

**IDAHO PERSONNEL COMMISSION**  
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IDAHO PERSONNEL  
COMMISSION

APR 12 2011

**FILED**

**IDAHO PERSONNEL COMMISSION**

**STATE OF IDAHO**

JEFFRY BLACK,	)	
	)	
Appellant,	)	IPC NO. 09-21
	)	
vs.	)	DECISION AND ORDER
	)	ON PETITION FOR REVIEW
IDAHO STATE POLICE,	)	
	)	
	)	
Respondent.	)	
_____	)	

This matter is on Petition for Review from the June 22, 2010 Memorandum Decision and Preliminary Order ("Preliminary Order") of Hearing Officer Elaine Eberharter-Maki ("Hearing Officer") granting summary judgment in favor of Idaho State Police ("ISP") and upholding Appellant Jeffrey Black's ("Black") termination from classified service. The Hearing Officer held that the undisputed facts supported the conclusion ISP had established proper cause under IDAPA 15.04.01.190.01 b., d, and e. ("IPC Rule 190.01") for Black's dismissal.

The Idaho Personnel Commission (hereinafter "Commission" or "IPC") heard oral argument in this matter on Friday, February 18, 2011. Chad M. Nicholson represented Black, and Brian B. Benjamin represented ISP.

I.

**FACTUAL AND PROCEDURAL BACKGROUND**

Both parties provided detailed factual backgrounds in their pleadings. The following is a summary of undisputed facts relevant to the issues on appeal. Black was hired by ISP, as the Executive Director of POST on August 9, 2006. Specifically, Colonel R. Dan Charboneau, then Director, ISP, extended a conditional offer of employment to Black on July 15, 2006 and followed this up with a letter on August 9, 2006 confirming Black's hiring and notifying him that he (Col. Charboneau) would be his "direct supervisor". (Exhibits 1-2 to Affidavit of Colonel Russell attached to ISP's Memorandum in Support of Motion for Summary Judgment) (hereafter "Colonel Russell Aff., Exhibit \_\_\_").

In November 2008 the POST budget was nearly depleted and POST was unable to pay its obligations through the end of the month. On November 24, 2008, Colonel Russell, successor to Colonel Charboneau, and current ISP Director, held a meeting with Black and several other ISP employees regarding POST's financial problems. Colonel Russell directed Black to take immediate control of fiscal matters at POST. Black told Colonel Russell that, as Executive Director of POST, he took direction only from the POST Council, not from the Director of ISP. Colonel Russell informed Black that, as Director of ISP, he had ultimate responsibility for the POST budget and that the Executive Director is subject to ISP policies and rules.

During that same meeting, Colonel Russell directed Black to provide a memo explaining the budget deficit and a proposal for balancing the budget going forward.

Colonel Russell followed up that meeting with a November 24, 2008 letter to Black. (Colonel Russell Aff., Exhibit 12). In the letter, Colonel Russell clearly informed Black that, contrary to Black's position that he does not answer to Colonel Russell, it is the Director of ISP who has oversight and responsibility for POST's budget management. Colonel Russell reiterated his directive that Black must provide a memorandum by November 25, 2008, explaining the budget deficit and a proposal for balancing the budget going forward. Colonel Russell also stated that, pursuant to Idaho Code §19-5109 and IDAPA 11.11.01.031<sup>1</sup>, Black was subject to the policies and rules of ISP concerning, but not limited to fiscal, purchasing and personnel matters. *Id.*

On November 25, 2008, Black responded in an e-mail that, pursuant to Idaho Code §19-5116, the POST budget is under the direction of the POST Council. Nonetheless, Black stated that he would provide the two items that Colonel Russell had requested. (Colonel Russell Aff., Exhibit 16). Later that day, Black provided Colonel Russell with a letter that addressed the issue of how the budget deficit occurred, but did not address Black's plan to balance the budget. (Colonel Russell Aff., Exhibit 17).

