IDAHO PERSONNEL COMMISSION
P. O. Box 83720
Boise, ID 83720-0066
Phone: (208) 334-2263
EMAIL: IPC@dhr.idaho.gov

IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

BRYAN McCLURE, Appellant, vs. IDAHO DEPARTMENT OF CORRECTION, Respondent.	)	IPC NO. 21-6 **DECISION AND ORDER ON PETITION FOR REVIEW**

This matter is on petition for review from the October 27, 2022, Findings of Fact, Conclusions of Law, and Preliminary Order ("Preliminary Order") of Hearing Officer John Lynn ("Hearing Officer") sustaining Idaho Department of Correction's ("IDOC" or "Respondent") dismissal of Bryan McClure's ("Appellant" or "McClure") employment from classified service with IDOC.

After a three-day hearing in September 2022, the Hearing Officer found IDOC proved proper cause for discipline existed and Respondent had met its burden of proof that Appellant intentionally or willfully disregarded a lawful and reasonable instruction from a supervisor, constituting insubordination under IDAPA 15.04.01.190.01.e ("IPC Rule 190.01.e"). Appellant timely appealed the Hearing Officer's Preliminary Order by filing Petition for Review on November 30, 2022.

The Idaho Personnel Commission ("Commission" or "IPC") heard oral argument in this matter on April 21, 2023. Appellant appeared pro se on petition for review to the IPC and Deputy Attorney General Nathan Austin represented Respondent.

Appellant did not effectively challenge or dispute the relevant, material factual findings, but felt that taken in the right context, his conduct did not warrant discipline and he also raised claims of retaliation for engaging in protected speech and whistleblower activity.

II.

ISSUES

1. Did IDOC prove by a preponderance of the evidence that there was basis for discipline of Appellant pursuant to IPC Rule 190.01.e.?

2. Did IDOC discipline Appellant in retaliation for engaging in protected speech and in violation of the Idaho Whistleblower Act?

3. Was Appellant afforded due process under the law?

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 conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. IDOC has the burden to prove cause for discipline by a preponderance of the evidence. IDAPA 15.04.01.201.07 ("IPC Rule 201.07"). Discipline must be based upon one of the reasons set forth in IPC Rule 190. Any one violation of IPC Rule 190 supports the level of discipline the state agency decides to enforce. *Idaho Dept. of Health & Welfare v. Arnold*, IPC No. 04-26. If cause for discipline exists, IPC does not have jurisdiction to decide the level of discipline the agency decides to impose.

On petition for review to the Commission from the Hearing Officer's Preliminary Order, the Commission must review the record of the proceeding before the hearing officer, the transcript of the hearing, and any briefs submitted to the Commission. Idaho Code § 67–5317(1). The hearing before the Commission on a petition for review is limited to oral arguments regarding issues of law and fact as may be found in the record established before the hearing officer and any post-hearing orders. IPC Rule 202.03. No new evidence shall be produced or introduced during proceedings on petition for review, or at oral argument on petition for review. The Commission may affirm, reverse or modify the decision of the hearing officer, it may remand the matter, or it may dismiss it for lack of jurisdiction. Idaho Code § 67–5317(2). See *Horne v. Idaho State Univ.*, 138 Idaho 700, 704 (2003). On petition for review, the Commission conducts a *de novo* review of the record and renders an independent decision that effectively displaces the proposed decision of the hearing officer. *IDOC v. Anderson*, 134 Idaho (Ct. App. 2000); *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 259 (1985).

III.

DISCUSSION

IDOC has alleged three categories of behavior as the basis of supporting a finding of just cause for discipline. The Hearing Officer did not find proper cause for discipline for the first two alleged bases, involving emails sent by the Appellant and C-Note entries made in IDOC's resident progress tracking system. However, the Hearing Officer did find IDOC had proven proper cause for discipline existed for insubordination related to Appellant's failure to follow orders and instructions given that were consistent and in compliance with on-point IDOC policies for the reporting of a potential Prison Rape Elimination Act (PREA) incident. The relevant, substantive facts are laid out by the Hearing Officer in the Preliminary Order. The more substantive facts are

revisited and laid out in relevant fashion below, in addressing the merits of this matter, and they are supported by substantial evidence in the record.

