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IDAHO PERSONNEL COMMISSION  
304 N. 8<sup>th</sup> St. – Third Floor  
P. O. Box 83720  
Boise, Idaho 83720-0066  
Phone: (208) 854-3080

**IDAHO PERSONNEL COMMISSION**

**STATE OF IDAHO**

<b>MICHAEL T. PRAEGITZER,</b>	)	
	)	
<b>Appellant,</b>	)	<b>IPC NO. 10-27</b>
	)	
<b>vs.</b>	)	<b>DECISION AND ORDER</b>
	)	<b>ON PETITION FOR REVIEW</b>
<b>IDAHO TRANSPORTATION DEPARTMENT,</b>	)	
	)	
	)	
<b>Respondent.</b>	)	
_____	)	

This matter is on petition for review from the April 1, 2011 decision of Hearing Officer Laird B. Stone (hereinafter "Hearing Officer"). After a two-day hearing over March 15<sup>th</sup> and 16<sup>th</sup>, 2011, the Hearing Officer held that Idaho Transportation Department (hereinafter "ITD") met its burden of proving, by preponderance of the evidence that Praegitzer used ITD equipment for personal use in violation of ITD policy and in violation of IDAPA 15.04.01.190.01.g (IPC Rule 190.01.g), and therefore there was just cause for his dismissal. Praegitzer petitions for review seeking reversal of the Hearing Officer's decision and reinstatement along with back pay and back benefits to which he would have been entitled during the period since his dismissal. *Petition for Review and Request for Briefing Schedule, Transcript and Oral Argument*, May 6, 2011. (*"Petition for Review"*).

The Idaho Personnel Commission (hereinafter "IPC" or "Commission") heard oral argument in this matter on Thursday November 17, 2011. Cynthia J. Woolley represented Praegitzer and ITD was represented by Deputy Attorney General Robert M. Adelson.

## I.

### PROCEDURAL BACKGROUND, ISSUES AND STANDARD OF REVIEW

#### A. BACKGROUND AND PRIOR PROCEEDINGS

Praegitzer was employed with the ITD for 25 years from around June 2, 1985 until around July 26, 2010. (Preliminary Order, p. 2). On July 12, 2010, Praegitzer was sent a Notice of Contemplated Action and Basis and Evidence Relied upon for Contemplated Action (NOCA) by District 4, District Engineer Devin Rigby. (Respt. Ex. 22. In the NOCA, ITD also set forth a history of prior written warnings and prior disciplinary action issued to Praegitzer for ITD policy infractions, but the main thrust of the NOCA was that Praegitzer used an ITD-owned bead blaster for personal use in a significant amount, and on state time. There was also a general allegation that Praegitzer "maintain[ed] a double-standard between you and your fellow employees when it comes to adhering to ITD policy". *Id.* Praegitzer responded to that Notice on July 19, 2010. (App. Ex. C). He admitted use of the bead blaster for a personal project but adamantly denied he did so on state time. He also denied maintaining any double-standard.

On July 26, 2010, Devin Rigby sent Appellant a Response to NOCA which was, in essence, a letter of termination dismissing Praegitzer from ITD employment (hereinafter referred to as "Letter of Termination"). (Respt. Ex 23). As had been set

forth in the NOCA, Praegitzer was terminated because ITD believe him to have (1) “[u]sed ITD equipment for personal gain [use of the bead blaster]; (2) “fraudulently do work on personal projects while on the clock (on state time); and (3) maintain a double-standard between you and your fellow employees when it comes to adhering to ITD policy”. NOCA, p. 2; Letter of Termination, p. 2. Further, IPC Rules 190.01 b., e. and g were provided as basis for termination.

Appellant timely petitioned for review and the Hearing Officer held a hearing on March 15 and 16, 2011. The Hearing Officer issued a Preliminary Order on April 1, 2011 in which he found ITD had proven its case on improper use of the bead blaster under ITD policy and Rule 190.01.g., but had not proven its allegation on Praegitzer's use of a double standard or other inadequacies as a supervisor<sup>1</sup>. The Hearing Officer made no finding on whether Praegitzer had used the bead blaster for a personal project while on state time. Praegitzer timely filed his Petition for Review.