On January 15, 2009, Colonel Russell sent Black a letter outlining his continuing concerns with the fiscal management of POST. (Colonel Russell Aff., Exhibit 20). In that letter, Colonel Russell agreed to allow ISP Financial Specialist Lori Guthrie to be physically moved from the ISP Financial Services Office to the POST offices. This had

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<sup>1</sup> The version of the POST Council rules in effect at the relevant time for this appeal are attached as Exhibit 1 to Brian Benjamin's Affidavit in support of ISP's Motion for Summary Judgment.

been requested by Richard Juengling, Standards, Certifications and Support Manager, POST Academy. (Colonel Russell Aff., ¶¶ 28-29).

Around this time, Colonel Russell received reports that morale was poor within POST and that Black was not fulfilling POST Council's directives. Accordingly, Colonel Russell directed ISP Executive Officer Steve Raschke to conduct a management audit of POST. On June 15, 2009, Colonel Russell provided Black with a copy of the audit report and directed Black to provide a written response by June 29, 2009. (Colonel Russell Aff., Exhibit 23).

Colonel Russell met with Black to discuss management issues on July 27, 2009. Black had not yet provided a written report/response to the audit and this was discussed. At that meeting, Colonel Russell also told Black that the physical transfer of Lori Guthrie was not having a positive impact on POST's financial situation. Therefore, Colonel Russell directed Black to coordinate Ms. Guthrie's return to ISP's Financial Services Office. Colonel Russell followed up this conversation with a letter to Black on July 28, 2009. (Colonel Russell Aff., Exhibit 25).

On July 31, 2009, a month later than directed, Black provided a written response to the audit report. Colonel Russell responded with a detailed memorandum and directed Black to provide a more detailed response by August 28, 2009. Colonel Russell also asked for a draft of Black's response to POST staff regarding the personnel issues raised in the audit report. (Colonel Russell Aff., Exhibit 27).

In response, on August 12, 2009, Black advised Colonel Russell in writing that he would not move Ms. Guthrie back to ISP Financial Services Office as directed. Black

stated that he was responsible for the supervision of POST employees, pursuant to IDAPA 11.11.031.03. (Colonel Russell Aff., Exhibit 28).

Colonel Russell asked Deputy Attorney General Stephanie Altig for advice concerning who had authority over POST fiscal, purchasing, and personnel matters. Ms. Altig wrote Colonel Russell a letter opining that the Director of ISP has ultimate authority over these matters and that POST Council does not have any statutory authority over these matters. (Colonel Russell Aff., Exhibit 29).

Once again, on August 21, 2009, Colonel Russell sent Black a letter directing him to move Ms. Guthrie back to ISP Financial Services Office as soon as possible. Colonel Russell cited Idaho Code §19-5102 as establishing POST *within* ISP and IDAPA 11.11.01.031.04 as subjecting POST to ISP rules and policies *concerning, but not limited to fiscal, purchasing and personnel matters*. (Colonel Russell Aff., Exhibit 31). On August 27, 2009, Black responded in writing that he was solely responsible for “operational aspect” of POST, including personnel. Black stated that he would not move Ms. Guthrie back to ISP’s Financial Services Office, nor would he respond further to the management audit report. (Colonel Russell Aff., Exhibit 32).

Colonel Russell issued a Notice Of Contemplated Action (“NOCA”) on September 28, 2009, alleging violations of IPC Rules 190.01. b. (Inefficiency, incompetency, or negligence in performing duties, or job performance that fails to meet established performance standards); d. (Refusal to accept a reasonable and proper assignment from an authorized supervisor); and e. (Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the

agency). (Colonel Russell Aff., Exhibit 33). The NOCA outlined three bases for possible disciplinary action: (1) Black's refusal to provide Col. Russell with his proposed letter to POST staff addressing concerns outlined in Mr. Raschke's Management Audit Report, (2) Black's refusal to return Lorie Guthrie to the ISP financial services office, and (3) Black's notification to Colonel Russell on August 27, 2009, that he would no longer cooperate with Colonel Russell with respect to addressing concerns raised in Mr. Raschke's Management Audit Report.

