams") from classified service. Williams petitions for review in disagreement and seeks reinstatement, back pay and back benefits to which he would have been entitled during the period since his dismissal. He also seeks attorney fees and costs.

The Idaho Personnel Commission (hereinafter "IPC" or "Commission") heard oral argument in this matter on Tuesday, June 8, 2010. Scott A. Gingras represented Williams. IDOC was represented by Karin D. Jones at oral argument.

## I.

### PROCEDURAL BACKGROUND, ISSUE AND STANDARD OF REVIEW

#### A. Background and Prior Proceedings

Appellant Williams was employed with IDOC for roughly 16 years beginning in 1992 as a correctional officer. He received promotions to Corporal and to Sergeant while working as a correctional officer. In 2002, Williams transferred to District 1 Community Corrections Adult Probation and Parole unit, accepting a position of Probation Officer. Subsequently, he was promoted to Senior PO and held this position at the time of his termination. From all appearances, Williams was a dedicated, good employee over the years and received positive reviews and numerous letters of appreciation, all contained in Appellant's exhibits, part of the record in this case.

However in July 2008, one of his assigned probationers, Wanda Arrington ("Arrington"), lodged a complaint against Williams regarding a number of late-night/early morning phone voice mail messages to her on July 10, 2008 and the substance of the ensuing conversation between them when she called him back. She alleged Williams was intoxicated during the messages and during the one call they actually conversed, not only was he intoxicated, but he made inappropriate remarks. After an investigation into this matter, Williams received a letter of reprimand for the incident for violation of IDOC policy and for conduct unbecoming a state employee and detrimental to the good conduct and order of the department. Hearing Officer's *Findings of Fact, Conclusions of Law, and Preliminary Decision*, p. 2 ("*Preliminary Order*"); Appellant's Exhibit 79 ("*App. Ex.*").

Arrington contacted a local television station and was interviewed about her complaint against Williams. This was broadcast on local television. Thereafter, a number of Williams' female co-workers reported descriptions of activities involving Williams' alleged inappropriate conduct towards or involving them that had occurred between August 2002 and September 2006. This new information prompted another investigation and resulted in a Notice of Contemplated Action ("NOCA") dated October 10, 2008. The NOCA alleged violations of IDOC Policies Nos. 201 and 217 and IPC Rule 190.01 a., e., f, and g. *App. Ex. 80*. Williams responded on October 20, 2008, denying Arrington's allegations, and disputing his co-workers' assertions. *App. Ex. 81*. District Manager Eric Kiehl ("Kiehl") issued a Letter of Disciplinary Action ("LODA") on October 29, 2008, terminating Williams' employment. *App. Ex. 82*.

Williams filed an appeal with the IPC on November 24, 2008 and the Hearing Officer conducted a two day hearing on August 11-12, 2009. On September 8, 2009, the Hearing Officer issued the Preliminary Order finding that IDOC had shown by a preponderance of the evidence that there was basis for imposition of discipline against Williams, and affirming his termination. *Preliminary Order*, p. 25. Williams timely filed petition for review with the IPC on October 12, 2009.

## **B. ISSUE**

Did IDOC prove by a preponderance of the evidence that there was proper cause for Williams' dismissal under Rule 190.01e.?

## **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 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).

## II.

### FACTUAL FINDINGS AND DISCUSSION

The factual background concerning the initial Arrington allegation/complaint and the subsequent co-worker complaints, including Williams' account of the facts relating to each complaint, are laid out by the Hearing Officer in the *Preliminary Order*, pp. 3-14.

At the outset, while making certain factual findings set forth directly below, the Hearing Officer didn't find there was enough evidence on certain allegations relating to conduct toward female co-workers to support a finding that there was IDOC policy or IPC Rule 190 violation.