A. Idaho Personnel Commission's Review and Consideration of Evidence on Petition for Review

At the outset, we first address and reiterate the standard of review that governs consideration of this matter on petition for review. There have been proceedings before the Hearing Officer in this matter and a three-day evidentiary hearing was conducted with testimony of seven witnesses, including Appellant, and admission of exhibits by both parties. A transcript of the evidentiary hearing is included in the record.

On petition for review, the IPC is limited to review of the record established in the proceeding before the hearing officer, briefs submitted in accordance with the ordered briefing schedule, and the transcript of the evidentiary hearing. Idaho Code § 67-5317(1). Further, the hearing on petition for review is limited to oral arguments regarding issues of law and fact as may be found in the record established before the hearing officer and any post-hearing orders. IPC Rule 202.03. The IPC shall not consider additional evidence beyond that contained in the record established before the hearing officer in proceedings below.

With this mandate, on petition for review in this matter, the IPC has limited its review and consideration of evidence to those exhibits introduced and admitted at the evidentiary hearing before the Hearing Officer that took place September 15-16 and 20, 2022, and has considered the entire administrative record from the proceedings before the Hearing Officer up until the issuance of the Preliminary Order on October 27, 2022. This includes the transcript from the three-day evidentiary hearing and includes review and consideration of the parties' briefs submitted pursuant to, and as limited by, the Briefing Schedule on Petition for Review filed by the IPC on December 20, 2022. It also entertained and considered oral argument on April 21, 2023, and has limited its

consideration solely to argument on facts and evidence as contained in the record established in proceedings before the Hearing Officer. The Commission has not considered or reviewed the additional filing by Appellant titled Motion for Summary Judgment filed February 3, 2003, or the ten attachments included and filed therewith. This filing was not authorized by the Briefing Schedule on Petition for Review.

B. The Emails and the C-Notes

The first proposed basis for discipline involves allegations that Appellant sent unprofessional emails from his work account to fellow IDOC employees that were interpreted as accusing them and being disparaging. The second, along a similar note, alleged that Appellant made inappropriate entries into the tracking system that IDOC uses to monitor resident treatment progress. The entries are referred to as C-Notes, and they are documents that are routinely prepared by staff, including Appellant, to reflect a resident's progress towards a parole or release date. Each is addressed in turn.

1. Emails

With respect to the alleged unprofessional emails, there are two email chains at issue, and they are laid out in Respondent Exhibits 3 and 4.

In the first, on May 19, 2021, McClure sent an email to East Boise Community Re-Entry Center ("EBCRC") Manager Gretchen Woodland. A mutual client had failed to abide by the rules at the Re-Entry Center, had used drugs while at her place of employment, and had been removed from EBCRC and returned to the South Idaho Correctional Institution (SICI), where McClure worked. In his email, McClure blamed IDOC and EBCRC for not providing that resident a safe workplace and he asked whether to write an Information Report (IR). Respondent Exhibit 3.

When she did not respond to him, McClure forwarded that email to Employment Manager ("EM") Julie Braese and Correctional Case Manager (CCM) Diana Ortiz at EBCRC, both of whom

report to Manager Woodland and all of which are in a separate, different IDOC facility and outside McClure's chain of command. He also sent it to his own supervisor, Program Manager ("PM") Daina Drake at SICI on May 25, 2021. He indicated that he was contacting them because Manager Woodland, at EBCRC, had failed to respond to him. EM Braese sent a follow up email to Woodland stating she would not be responding to McClure and did not "appreciate the fact that in his email he stated, "And while there is assigned blame some of it is ours too". Id.

On June 24, 2021, Appellant sent the second email at issue to Manager Woodland, at EBCRC, again. It included a criticism he had heard from a resident that Manager Woodland had "addressed [the resident] as less than a human being." Manager Woodland responded to his concerns and disabused him of the notion that she disparaged any resident. She sent that email on June 30, 2021, and copied his supervisor PM Drake.

