

IDAHO PERSONNEL COMMISSION
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IDAHO PERSONNEL
COMMISSION

OCT 29 2013

FILED

IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

MATTHEW P. EMERY,)	
)	
Appellant,)	IPC NO. 12-15
)	
vs.)	DECISION AND ORDER ON
)	PETITION FOR REVIEW
IDAHO DEPARTMENT OF)	
HEALTH AND WELFARE,)	
)	
Respondent.)	
_____)	

This matter is on petition for review from the February 28, 2013 decision of Hearing Officer Jean Uranga (hereinafter "Hearing Officer"). On February 28, 2013, the Hearing Officer granted the Idaho Dep't of Health and Welfare's ("DHW") Motion for Summary Judgment and affirmed DHW's decision to terminate the employment of Appellant Matthew Emery ("Emery") pursuant to IDAPA 15.04.01.190.01.b. and e. ("IPC Rules 190.01.b and e"), which provide for discipline based upon inefficiency, incompetency, or negligence in performing duties, or job performance that fails to meet established performance standards; and "insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the agency".

Emery filed his Petition for Review with the Idaho Personnel Commission and is Pro Se. DHW is represented by Deputy Attorney General Robert M. Adelson.

I.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

In this case the overriding issue is whether the Hearing Officer abused her discretion in denying Emery's second Motion for Continuance whereby he was requesting additional time to respond to DHW's Motion for Summary Judgment. Emery has also alleged a conflict of interest on the part of the Hearing Officer and has pointed to an error in the Hearing Officer's recitation of the standard of review for a motion for summary judgment. See Petition for Review and Appellant's Memorandum on Petition for Review.

DHW terminated Emery's employment on October 1, 2012. On November 1, 2012, Emery, representing himself, appealed his dismissal and the matter was assigned to the Hearing Officer. On December 19, 2012, DHW filed a motion for summary judgment with extensive affidavits and a memorandum of law in support thereof. A hearing on the motion was scheduled for January 23, 2013.

On January 2, 2013, the Hearing Officer received a Motion for Continuance filed by Emery requesting a continuance of the hearing on the Motion for Summary Judgment. He alleged he needed more time to comply with procedural requirements and to allow the discovery process to take place and also indicated he needed time to retain counsel to assist him. The Hearing Officer scheduled a Notice of Hearing on the Motion for Continuance and the hearing was held on January 11, 2013. On January 11, 2013, the Hearing Officer issued a verbal order, followed by a written order, vacating the evidentiary hearing scheduled for February 4 through 8, 2013, and granting the motion for continuance by rescheduling the motion for summary judgment hearing for February

4, 2013. The Order clearly and unequivocally stated Emery was granted additional time to file his responsive affidavits to the Motion for Summary Judgment no later than January 18, 2013.

On January 17, 2013, Emery hand delivered a second Motion for Continuance requesting additional time to respond to the Motion for Summary Judgment. The basis for the request was additional time to seek counsel and he also stated his significant other gave birth to his first child on January 16, 2013. On the morning of January 18, 2013, the Hearing Officer telephoned Emery and advised him his request for another continuance would be denied and this was followed up by an Order Denying the Motion for Continuance.

Emery participated in oral argument on the motion but did not submit any responsive affidavits or a memorandum in opposition to DHW's Motion for Summary Judgment. After oral argument on the Motion for Summary Judgment on February 4, 2013, the Hearing Officer granted DHW's Motion for Summary Judgment, essentially concluding that Emery's performance was insufficient, that he had been provided repeated instruction and opportunities to improve his performance, but that he simply failed to do so. Preliminary Order, pp. 4-7.

Emery filed Petition for Review challenging the Hearing Officer's denial of his second motion for continuance, and also argues that the Hearing Officer should be disqualified based upon a conflict of interest. Finally, Emery points out that the Hearing Officer applied the incorrect standard in evaluating the Motion for Summary Judgment.

II.