Specifically, the Hearing Officer made factual findings that:

(1) Williams and co-worker Christine Jensen went out drinking one night in 2002 and ultimately ended up at Jensen's residence where he was more than likely invited in. *Preliminary Order*, p. 21. The Hearing Officer accepted Williams' story that both were intoxicated after three hours of drinking together and that there was consensual light kissing and massaging of Jensen's shoulders. Perhaps Williams wanted to go further and overstayed his welcome before leaving. There was no contemporaneous reporting of the incident and Jensen continued working with Williams in the field. *Id.*

(2) Williams telephoned co-worker Ruth Brownlee, maybe a few times, while intoxicated and late at night and wanting to get together and drink more. Brownlee specifically testified to one such instance occurring in 2006, after Williams' and his wife had separated. *Id* at p. 14. Brownlee always forcefully declined the invitation(s) and testified that she perceived sexual undertones in these intoxicated, late-night calls. *Id*.

(3) Co-worker Kathy Felder and Williams had two known sexual encounters both while each was significantly under the influence of alcohol: sexual intercourse at the 2005 Halloween party and a petting episode in Brownlee's vehicle returning home from the Rainbow Inn in 2004 or 2005. *Id* at pp. 8-11, 21-22. The Hearing Officer accepted Williams' accounts of both incidents and did not find the evidence was sufficiently clear and persuasive to find, as Felder testified in deposition, that Williams overcame her freewill and forced the sexual intercourse at the Halloween party or that she was necessarily physically forced to touch Williams' exposed penis in the petting episode in the back of Brownlee's Bronco on the way back from the Rainbow Inn. *Id*. at p. 21-22.

The Hearing Officer's factual findings are supported by substantial and competent evidence, and more importantly, we see no reason to deviate from them. Neither these findings nor the Hearing Officer's legal conclusions stemming therefrom have been challenged or appealed by either party on petition for review. What is important to note, as the Hearing Officer pointed out, is that all co-worker complaints were similar in that they all contained common denominators of some allegedly untoward statements or actions by Williams while he was intoxicated. *Id*. at 19.

Further, it is quite relevant that Williams admitted to engaging in sexual conduct with Jensen and Felder (on two separate occasions) when under the influence of alcohol. This combination of Williams' intoxication and sexual conduct or conduct with sexual undertones lends credibility to the testimony provided by Tammy Douglas, Julie Melby and Wanda Arrington relating to their complaints, as discussed below, because it demonstrates a distinct pattern of behavior, upon which the Hearing Officer understandably relied.

#### **A. Tammy Douglas Allegation**

The Hearing Officer considered the deposition and hearing testimony of Tammy Douglas, her written story contained at Respondent's Ex. 11, and Williams' testimony at the hearing on the nature of this allegation. He accepted the essence of Douglas' version of the episode between her and Williams in her office at work one evening around 7:30 p.m. in September 2006. See *Preliminary Order*, pp. 12-13, 23, 25 for the factual findings and legal conclusion. Upon review of the record, including Douglas' deposition transcript and Respondent's Ex. 11, our factual findings on this allegation are consistent with the Hearing Officer's, as set forth in the *Preliminary Order*. It is clear Williams went to Douglas' office after hours clearly intoxicated and proceeded to express his true romantic feelings for her (telling her he had been drinking "truth serum"), relaying his dreams and fantasies he harbored for her, including taking her hand in his and speaking to her about looking down her blouse at her breasts when he had the opportunity. See Respondent's Ex. 11.

Even in the face of Douglas' turning down his romantic overtures and asking him to leave, he continued his inappropriate behavior for 20 minutes. Williams own

testimony is not inconsistent on key points; in fact, he admitted to the majority of the conduct described by Douglas. Tr. Vol. II, pp. 329-30; 332. Williams denied being intoxicated, but there is substantial and competent evidence to find he was and we so find. Douglas testified in deposition that he was and the testimony is consistent with Douglas' July 17, 2008 letter to Kiehl. Respondent's Ex. 11. She testified Williams was slurring his words and that [h]is eyes were red, watery, glassy, and I could smell the alcohol." Appellant's Ex. 2 (Douglas Deposition, p. 48). She also testified that she asked Williams whether he had been drinking alcohol, and "he admitted that he shouldn't have come there because alcohol to him was like truth serum". *Id.* at 48-49.