He replied to both of those individuals the same day. In his reply, he repeated information he had received from a resident that accused EM Braese of risking the safety of the public and the EBCRC residents and he also criticized EBCRC for not modeling appropriate behaviors, treating residents equally, and called-out Manager Woodland for not responding to his earlier email.

a. Hearing Officer's Analysis

The Commission finds the Hearing Officer's evaluation of this basis for discipline is sound. See Preliminary Order, p. 18-19. The allegations are that the emails violate general IDOC Policies for Respectful Workplace (IDOC SOP 201), and Ethics and Standards of Conduct (IDOC SOP 217). These general, broad policies are laid out in the NOCA and LODA. Respondent's Exhibits 7 & 10. The Hearing Officer, while acknowledging that perhaps McClure made some inappropriate statements and took a tone that was somewhat accusatory and disparaging in some of his comments, didn't find it rose to the level of violating the policies in a manner that supported just cause for discipline.

The Commission concurs with the Hearing Officer that McClure would be better to point out his concerns up his chain of command and not be directing them outside that chain to personnel at EBCRC. Certainly, McClure's method of delivery, and blunt, forward assessment of his observations and opinions ruffled feathers and placed recipients on the defensive.

But the policies at issue are general policies and are of the sort that lend to a somewhat subjective interpretation as to what rises to a violation. McClure's manner and tone of raising what he felt are legitimate concerns leaves something to be desired, and would have been better addressed up his chain of command, alone, but the Hearing Officer found that the behavior did not rise to a level justifying a finding a violation of policy that would constitute just cause for discipline under IPC Rule 190 a. or b. We concur and so find.

2. The C-Note Entries

As the Hearing Officer points out in the Preliminary Order, the C-Note entries made by Appellant are along the same vein as the emails discussed above. They also set forth inappropriate criticism, perceptions, comments, and perhaps personal judgement of IDOC's approach as it relates to handling of residents. The record shows entries on May 19, June 7, June 14, June 21, June 24, and June 30, 2021, where McClure made C-Note entries into the case management program ("CIS" or "C-Notes") for certain residents. IDOC Exhibit 22. Deputy Warden Shewmaker, Program Manager Drake (both directly upward on McClure's chain of command), and Chief of Prisons Chad Page all testified that they believed the C-Notes McClure entered in the files of these individual residents violated the practices and training that all staff and case managers receive for how to properly use CIS and in entering C-Notes. Transcript, Day 1, p. 83, l. 4 – p. 96, l. 15 (Testimony of Shewmaker); Day 2, p. 370, l. 10 –3; p. 372, l. 3 (Testimony of Drake); p. 467, ll. 8-21 (Testimony of Page). The common theme is that C-Notes are supposed to be reserved for documenting a resident's progress through habilitative programming and that the entries violated general IDOC

policies: Respectful Workplace (SOP 201), Ethics and Standards of Conduct (SOP 217) and Computing Devises, Electronic Mail and Internet Use (SOP 141), again laid out in the NOCA and LODA, Respondent's Exhibits 7 & 10.

However, in reading testimony, there isn't much of substance beyond the adage of "I know it when I see it" or "that's just how we do it," as far as why his entries in C-Notes were inappropriate. There is a position taken that it goes against policy in what is to be included in C-Notes, but there was also testimony that there isn't any specific policy that addresses what goes into C-Notes; that it isn't expressly identified or addressed in policy. Transcript, Day 2, p. 371-72 (Testimony of Drake). McClure disputed that there were any standards detailing what should be included in residents' C-Notes. Transcript, Day 3, p. 680, l. 5 – p. 681, l. 11. Preliminary Order, ¶ 23.

Similar to the email allegations, the Hearing Officer noted that there was no specific policy violation involved and no prior counseling regarding McClure's C-Note entries. Further, the Hearing Officer noted Chief Page's testimony, as the ultimate decision-maker, that while he did feel the C-Note entries went against the general policies, they were just not at the "same level of concern" for him as the potential PREA incident and the alleged insubordination related to McClure's IR.

While the Hearing Officer found the better practice for McClure would have been to direct his concerns to his supervisors at SICI instead of entering them into C-Notes, he concluded that the allegations on this subject didn't rise to the level to support policy violations and ultimate just cause for discipline under IPC Rule 190. Preliminary Order, p. 20. There is substantial and competent evidence in the record in support of his decision and the Commission agrees with the Hearing Officer and so finds.

C. The Potential PREA Incident and Appellant's IR

The following factual background is supported by substantial and competent evidence contained in the record, including the exhibits and hearing testimony set forth in the transcript.