ISSUES

- A. Did the Hearing Officer err by denying Emery's second motion for continuance?
- B. Did the Hearing Officer properly grant summary judgment in favor of DHW?
- C. Is there any basis for Hearing Officer disqualification based upon a conflict of interest?

III.

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 15.04.01.201.07. 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.

The law is clear that once proper cause is proven for discipline under I.C. § 67 5309(n) and IPC Rule 190, the Commission (and its hearing officers) have no authority to second guess the choice of discipline imposed. *Sickles v. Idaho Dep't of Labor*. IPC No. 04-15 (May 2005).

Summary judgment is appropriate before the IPC when the record establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fry v. Idaho Dep't of Correction*, IPC No. 94-38 (Decision on Petition for Review, May 13, 1996.) Summary judgment should be rendered when the pleadings on file, together with any affidavits, show that there is no genuine issue of material fact. *Kaufield v. Idaho Personnel Comm'n*, IPC No. 96-06 (Hearing Officer Order Granting Summary Judgment, November 6, 1996). Under such circumstances, a party is entitled to summary judgment as a matter of law. *Id.* at 12.

As the Idaho Supreme Court has held: "[A] mere scintilla of evidence or only slight doubt as to the facts" is not sufficient to create a genuine issue for purposes of

summary judgment. *Marchand v. JEM Sportswear, Inc.*, 143 Idaho 458, 147 P.3d 90 (2006). The non-moving party “must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial,” or, in this case, for a full administrative hearing. *Id.* “[T]he nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment.” *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 237, 108 P.3d 380, 385 (2005).

IV.

DISCUSSION

A. Denial of Emery’s Second Motion for Continuance

1. Standard of Review.

Under Idaho Code § 67-5316, the Commission assigns appeals to a duly appointed hearing officer and it is the hearing officer who has broad discretion and authority to oversee the proceedings and conduct evidentiary hearings, while keeping the process and procedure as summary and simple as reasonably may be. Idaho Code §67-5316(5). Upon petition for review to the Idaho Personnel Commission from the decision of the hearing officer, the Commission is charged with reviewing the record of the proceeding before its assigned hearing officer and has the final discretion to affirm, reverse or modify the decision of the hearing officer and may also remand the matter to the hearing officer. Idaho Code § 67-5317. It is the Commission’s final decision on petition for review that is ultimately subject to review by the district court should it be appealed. Idaho Code § 67-5318.

In reviewing a motion for continuance, the Commission’s position is somewhat analogous to an appellate court’s review of a trial court judge’s ruling on such motions. The law is well settled that “[a] decision to grant or deny a motion for continuance is vested in the sound discretion of the trial court.” *Gunter v. Murphy's Lounge, LLC*, 141

Idaho 16, 24 (2005). Only where there is a clear abuse of discretion will an appellate court reverse a trial court's ruling on such motions.

In fact, when a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. Sun Valley Shopping Ctr. Inc. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). This Commission adopts that same standard of review on discretionary prehearing motion decisions of its hearing officer.

2. The Hearing Officer Properly Exercised Discretion in Denying Emery's Second Motion for Continuance

The Hearing Officer clearly understood and perceived the granting or denial of the motion for continuance as an issue of discretion, acted within the boundaries of that discretion, and stated her reasoning behind the decision to deny the motion. Preliminary Order, p 3. Emery had months to obtain legal counsel and did not do so. Indeed, Emery was terminated from the Department on October 1, 2012, appealed his termination on November 1, 2012, and participated in a scheduling conference on November 19, 2012 – all without the assistance of counsel. By the time Emery filed his second motion for continuance on January 17, 2013, two and one half months had passed and the evidentiary hearing was approximately two weeks away.

Emery had already received one continuance to extend his deadline to respond to the Department's motion for summary judgment and his reason then, among others, was that he needed to retain counsel. He failed to do so then as well. The Hearing

Officer pointed out this failure to have obtained counsel at any point in the proceedings and decided, in her discretion, that he had had “ample time” to do so.