At hearing Douglas only briefly testified about her job duties and confirmed the truth and accuracy of what she wrote in the July 17, 2008 letter contained in the record at Respondent Ex. 11. She also explained how she came to write the letter- after seeing the Arrington television interview and being asked by Kiehl to put the incident in writing after initially orally reporting it to him. Tr. Vol. I, pp. 9-18. The evidence relied upon in support of the allegations concerning this incident are largely found in Douglas' deposition testimony and exhibit evidence.

We find no fault in the Hearing Officer's acceptance of Douglas' testimony regarding the events between her and Williams in her office that night. *Preliminary Order*, p. 23. We agree that Douglas appears highly credible and the record is replete with evidence in support, including Williams' testimony. She came forward after hearing the Arrington allegation on TV, when she realized it was not an isolated incident; this explained her delay, plus the fact that she generally "isn't a pot-stirrer". App. Ex. 2 (Douglas Depo, pp. 54-56).

Even Williams doesn't call Douglas' credibility into question in his testimony at the hearing. He described Douglas as "very generous and kind. And you know, she's very much into the church and respects that." Tr. Vol. II, p. 336. He testified that Douglas' version of their conversation in her office was not too different from his own version and that the differences may have been simply due to her different perception. *Id.* at p. 341, 390. He testified "I don't know that she's lying. I think it's her perception." *Id.* at 384. He offered no explanation or motive for Douglas to lie, asserting, rather, that he and Douglas were "very good friends." *Id.* at 332.

Williams' conduct that evening in Douglas' office certainly fits within the distinct pattern of behavior described in the NOCA, LODA and set forth in the record, lending further independent credibility to Douglas' testimony and account. Clearly, the episode was unwanted and offended Douglas. It was inappropriate behavior at the workplace. Williams made comments about Douglas' body and expressed romantic feelings for her that Douglas specifically rejected. Douglas testified that she "felt like I was put in a bad situation" and that she felt harassed "[t]o the extent that he wouldn't leave when I asked him to leave." App. Ex. 2 (Douglas Depo, pp. 50, 53). She further testified: "It was unwelcome" . . . and it did interfere with the way we worked together." *Id.* at p. 65.

We agree with the Hearing Officer's factual findings and also affirm his legal conclusion that Williams behavior violated IDOC's Respectful Workplace Policy and constituted conduct unbecoming a state employee and detrimental to the good order of the Department. IPC Rule 190.01. e.; IDOC Policy 201 (prohibiting employees from engaging in "conduct or behavior that is sexually suggestive or sexually related

language, behavior or actions that are unwanted”, even if that conduct does not rise to the level of sexual harassment).

On this finding and conclusion, alone, there is sufficient basis for Respondent’s termination of Williams. Once a single violation is established under Rule 190, it is not our function to second-guess the level of discipline imposed. *Worman v. Idaho Dep’t. of Correction*, IPC No. 04-24 (Decision and Order on Petition for Review, June 25, 2007). Nonetheless, we briefly discuss certain remaining allegations at issue.

**B. Wanda Arrington and Tina Faulkner – Phone messages/calls July 11, 2009**

**1. Wanda Arrington.**

The Hearing Officer’s findings of fact regarding these allegations are contained at *Preliminary Order*, pp. 3-7, including Williams’ account regarding the same. Williams doesn’t deny making the multiple phone calls while on duty, but denies any impairment when he did. The Hearing Officer found Williams was clearly on duty while making the phone calls at issue to Arrington and Faulkner. While he didn’t find the evidence sufficient to show Williams’ was intoxicated by alcohol while making the calls, he still found that Williams’ late-night phone calls to Arrington and Faulkner were grounds for discipline.

With respect to the calls to Arrington, he found grounds for discipline because, “whether by fatigue and/or prescription medications he takes, he was becoming progressively more impaired during these telephone calls” and this impairment “compromised his ability to effectively perform his duties” and making the calls was a “failure to exercise objective and professional judgment” in violation of IDOC Policy 217. *Preliminary Order*, p. 20, 24.