On Tuesday, July 6, 2021, at 8:19 am, a female resident reached out to McClure, her case manager, for advice via J-Pay (the facility's internal email system). She was worried that a girl she was living with "may be jeopardizing all of us," but she told McClure she wished to remain anonymous and did not want to share her information with the facility's staff or submit an Information Report ("IR"). McClure responded to her at 10:24 a.m. and provided her with some legitimate options, such as contacting the facility's security staff. Respondent's Exhibit 27. The same resident reached out to him again at 10:39 a.m. In her second message to McClure, the resident replied that she was still reluctant to make waves and it may not affect her personally since she was set to be released in eight days, but wondered whether information could result in innocent casualties. *Id.*

The resident then described a hypothetical scenario. She said she had walked in on two females engaged in sexual activity on numerous occasions. Previously, she had observed the two in an abusive relationship that involved hitting and fighting. The two women also shared each other's prescription pills. At the conclusion of her hypothetical story, she asked if she could get in trouble for not reporting what she had observed. She reiterated that she did not want to share her information with the facility's staff because she just wanted to keep her head down and fulfill her final eight days of confinement at the facility. McClure responded again at 10:50 a.m. He relayed the following advice to the resident: "If you are fine and going to be ok then you should just watch the house burn. I'll be glad to get the info from you next week if you are so inclined. But if not then it is about nothing else and no one else. This is just about you." Respondent's Exhibit 27. Preliminary Order, ¶ 24-26, pp. 6-7.

Later that day, McClure spoke with facility investigator Dax Anderson. He told Anderson he had been informed that two female residents were engaging in sexual activity. Anderson asked McClure if he had notified Shift Command about his information. McClure said he had not. Anderson directed McClure to notify Shift Command about the incident, and reminded McClure that he must complete an IR that same day, Tuesday July 6, 2021, even if he did not know all the specific details. Transcript, Day 1, p. 180,- ll. 10-19. This advice was consistent and in compliance with IDOC SOP Policies 105 and 149.

McClure did not tell Anderson the name of the resident who had reported the sexual activity to him, although he clearly knew her identity. Transcript, Day 3, p. 697, ll. 7-9. He informed he didn't have specifics and he did not inform of the J-Pay communications as the origination of the information. Contrary to Anderson's clear advice (Anderson was not McClure's supervisor nor in his chain of command) on complying with IDOC SOP 105 and 149, McClure did not disclose the incident to Shift Command, nor did he file an IR on July 6, 2021. Transcript, Day 3, p. 697, l. 20 – p. 698, l. 8. The next day, at the instruction of Deputy Warden Shewmaker, Anderson filed his own IR about his interaction with McClure. See Respondent's Exhibit 24; Preliminary Order, ¶ 27-29, p. 7.

While there is disagreement on how and exactly when the interaction occurred, it is undisputed that the next morning on July 7, 2021, Sgt. Chris Audens, Shift Commander, contacted McClure and specifically ordered him to complete an IR about the incident in question. In testimony on cross examination by IDOC counsel, there is plenty of dancing around by McClure on completing, and perhaps redoing an IR, and on when and how he was instructed to do so by Sgt. Audens. Transcript, Day 3, pp. 702-706.

This is all non-material. Ultimately, it is undisputed, in fact, admitted by McClure, that Sgt. Audens, as a Sergeant and Shift Commander, had absolute authority to order as many IRs to be

completed or redone by McClure as he (Sgt. Audens) felt necessary. Transcript, Day 3, p. 705, l. 23 – p. 706, l. 16; Preliminary Order ¶ 33, p. 9.

At 1:20 p.m., McClure did complete and file the IR that is in the record. Respondent's Exhibit 25. His IR stated that he "believe[d] it [the prohibited sexual activity] is occurring" and that he had shared that information with Investigator Anderson as well, notifying him that "this [activity] is indeed occurring." The IR was short and sweet, and appeared to leave out known details such as the identity of the resident, where she was housed in the facility, and the fact that the interaction with the resident forming the basis of the incident was documented in J-Pay messaging.