Colonel Russell met with the POST Council on November 3, 2009 to inform the Council of the situation and to give members the opportunity to have input. (Colonel Russell Aff., ¶ 49). No Council Members challenged Colonel Russell's authority to discipline Black. *Id.*

Through his attorney, Black provided a response to the NOCA. (Colonel Russell, Aff., Exhibit 35). After review of all the evidence, Colonel Russell dismissed Black from ISP. (Colonel Russell Aff., Exhibit 36). Black timely filed an appeal with the Idaho Personnel Commission on November 24, 2009, appealing his dismissal and seeking reinstatement.

On June 22, 2010, the Hearing Officer issued her Preliminary Order granting ISP's Motion for Summary Judgment and upheld Black's dismissal. She found that no genuine issue of material fact existed and that ISP clearly established what requests were made of Black and his responses, including his refusals to comply with reasonable mandates in violation of Rule 190.01 b., d. and e. Preliminary Order, p. 12. Black timely petitioned the Commission for review the Hearing Officer's Preliminary Order.

## II.

### ISSUES

1. Whether, as a matter of law, the Director of ISP is the appointing authority for the Executive Director of the Peace Officers Standards and Training Council.
2. Whether the Director of ISP has authority to assign the location of ISP employees.
3. Whether the Executive Director's refusal to follow the ISP Director's directives are protected by the Idaho Protection of Public Employees Act (the "whistleblower act").
4. Whether, as a matter of law, the State established by a preponderance of the evidence that at least one basis exists for dismissal.

## III.

### STANDARD OF REVIEW

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**

##### **A. The Director of Idaho State Police Is the Appointing Authority For the Executive Director of POST**

Black's arguments revolve around the central issue of whether the ISP Director, Colonel Russell, was Black's appointing authority. Black's argument seems to be that the POST Council, not the ISP Director, was his appointing authority. This argument is flawed because it ignores the material facts and applicable law. First, the ISP Director is the appointing authority with power to make hiring decisions. This is consistent with the manner in which Black was hired to be the Executive Director of POST. On July 15, 2006, then ISP Director Colonel R. Dan Charboneau extended a conditional offer of employment to Black, and subsequently followed the offer with a letter on August 9, 2006 confirming Black's hiring and notifying him that he (Col. Charboneau) would be his

“direct supervisor”. (Colonel Russell Aff., Exhibits 1-2). As Colonel Charboneau’s successor as ISP Director, Colonel Russell’s supervisory authority over the Executive Director was unchanged. Black continued to report to Colonel Russell as his “direct supervisor” and as the appointing authority under the Idaho Personnel System Act, the ISP Director has the sole authority to hire and fire the Executive Director. This clear framework renders Black’s argument and belief to the contrary wholly unreasonable.

Additionally, we find the legislative history concerning the division of authority between ISP and POST Council persuasive and consistent with our findings. The predecessor to the POST Council was a free-standing council that had authority to hire and fire the POST Executive Director. 1969 Idaho Session Laws, ch. 415, § 2, p. 1151, § 13, p. 1154. The predecessor council was eventually absorbed into ISP and replaced with the POST Council. 1980 Idaho Session Laws, ch. 144, § 1, p. 309. Shortly thereafter, the Legislature took away the authority to hire the Executive Director.<sup>2</sup> 1981 Idaho Session Laws, ch. 307, §§ 1, 2 p. 628-632.

Under the current statutory scheme, The ISP Director has broad statutory authority to make appointments unless that authority is specifically given to another appointing authority and POST Council does not have statutory authority to hire and fire employees. In contrast to POST Council, other boards, such as the State Brand Board within ISP have express hiring and firing authority. Idaho Code §§ 25-1103, 25-1104. Thus, had the Legislature intended the POST Council to have similar authority, the Legislature knew how to draft such a law. Notably, it did not.