The Hearing Officer relied upon substantial and competent evidence in finding that Williams did become progressively more impaired while making the telephone calls that very early morning on July 10, 2008. There was the recording of Williams' voice mail messages on Arrington's cell phone. IDOC Exhibit 1. There was Arrington testimony that he sounded intoxicated, "was slurring [and] you could hardly understand what he was saying." Tr. Vol. I, p. 25, lines 24-25. Faulkner told Kiehl in an interview that she thought Williams sounded drunk; that he asked her four times where Arrington was and she did not know. App. Ex. 7 (Kiehl Depo- Attach 7, p. 9). Kiehl noted in deposition testimony that Williams left an incorrect number on one of the messages. App. Ex. 7 (Kiehl Depo, Attach. 7, pp. 4-5, 12.)

Even more importantly, witnesses who know Williams and have been around him when he was not impaired (Eric Kiehl, Tammy Douglas) and also when he was intoxicated by alcohol (Tammy Douglas) testified in deposition that he sounded intoxicated. Appellant's Ex. 2 (Douglas Depo, p. 36, 99 and Attch. 9); App. Ex. 7 (Kiehl Depo, pp. 84-86, 89-90, 97, 99, 112, 114). Williams also acknowledged his speech sounded slurred in his final recorded message to Arrington. Tr. Vol. II, pp. 376-77.

We agree there was substantial and competent evidence to support the Hearing Officer's findings that "by fatigue and/or prescription medications he takes, [Williams] was becoming progressively more impaired during the telephone calls". *Preliminary Decision*, p. 20. Williams testified he is prescribed certain medications for treatment of depression, anxiety and to counter the side effects of one or more of these medications. *Id.* at p. 6. He acknowledged he takes these before he goes to bed and that he had taken them prior to placing the calls at issue. Tr. Vol. I, p. 241. While he testified they

do not cause drowsiness, he also stated he is “supposed to take it in the evening before I [go] to bed;” Tr. Vol. I, p. 234, 237, 240; that one of the medications was prescribed because he was having a problem getting to sleep;”, *Id.* at 237; and that Klonopin would “slow down” his mind and “allow me to get to sleep.” *Id.* at 238.

His girlfriend Danajo Cole also testified that after Williams takes his medications: “I’ve noticed . . . that it may make him a little bit sleepy or more tired or whatever.” *Id.* at 171. Cole also acknowledged when she first heard the phone messages: “I thought it sounded bad . . . Just the last message they played on TV made it sound like he was intoxicated or something to me.” Tr. Vol. I. p. 160. Williams also testified that night he was tired: “I was tired. I played golf and it was hot. So I was tired.” *Id.* at 247.

Further, Williams, in his Notice of Appeal document, contradicts his later testimony that the medications didn’t cause any effect on him that night relating to drowsiness or fatigue or impairment while making the calls. At that time he was apparently trying to counter the allegations of intoxication by alcohol and wrote to the potential effect of the medications on how he sounded on the voice messages. Resp. Ex. 10, p. 2, paragraph h.

Therefore, we find that Williams placed work-related phone calls to Arrington while impaired by drowsiness and/or prescription medications and we adopt the Hearing Officer’s legal conclusions that this constituted a violation of IDOC Policy 217. See *Preliminary Order*, p. 24.

## 2. Tina Faulkner Call<sup>1</sup>

With respect to Probationer Faulkner, the Hearing Officer found it was inappropriate and unprofessional for Williams to telephone Faulkner at approximately 2:15 a.m. simply to inquire as to Arrington's whereabouts; that this was disrespectful and discourteous. *Preliminary Order*, p. 20, 25. Further, the Hearing Officer found Williams violated Probationer Faulkner's and Arrington's rights to privacy. *Id.*

We don't see adequate support for finding any violations of rights to privacy, per se. Faulkner and Arrington are probationers and their rights to privacy are rather limited, particularly with respect to their Probation Officer, and the Hearing Officer's finding cites no law on this point. Further, all Williams did when calling Faulkner was inquire where Arrington was. Williams stated there was a history of acquaintance and friendship between the two and they had often been together in the past. We decline to find a violation of Arrington's right to privacy based upon Williams' calling Faulkner, nor a violation of Faulkner's right to privacy. Therefore, we do not find that Williams violated IDOC Policy 217 on the count that it was unprofessional to involve a probationer in the personal and otherwise private business of another probationer. *Preliminary Order*, p. 25, paragraph a.