At 3:36 p.m., Sgt. Audens sent a follow-up email to McClure that appears to document his earlier interaction with, and instruction (ordering) to, McClure. Respondent's Exhibit 26. That email instructed McClure to report "anything that is of a safety or security concern to Shift Command promptly. IR's are to be written and turned into Shift Command the same day the information is received. Regardless, if you feel that the information is insufficient, incomplete, or if the individual reporting to you does not want their name divulged, it still needs to be reported so alleged incidents can be investigated by the appropriate staff." *Id.*

Sgt. Audens also ordered McClure to supplement his IR because it lacked specific details. Sgt. Audens further stated, "On 07/06/2021 Investigations staff gave you direction to notify Shift Command, and complete an IR. In the IR you provided after I requested it on 07/07/2021, please add in the body of your IR, that you were instructed to notify shift command by Investigations staff, and why you chose not to." See Preliminary Order, ¶ 30-32' pp. 7-8. McClure did not respond to Sgt. Audens' email or update his IR after he received the email order from Sgt. Audens. Transcript, Day 3, p. 704, l. 4 – p. 706, l. 8.

The next day, July 8, 2021, PM Drake spoke to McClure about the events of the previous two days. She confirmed that he had received the follow-up email from Sgt. Audens from the day

before and, as his direct supervisor, reiterated Sgt. Auden's direction, ordering him, herself, to "redo his IR with the requested and required information." McClure refused to correct and update his IR with the information that Sgt. Audens and PM Drake had requested. He said he wasn't going to do that; wasn't going to redo it. He felt like it was blown out of proportion. Transcript, Day 2, p. 374, l. 21 – p. 387, l. 24 (Testimony of Drake); and Day 3, p. 707, l. 14 – p. 708, l. 15 (Testimony of McClure) Preliminary Order, ¶ 34, p. 8.

Even though McClure didn't divulge the resident's name or how he came to be provided the information on the potential PREA incident, in his discussion with McClure, Investigator Anderson was able to discern the source of McClure's information and and in so doing, discovered the JPay messages on his own (Respondent Exhibit 27), and advised Deputy Warden Shewmaker. He also spoke with the resident and it was determined that the sexual activity was consensual. No PREA investigation was pursued. Preliminary Order ¶¶ 35-36, p. 10.

Hearing Officer's Analysis

The Hearing Officer conducted a thorough analysis on the PREA Incident and regarding McClure's IR and his conclusion is supported by substantial and competent evidence in the record. The PREA incident and related IR are a different animal than the emails and C-Notes. The Hearing Officer found the issue precisely framed and not open to subjective interpretation like the policies that were relied upon for the emails and C-Notes. Was McClure insubordinate or not? The Hearing Officer found he was and this constituted a violation of IPC Rule 190.01.e (Insubordination or conduct unbecoming a state employee or conduct detrimental to the good order and discipline of the agency). The Commission agrees. McClure was insubordinate, and IDOC had just cause for discipline under IPC Rule 190.01.e.

Rule 190.01(e) defines insubordination as a "willful and intentional disregard of the lawful and reasonable instructions of the employer." *Whittier v. Dept. of Health and Welfare,* 137 Idaho

75, 79 (2002). A finding of insubordination requires proof that the employee intentionally or willfully disregarded a lawful and reasonable instruction from an employer or supervisor. *See Id.*

The Hearing Officer determined that McClure was insubordinate when he clearly refused to follow Sgt. Audens' directive to "add in the body of your IR, that you were instructed to notify shift command by Investigations staff, and why you chose not to. Preliminary Order, p. 21. McClure admitted under oath that he refused to comply with a direct order and his conduct was insubordinate. See Transcript, Day 3, p. 707, l. 14 – p. 708, l. 15. Appellant even admitted to the Hearing Officer, on a direct question, that it would have been better to just attach the J-Pay message to his initial IR and be done with it. Yes, he was concerned about confidentiality but there are processes for that, as Sgt. Audens explained in his email. Transcript, Day 3, p. 774, ll. 12-18; Respondent Exhibit 26.

The Hearing Officer rejected McClure's attempts to downplay the nature and substance of his policy violations. McClure argued that his conduct did not violate IDOC's policies and procedures for the following reasons: the sexual contact between the two female residents was determined to be consensual; he did not know the identities of the two females involved; he did not know when or where the contact took place; Investigator Anderson was ultimately able to identify the informant despite McClure's lack of cooperation; and, even if he had filed an updated IR, it would not have provided any new information to Sgt. Audens and PM Drake. The Hearing Officer found that McClure's arguments were unconvincing and not persuasive. Preliminary Order, p. 21-22. The Commission agrees.