## **B. ISSUES**

1. Does the record possess substantial evidence to support the Hearing Officer's conclusion that ITD met its burden of proving there was proper cause for Praegitzer dismissal under Rule 190.01g?
2. Was Praegitzer afforded the requisite due process?

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<sup>1</sup> The Letter of Termination also generically spoke to Praegitzer's inadequacies as a supervisor and ill-treatment of employees and apparently alleged this was a basis for discipline as well under Rule 190.01 b and e. At the hearing there were also allegations of taking state property such as nuts and bolts and other small items. However the Hearing Officer found ITD did not prove these allegations.

## 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. Once a single violation is established on any proper cause issue, it is not the function or the jurisdiction of the Commission to second-guess the state's decision on the level of discipline imposed.

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 AND LEGAL ANALYSIS

#### A. Appellant Used State Owned Bead Blaster for Personal Use.

There is substantial and competent evidence that Appellant used state equipment for personal use, namely the bead blaster. In fact, Praegitzer has never denied using the bead blaster in the shop for personal use. He admitted this use in his written response to the NOCA (Respt. Exhibit C). Further, Praegitzer's use of the bead blaster was witnessed by other mechanics in the shop, and at least three Mechanics, including Larry Tillinghast, Dave Gardner and Matt Kime testified that they witnessed

Praegitzer's use. Tr. Vol. I, p. 18; pp. 47-48; pp. 60-61; pp. 86-87. The Hearing Officer's finding to this effect is well supported by evidence in the record.

**B. Praegitzer's Use of the Bead Blaster Violated ITD Policy A-01-12 and A-01-13, as well as Rule 190.01.g.**

Two provisions of ITD policy prohibit the use of State property by State employees for personal projects. ITD Administrative Policy A-06-12 provides, in relevant part:

"Idaho Code states that State of Idaho employees shall not gain monetary benefit from the purchase of state property. Idaho Transportation Department employees **are further restricted from purchasing or using state property in the following areas:** . . . State property, regardless of value, **shall not** be taken, salvaged, or **used** by Department employees **for any personal purpose.** . . .

. . . Employees, regardless of their position or authority, who knowingly disregard this policy, are subject to disciplinary actions. (Emphasis added).

(Respt. Ex. 13).

ITD Administrative Policy A-06-13 provides, in relevant part:

The facilities and equipment of the Idaho Transportation Department are public property, paid for and maintained by highway user funds or aeronautics user funds. Use of the facilities and equipment for any activity other than the authorized business of the Department is **prohibited**. Department shops, equipments or materials are not to be used for repairs or maintenance of private vehicles or property. [Emphasis in original.]

(Respt. Ex. 12).

In addition, IPC Rule 190.01.g. provides that "[c]areless, negligent, or **improper use** or unlawful conversion of state property, equipment, or funds constitutes proper cause for disciplinary action against a state employee. (Emphasis added).

Praegitzer contends that ITD Policy A-01-12 by its terms, "read in context, is not a blanket prohibition against the personal use of state property. [Instead] It is

[only]...addressing the use of purchased or salvaged State property.” (App. Brief, p.16). This argument ignores precursory language that, while specifically prohibiting employees from gaining monetary benefit from the purchase of state property, also further broadly restricts them from “using state property” . . . “for any personal purpose”. ITD Policy A-01-12. Regardless, Praegitzer’s personal use of the bead blaster also clearly violates ITD Policy A-06-13, set forth above. Finally, even if there wasn’t specific ITD policy prohibiting personal use of state property (and there is), such use still violates Rule 190.01.g., since such personal use of state property, is “improper use”.

**C. Whether Praegitzer was on State Time While Using the Bead Blaster for Personal Use is Not Dispositive.**

There is much discussion and focus throughout this case on whether Praegitzer used the bead blaster for his son’s project **on state time**. Praegitzer contends that his use of the bead blaster for personal use was not on the clock, but was on personal time. ITD also put on significant evidence in the form of co-worker testimony that his personal use of the bead blaster was on state time and continued to include discussion of personal use on state time in Respondent’s Memorandum on appeal.