On January 17, Emery also stated his first child was born on January 16, 2013 as a secondary reason for requesting a continuance in his second Motion for Continuance. This was the first and only time he had mentioned or stated the upcoming and pending birth of his first child and at that time, the record contained no verification or substantiating evidence of that fact. Only on petition for review to this Commission has Emery produced a doctor's note substantiating the birth and this evidence is not properly in the record on appeal. The Hearing Officer did not abuse her discretion in denying the second motion for continuance based on the record she had before her.

B. Hearing Officer Properly Granted Summary Judgment to DHW

The Hearing Officer properly granted Summary Judgment to DHW. While she did, in fact, misstate the standard for evaluating a summary judgment motion by stating that “[t]he facts are to be construed in the light most favorable to the **moving** party”, rather than the **non-moving** party, Preliminary Order, p. 8. (emphasis added), this was likely a clerical error, and even if not, it was a harmless error since the hearing officer based her decision on the proper standard.

The factual evidence supporting the basis for discipline in this matter is clearly set forth in the record. It is plain from the Motion for Summary Judgment filed by DHW on December 19, 2012, including the multiple affidavits and documentary exhibit evidence submitted therein. Based on the undisputed evidence, the Hearing Officer issued her Preliminary Order granting summary judgment, concluding that Emery's performance was insufficient, that he had been provided repeated instruction and

opportunities to improve his performance, but that he failed to do so. Preliminary Order, pp. 4-7. We adopt the Hearing Officer's findings of fact and conclusions of law. The Hearing Officer did, in fact, apply the correct standard and concluded that "the record establishes no genuine issue of material fact and the Department is entitled to summary judgment as a matter of law". Preliminary Order, p. 8. Based upon the voluminous, unrefuted factual evidence set forth in the Motion for Summary Judgment and its supporting affidavits, which clearly provided basis for discipline under Rule 190.01. b & e. as a matter of law, the Hearing Officer was correct in granting the motion in favor of DHW.

C. There Was No Basis for Disqualification of the Hearing Officer

This assertion of error by Emery is not preserved for consideration before the Commission. Emery's first mention of a "conflict of interest" came in his Petition for Review where he references a purported conflict between his "counsel" and the hearing officer:

Additionally; when the petitioner had contacted counsel again in January, 2013 he was told that they had too many cases going at once to represent him; and even if they could represent the petitioner they would only do so if the hearing officer was replaced due to an apparent conflict of interest – as it was noted that the hearing officer was the opposing counsel on one of the firms [sic] important cases.

Conflicts of interest must be raised and ruled upon before the Hearing Officer in order to be preserved for review before this Commission. This perceived issue was never raised with the Hearing Officer and is not contained in the record. Further, and more importantly, this unnamed attorney was apparently never retained, certainly never appeared of record in this appeal, nor, of course, before the Hearing Officer. There was no conflict of interest and this allegation is without merit.

V.

CONCLUSION

The Hearing Officer properly exercised her discretion in denying Emery's second motion for continuance, did not err in applying the standard for summary judgment and the record fails to contain any evidence that a true conflict of interest existed. The Hearing Officer did not abuse her discretion in denying Emery's second motion for continuance and properly granted summary judgment to the DHW.

VI.

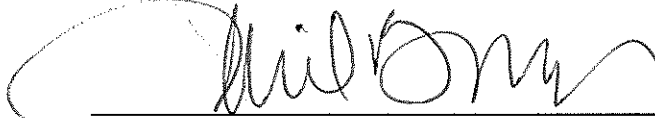
STATEMENT OF APPEAL RIGHTS

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.

BY THE ORDER OF THE
IDAHO PERSONNEL COMMISSION



Mike Brassey, Commission Chairman



Pete Black, Commissioner



John Cowden, Commissioner



Mark Holubar, Commissioner



Diana Bishop, Commissioner

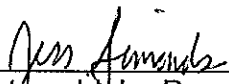
CERTIFICATE OF SERVICE

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 29th day of October, 2013.

FIRST CLASS MAIL

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Secretary, Idaho Personnel Commission