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<sup>2</sup> At the time, ISP was known as Department of Law Enforcement.

An "appointing authority" is the officer, board, commission, person, or group of persons authorized by statute or lawfully delegated authority to make appointments to or employ personnel in any department. Idaho Code §67-5302(3). Idaho State Police is one of the executive departments of the state. Idaho Code §67-2402.

In contrast, the POST Council is a council *within* ISP. Idaho Code §19-5102. In general, the POST Council has the power to establish requirements for basic training and education of peace officers, to approve training schools, to establish minimum requirements for peace officers, and to maintain records. The POST Council has the authority to expend funds from the peace officers standards and training fund for certain enumerated purposes. Idaho Code §19-5116. The POST Council has authority to promulgate rules to carry out its statutory duties. Idaho Code §19-5107.

The POST Council created the position of the Executive Director of POST Council through its administrative rules. IDAPA 11.11.01.031. According to those rules, POST Council selects the Executive Director *subject to the approval of the Director of ISP*. IDAPA 11.11.01.031.b. The Executive Director serves under the direction of the POST Council *in carrying out the duties of the POST Council*. IDAPA 11.11.01.031.02. The Executive Director has supervision over employees necessary to carrying out POST functions. IDAPA 11.11.01.031.03. For administrative purposes, the Executive Director and his staff are governed by the policies and rules of the State of Idaho and the Idaho State Police, *concerning, but not limited to fiscal, purchasing, and personnel matters*. IDAPA 11.11.01.031.04.

Black's argument focuses on two isolated provisions in the applicable law. First, he points to Idaho Code §19-5116 which gives POST Council the authority to expend funds in the peace officers standards and training fund for the specific purposes set forth in the statute. This provision does not negate the ISP Director's statutory authority as the appointing authority in §67-2405 and 67-2901.

Second, Black relies upon IDAPA 11.11.01.031.02 which states, "The Executive Director will be employed by the Idaho State Police to serve under the direction of the POST Council in carrying out the duties and responsibilities of the Council." Apparently, Black believes that the phrase "serve under the direction of the POST Council" preempts the statutory authority of the ISP Director to hire and fire ISP employees. This reasoning is flawed for several reasons.

Administrative rules must yield to statutory authority. *See Druffel v. State, Dept of Transp.*, 136 Idaho 853 (2002). POST Council's statutory authority is limited to establishing training programs for peace officers and some related activities. POST Council cannot bestow upon itself, through rulemaking, the authority to hire and fire the Executive Director. *Id.* While the Executive Director may report to POST Council on certain matters, those matters are, by definition, limited to "the duties and responsibilities of the Council," that is, establishing the training programs for peace officers. *Id.* This division of authority is clearly reflected in IDAPA 11.11.01.04, which states, "For administrative purposes, the Executive Director and his staff will be governed by the Policies and Rules of the state of Idaho and the Idaho State Police, concerning but not limited to fiscal, purchasing, and personnel matters." For all of the

foregoing reasons, Black's argument that Colonel Russell is not his appointing authority is without merit.

**B. The Director of Idaho State Police Has Authority To Assign Employees' Locations**

Black seems to argue in a related matter that Colonel Russell did not have the authority to assign Ms. Guthrie to a particular location. We reject this argument, as contrary to statute. This argument also flies in the face of the facts concerning Ms. Guthrie's temporary move to POST. Mr. Juengling, the Standards, Certifications and Support Manager for POST, requested that Ms. Guthrie be physically moved to POST so she could work more directly with him to assist him in managing and overseeing the POST budget and its fiscal transactions and Colonel Russell approved the request and allowed the move. (Colonel Russell Aff., ¶¶ 28-29). This is consistent with Colonel Russell's authority as set forth in the statutory framework.