While, clearly, ITD certainly alleged personal use on state time in the NOCA and in the Letter of Termination, it also alleged and ultimately terminated Praegitzer based on allegations of Praegitzer’s “inappropriate use of state equipment – such as the bead blaster, for personal use” without any element of it being on state time. NOCA, p. 2; Letter of Letter of Termination, p. 1. There was also testimony from Ken Angell, ITD human resource specialist senior on ITD Policy A-06-13 that it doesn’t matter whether use of ITD equipment occurred on state time or not- the fact there is personal use of state equipment is prohibited. Tr. Vol. I, p. 152, LL. 1 - p. 153, L 11.

The Hearing Officer did not make findings of fact on whether Praegitzer used the bead blaster for personal use **while on state time**. We presume he did not do so because it doesn't matter whether Praegitzer used the bead blaster on state time- the simple fact he used it at all, whether on state time or his own time, constitutes violation of two ITD policies and IPC Rule 190.01.g., as set forth above. The cited ITD policies and IPC Rule 190.01.g. do not require a showing of improper, personal use of state equipment or property **while on state time**. This makes sense. Personal use of state equipment is still improper use whether you do so on your own time or on state time.

**D. Praegitzer Had Knowledge of ITD Policies Regarding Personal Use of ITD Equipment and Property.**

Praegitzer has consistently maintained the argument that he was unaware that what undeniably amounts to significant use of the ITD bead blaster for his son's personal project violated ITD policy. He indicates it was his understanding that his personal use of the bead blaster is allowed because he did not use it for his son's project while on state time; instead he did so on his own personal time.

The Hearing Officer found that Praegitzer had knowledge of not only ITD Policy A-01-12, but that his performance evaluations established he had knowledge of all appropriate policies. Preliminary Order, p. 8. These findings are supported by substantial and competent evidence in the record. At the time of his termination, Praegitzer was a shop supervisor for the ITD shop in Shoshone, Idaho. (Preliminary Order, p.3, ¶ 12). Praegitzer indicates that he was familiar with Policy A-01-12 (*Id.*, 5, ¶ 21), and he had received previous notice of this policy in a previous NOCA (App. Brief, p. 16). Praegitzer argues that he did not "knowingly" disregard Policy A-01-12 because he was unaware of its content, and as he put it, he may have "known about Policy A-01-

12 -- because it was the basis for his previous disciplinary action--but he was unaware that it would be interpreted to prohibit the use of the bead blaster for personal use". (App. Brief, p. 16). As already discussed, Praegitzer argues ITD Policy A-01-12 refers only to the purchase of State property and didn't address the "use" of State property for personal purposes. However, it does. See Section II. B., herein; Respt. Exh. 13.

Further and separately, as discussed above, ITD Policy A-06-13 also very clearly prohibits personal use of state equipment. As shop supervisor, Praegitzer, as reasonably expected, understood the prohibition. There was testimony regarding two global emails sent by Devin Rigby to all District 4 ITD employees regarding the prohibition on personal use of state equipment, including one within the last year before the hearing and Praegitzer was on the receipt list as an employee in District 4. Tr. Vol. II, pp. 371-373. Shop employees who were supervised and trained by Praegitzer testified that they were aware of the prohibition against the use of State property for personal use (Preliminary Order, p. 8, ¶ 39). In fact, multiple employees, including Dave Gardner, Ken Angell, and supervisor Devin Rigby, testified that Praegitzer had turned in other employees for using state equipment/property for personal use, including, for example a tire machine and a battery charger, and they were disciplined. Tr. Vol. I., pp. 63-64; 207-208; 330-332. There is substantial and competent evidence to support a finding that Praegitzer had knowledge of all appropriate policies, including A-06-13.

#### **E. Appellant Was Afforded the Requisite Due Process**

As a classified employee of the State of Idaho, Praegitzer is entitled to procedural due process prior to his termination from employment.

The essential requirements of due process . . . are notice and an opportunity to respond. . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985) (internal citations omitted). “[A]ll that is required is a sufficient account of the charges to put the employee on notice of what he/she allegedly did wrong in order to allow the employee to facilitate a meaningful response.” *Peska v. S. Cent. Health Dist.*, IPC 03-12 (July 28, 2004), p. 13.