Hearing Officer Lynn understood and considered McClure's testimony about his thought process at the time and his established history and rapport with the resident. The Hearing Officer recognized:

> Appellant found himself in a situation which required divided loyalty, that is, he felt the need to protect the identity of his source for fear of reprisal against her, but was ordered to reveal that identity, not in an IR, but to the investigative staff. The Hearing Officer appreciates Appellant's difficulty and, in fact, commends his obvious interest and devotion to the the job of helping residents transition to normal life. However, when confronted with a situation of divided loyalty in a prison environment, the loyalty must go to the organization for obvious reasons - safety and security are of the highest priority.

Preliminary Order, p. 22.

The Hearing Officer's findings are supported by substantial and competent evidence. McClure refused a direct, appropriate, and work-related order from two separate superior officers, Sgt. Audens and PM Daina Drake, and the Commission concludes McClure was clearly insubordinate in violation of IPC Rule 190.01.e.

D. Retaliation, Whistleblower Defense and Due Process Arguments

The Commission recognizes that Appellant has asserted affirmative claims that he was subject to general retaliation, and protections under Idaho's Whistleblower Act, and that he wasn't afforded due process. The latter two claims involve claims that Appellant engaged in "protected speech" under the First Amendment and was illegally disciplined in response. Appellant has also argued that he wasn't afforded certain documents during the due process procedure leading to the issuance of the Letter of Disciplinary Action (Respondent Exhibit 10), terminating his employment.

In our review of the Hearing Officer's Preliminary Order, it is readily apparent that the Hearing Officer clearly set forth the applicable law, and his detailed application of that law to the relevant facts is fully supported by substantial and competent evidence in the record. We adopt the Hearing Officer's conclusions of law setting forth detailed recitation of the applicable law in the Preliminary Order at pp. 15-18, and we affirm and adopt the Hearing Officer's application of the law to the relevant facts as he has done, in detail, at pp. 23-26 of the Preliminary Order.

See Preliminary Order, Conclusions of Law, Section B. at pp. 15-18; Section C. 4., at pp. 23-26.

1. Retaliation

Appellant's theory of the case revolves around claims that he was targeted for discipline because of expressing concerns about (1) work assignments, safety and pay in 2020 through 2021 as a result of the COVID outbreak, and (2) drug use and safety issues related to specific residents and subjects of his emails and C-Notes created in May, June and July 2021.

To establish a retaliation claim, McClure needed to have demonstrated that (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse employment action. *Hatheway v. Bd. of Regents of Univ. of Idaho*, 155 Idaho 255, 269 (2013).

Where an employee claims that his dismissal was affected by his participation in protected conduct, "the employee must show that the protected speech was a substantial or motivating factor in the detrimental employment decision." *Fridenstine v. Idaho Dept. of Admin.*, 133 Idaho 188, 194 (1999) (internal citations omitted). In that case the Idaho Supreme Court went on to note that because there were numerous unrelated bases for the employee's dismissal, "it is clear that the Department had adequate grounds and would have dismissed" the employee regardless of his participation in any allegedly protected speech. *Id.*

As the Hearing Officer recognized, retaliation analysis must also consider the *Garcetti* rule with respect to whether employee speech is protected. *Garcetti v. Ceballos,* 547 U.S. 410, 418 (2006); *Sadid v. Idaho State Univ.*, 154 Idaho 88, 97 (2013). A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations. In other words, "the question is whether the subject matter of the speech owes its existence to the fact of employment or is merely tangentially related to that fact." Id.

The Hearing Officer determined that when McClure complained about work assignments, safety, and pay – those were personal grievances and not of "public concern." Preliminary Order, pp. 23-24. When he raised issues about EBCRC residents being exposed to drug use in the community, those comments WERE of public concern; however, that speech still was not protected because it was all communicated within IDOC. Preliminary Order, p. 24; Transcript, Day 3, p. 686, l. 7 - p. 689, l. 19.

Regarding the emails that McClure exchanged with staff at EBCRC, the Hearing Officer determined that "there is no proof that the [May-July] emails [between McClure and staff at EBCRC] caused Appellant's dismissal." Preliminary Order, p. 24. In fact, Chief Page, the final decision maker, was clear in his testimony that the emails and C-Note entries were of little consequence to him as a basis for discipline. Transcript p. 467 l. 8 – p. 468, l. 8. His overriding concern and basis for discipline was the PREA incident and corresponding insubordination and violation of IDOC policies in relation to that. Transcript, Day 2, pp. 455-467; p. 506, l. 3 – p. 507 l. 2. Consistent with the holding in *Fridenstine*, the Hearing Officer correctly determined that "Appellant would have been disciplined anyway." Id. at 25.