Also, while it may well be disrespectful and discourteous due to the time of the call (2:15 a.m.), we decline to find this constituted a violation of IDOC Policy 217, subsection 05.01.00 relating to disrespectful or discourteous action. There is no

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<sup>1</sup> In his petition for review and support briefing to the IPC, Williams argues he didn't receive due process regarding the issue of the call to Tina Faulkner because it wasn't an alleged basis contained in the NOCA or the LODA or argued by IDOC as a basis for discipline. This is without merit. Clearly there was mention of the phone call to Tina Faulkner, both in the NOCA and the LODA. See App. Ex. 80, 82. Further, Williams clearly considered the call to Faulkner to be at issue because he included significant response to it, in conjunction with the Arrington allegation in his response to the NOCA. See App. Ex. 81. Williams testified he assumed that his call to Faulkner formed part of the basis for the disciplinary action. Tr. Vol. I, p. 250. He received the required due process.

specific IDOC policy prohibiting late-night calls to probationers and all Williams did was ask where Arrington was.

However, while the Hearing Officer made no factual findings that Williams was impaired when he called Faulkner, we believe there is substantial and competent evidence to support such a finding. The call was close in time to the calls to Arrington, and Faulkner told Kiehl he sounded drunk and kept asking her where Arrington was (four times) even though she didn't know. App. Ex. 7 (Kiehl Depo, Attachment 7, p. 9). We find, much like we have found with respect to the Arrington calls, that Williams was also impaired, whether by fatigue and/or prescription medications, when he called Faulkner that morning and this constitutes a violation of IDOC Policy 217, subsection 05.01.00 (failure to exercise objective and professional judgment and subsection 05.02.00 (by compromising his ability to properly perform his duties).

**C. The Curly's Bar Allegation**

Having reviewed the Hearing Officer's factual and legal findings on this allegation, (*Preliminary Order*, pp. 11-12, 22-23), and based upon the record in this case, we decline to reach the merits of this allegation. IDOC has proven just cause for discipline, as outlined above, and we find it unnecessary to decide this issue.

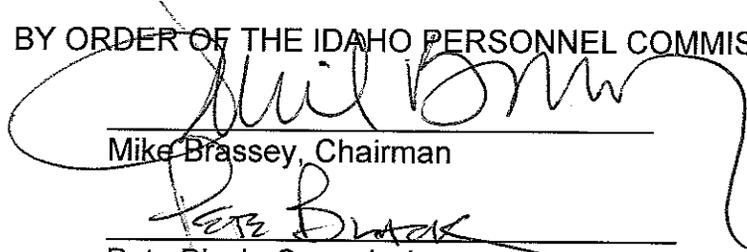
**III.**

**CONCLUSION**

Having reviewed the record, including the two-day hearing transcript, five witness deposition transcripts entered as exhibits, briefs of the parties, and the Preliminary Order of the Hearing Officer, and based upon our findings above, we find substantial and competent evidence in the record to support IDOC's imposition of discipline on

Williams. IDOC has proven by a preponderance of the evidence that there is just cause for Williams' termination.

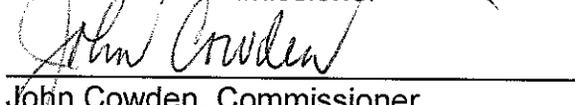
BY ORDER OF THE IDAHO PERSONNEL COMMISSION



Mike Brasseley, Chairman



Pete Black, Commissioner



John Cowden, Commissioner



Clarisse Maxwell, Commissioner



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 12<sup>th</sup> day of August, 2010.

### FIRST CLASS MAIL

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