The July 12, 2010 NOCA clearly met the first prong of the due process notice. Devin Rigby described the basis for the contemplated action under IPC Rule 190.01. b., e. and g. and provided a description of the evidence relied upon for the contemplated action. (Respt. Ex. 22). ITD clearly provided Praegitzer with notice of three allegations, the first two of which overlap, and explained the evidence upon which they were based.

He was provided notice that ITD believed him to have: (1) “use[d] ITD equipment for personal gain; (2) “fraudulently do work on personal projects while on the clock”; and (3) “maintain a double-standard between you and your fellow employees when it comes to adhering to ITD policy”. See NOCA, p. 2; (Respt. Ex. 22); Letter of Termination, p. 2 (Respt. Ex. 23). Further, IPC Rules 190.01.b., e. and g. were provided as basis for termination. *Id.*, p. 1. Praegitzer was afforded opportunity to respond to the NOCA and he did so, in writing, in which he admitted use of the bead blaster for a personal project, but hotly contested that he did so on state time. He also denied he maintained any

double standard when it comes to adhering to ITD policy. (App. Ex. C). He clearly exercised his right to appeal to this Commission and a full hearing was conducted before the hearing officer whereupon ITD policy was examined, evidence and testimony considered, and a decision issued. Praegitzer has received the due process required under the law.

### III.

#### CONCLUSION

Having reviewed the record, including the two-day hearing transcript, briefs of the parties, and the Preliminary Order of the Hearing Officer, there is sufficient evidence in the record to support and uphold the disciplinary action. Praegitzer received the requisite due process under the law and there is substantial and competent evidence that he violated applicable ITD policy as well as IPC Rule 190.01.g, by his extensive use of ITD's bead blaster on a personal project. ITD has proven by a preponderance of the evidence that there is proper cause for Praegitzer's termination under Rule 190.01.g. ITD's termination of Praegitzer is upheld.

Parties are responsible for their own attorney fees and costs.

IV.

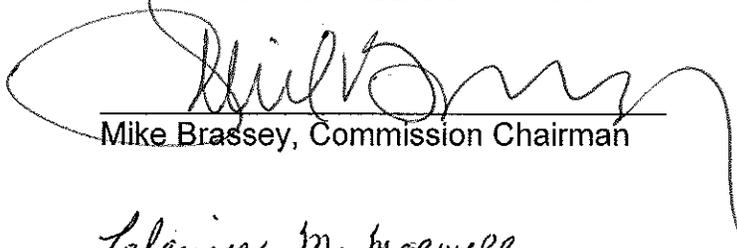
**STATEMENT OF APPEAL RIGHTS**

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:

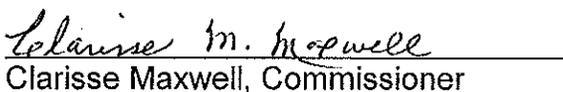
- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers;
- (3) That the findings of fact by the commission do not as a matter of law support the decision.

Idaho Code § 67-5318.

BY THE ORDER OF THE  
IDAHO PERSONNEL COMMISSION



Mike Brassey, Commission Chairman

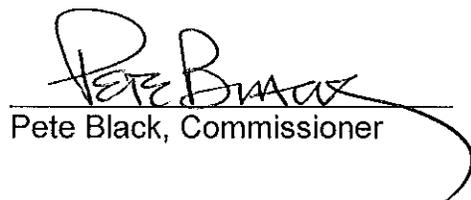


Clarisse Maxwell, Commissioner



John Cowden, Commissioner

Commissioner Black dissents with the ultimate conclusion on the grounds that the alleged and proven conduct was not sufficient to justify termination.



Pete Black, 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 10<sup>th</sup> day of Jan, 2012.

FIRST CLASS MAIL

Cynthia J. Woolley  
Law Offices of Cynthia J. Woolley, PLLC  
200 West River Street, Suite 301  
P.O. Box 6999  
Ketchum, ID 83340

Rob Adelson  
Deputy Attorney General  
Civil Litigation Division  
954 W. Jefferson- 2<sup>nd</sup> Floor  
Boise, ID 83720-0010

  
Secretary to the Idaho Personnel Commission