As a head of an executive agency, the Director of ISP has general authority to supervise, direct, account for, organize, plan administer and execute the functions vested within the department, establish policy to be followed by the department employees, establish and make appointments, remove employees, transfer employees between positions, and change the duties of employees, among other things. Idaho Code §67-2405. In addition, the Director of ISP has the general powers and duties "necessary to carry out the proper administration of the state police[.]" Idaho Code Section 67-2901. Moreover, as explained above, IDAPA 11.11.01.04, states, "For administrative purposes, the Executive Director and his staff will be governed by the Policies and Rules of the state of Idaho and the Idaho State Police, concerning but not

limited to fiscal, purchasing, and personnel matters.” We find it is clear that the Director’s directive to assign Ms. Guthrie to a particular location was within his authority. Accordingly, Black was required to comply with the directive.

**C. The IPC Is Not The Proper Forum For A Claim Of A Violation Of The Idaho Whistleblower Act**

Black argues that he did not violate Rule 190 because he “has a statutorily protected right to refuse to carry out directives he reasonably believed violate the law . . . .” (Memorandum in Opposition to Respondent’s Motion for Summary Judgment, p. 10). Black cited the whistleblower act as authority for this statutorily protected right. The whistleblower act creates a private cause of action in district court for public employees who experience adverse action from their employer for reporting waste and violations of a law, rule, or regulation. Idaho Code §6-2101. Black points to I.C. §6-2104(3), which provides that “[a]n employer may not take adverse action against an employee because the employee has . . . refused to carry out a directive that the employee reasonably believes violates a law or rule . . . .”, and submits this provides Black with a defense against allegations of refusing to obey Colonel Russell’s directives and insubordination.

In her Preliminary Order, the Hearing Officer rejected this argument because Black did not meet his burden of presenting evidence from which a rational inference of retaliatory discharge under the whistleblower act could be drawn. (Preliminary Order at 11).

At oral argument before the Commission, Black reiterated his overriding argument that the whistleblower act provided him with a defense to the alleged

insubordination and refusal to obey reasonable directives of his supervisor. Black further argued that there were factual issues as to the reasonableness of his belief that Director Russell did not have authority to issue the assignments/orders he did to Black and this precluded a granting of summary judgment. We find these arguments wholly without merit. We find ISP has clearly proven that Colonel Russell, as appointing authority, had the authority to issue the orders he did to Black and that they were reasonable assignments. The Hearing Officer reached the correct result in refusing to accept Black's whistleblower argument, but we find the better reasoning is that the whistleblower act is not within the jurisdiction of the IPC.

The whistleblower act requires an employee who alleges a violation to bring an action *in district court within 180 days after the occurrence of the alleged violation.* Idaho Code §6-2105. The statutory remedies are *injunctive relief and actual damages.* Idaho Code § 6-2105. Black has provided no authority for his apparent proposition that the whistleblower act provides a remedy in a personnel matter before the Idaho Personnel Commission. By the plain language in the whistleblower act, the sole remedy is: 1) an action for damages or injunctive relief, 2) in the district court, 3) within 180 days of the alleged violation. If an employee or former employee believes he has a cause of action under the whistleblower act by virtue of a state employer's adverse action against him, he may file a lawsuit in district court within one-hundred eighty (180) days, thereof. The whistleblower act is of no relevance in IPC proceedings.

**D. The State Established Basis For Dismissal By A Preponderance of the Evidence**

In briefing, Black argues that his conduct did not violate IPC Rule 190. He asserted that the management audit report did not relate to “fiscal matters,” and therefore, he did not violate Rule 190 when he refused to respond as directed by Colonel Russell. Black characterizes the issue as a personnel matter, over which he, not Colonel Russell, had authority. This argument has no basis in law. First, even if the management audit report was a “personnel matter,” the Director does, in fact, have authority. For administrative purposes, the Executive Director and his staff are governed by the policies and rules of the State of Idaho and the Idaho State Police, concerning, but not limited to fiscal, purchasing, and *personnel matters*. IDAPA 11.11.01.031.04 (emphasis added).

Second, this argument ignores the sources of the ISP Director’s authority. As previously discussed in Section IV. A. and B. herein, we find the Director of ISP has all powers and duties necessary to carry out the proper administration of the state police. Idaho Code §67-2901. The Director of ISP has general authority to supervise, direct, account for, organize, plan, administer and execute the functions vested within the department, establish policy to be followed by the department employees, establish and make appointments, remove employees, transfer employees between positions, and change the duties of employees, among other things. Idaho Code §67-2405. This broad grant of authority, especially when compared to POST Council’s very limited scope of authority, clearly gives the Director of ISP the authority to request a management audit, and to require a thorough response to the audit.

Black also argues that he did not violate Rule 190 in refusing to transfer Ms. Guthrie back to the Financial Services Office because she was a POST employee whom he supervised. This conclusion is not supported by the law. POST does not have employees under the statutory framework and applicable rules. Rather, there are ISP employees who are tasked with carrying out necessary functions of POST. While the Executive Director of POST has supervision over the employees carrying out POST functions (see IDAPA 11.11.01.031.03), it is the Director of ISP who has ultimate administrative authority over the ISP employees carrying out POST functions as well as the Executive Director; including the express authority to transfer employees. IDAPA 11.11.01.031.04; Idaho Code §67-2405.

Further, under Idaho Code §67-2901 the Director has all powers and duties necessary to carry out the proper administration of the state police. By implication, this includes transferring employees within ISP and otherwise managing ISP human resources. Under IDAPA 11.11.01.031.04, the POST Executive Director and his staff are governed by the policies and rules of the State of Idaho and the Idaho State Police regarding personnel matters. This is consistent with Mr. Juengling's request and Colonel Russell's approval thereof for Ms. Guthrie to move to POST.

It is undisputed that Black refused Colonel Russell's directives to respond to the management audit report, to move Ms. Guthrie back to the Financial Services Office and to provide a draft of a letter to POST staff concerning the audit report. Here, the undisputed documentation speaks for itself: Black refused to follow reasonable orders and assignments from an authorized supervisor. This refusal to accept and follow

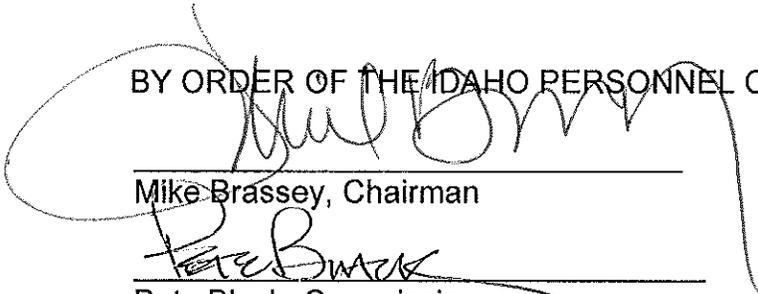
reasonable and proper assignments from Colonel Russell is insubordination and is proper cause for disciplinary action pursuant to IPC Rule 190.01.d and e.

V.

**CONCLUSION**

Upon review of the record and consideration of arguments at the oral argument hearing, we find sufficient basis to affirm the Hearing Officer's Preliminary Order that ISP had authority to terminate Black, and ISP has proven proper cause under Rule 190 to do so. Based upon the foregoing, summary judgment is granted to ISP and Black's termination is upheld.

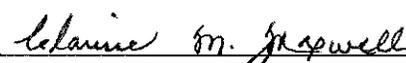
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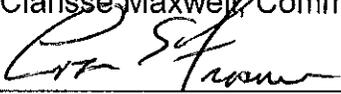
\_\_\_\_\_  
Mike Brasseley, Chairman



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Pete Black, Commissioner



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Clarisse Maxwell, Commissioner



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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 12<sup>th</sup> day of April, 2011.

**FIRST CLASS MAIL**

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