1. Whistleblower Claims

The general retaliation analysis above is the same under the Idaho Protection of Public Employees Act, I.C. § 6-2104(1)(a), Idaho's whistleblower protection law. *Van v. Portneuf Med. Ctr., Inc.*, 156 Idaho 696, 701 (2014).

An employer may not take adverse action against an employee because the employee, or a person authorized to act on behalf of the employee, communicates in good faith the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state or the United States. Such communication shall be made at a time and in a manner that gives the employer

reasonable opportunity to correct the waste or violation. I.C. § 6–2104(1)(a). "[S]peech that deals with 'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern.'" *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003) (quoting *McKinley v. City of Eloy*, 705 F.2d 110, 1114 (9th Cir. 1983)).

Hearing Officer Lynn considered McClure's evidence and testimony and found that McClure had not presented a *prima facie* case of retaliation pursuant to the state Whistleblower statute; he "failed to show that his speech concerned the existence of any waste of public funds, property or manpower or a violation, or suspected violation of a law, rule or regulation." Preliminary Order, p. 25. The Hearing Officer then applied the *Fridenstine* language above and determined that "the driving factor for discipline was … the insubordination arising from the potential PREA incident which is significant. The Hearing Officer concludes that i[t] was significant to the point where, even if part of the motivation for discipline by Shewmaker was retaliation over 'protected speech,' Appellant would have been disciplined anyway." *Id.* The Commission agrees. While the Commission doesn't find the existence of protected speech here, even if it existed and was part of the motivation for discipline, it is clear from Chief Page's testimony that the overriding, focused basis for discipline was the insubordination arising from the potential PREA incident and the violation of relevant IDOC policies related thereto.

2. Due Process Claims

Appellant's assertion he was denied due process during the disciplinary due process procedure is without merit. Certainly, Appellant had a protected interest in his employment that cannot be deprived without proper notice of charges and a meaningful opportunity to respond. Idaho law is well established on required due process:

> 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, 546 (1985).

> . . .
> The purpose of a pre-termination hearing is not to conclusively establish the propriety of the dismissal. "It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." (Citation omitted) "In general, `something less' than a full evidentiary hearing is sufficient prior to adverse administrative action."
> . . .
>
> Although the due process inquiry focuses on the pre-termination procedures, this Court may also take into consideration the post-termination procedures, including in this case an eight-day evidentiary hearing, when evaluating Fridenstine's due process claim. (Citations omitted) In light of the extensive procedures followed in this case, both pre- and post-termination, we hold that the Department did not violate Fridenstine's right to due process.

Friedenstine v. Idaho Dept. of Admin., 133 Idaho 188, 192 (1999).

At proceedings before the Hearing Officer, Appellant asserted that he was not provided with the Disciplinary Packet during the pre-termination procedure, and on petition for review to the Commission, he complains of being deprived of "emails and C-notes regarding Offender Ms. Giese". Appeal, p. 5-6.

As established in *Loudermill* and *Friedenstine,* Appellant is not entitled to receive any document or record desired during the due process procedure. In this case, Appellant was provided an explanation of the evidence and an opportunity to present his side of the story. He did so through his attorney in pre termination procedures, and clearly had further opportunity in proceedings before the Hearing Officer, including a three-day evidentiary hearing, during which he introduced into evidence that same Disciplinary Packet and the Griese C-notes. Appellant's Exhibits 14, 20. He has been afforded requisite due process.

IV.

CONCLUSION

The Hearing Officer concluded proper cause for discipline by IDOC has been shown and exists on the allegation of insubordination related to the PREA Incident and Appellant's IR. The findings and conclusions are supported by substantial and competent evidence in the administrative record. Just cause for discipline exists pursuant to Rule 190.01.e.

While Appellant alleges an extended retaliation effort and that he was also disciplined for whisteblower activity, the Hearing Officer thoroughly evaluated and analyzed those claims and found they are without merit. The Commission agrees and affirms the Hearing Officer's findings. Finally, the Appellant was provided with the requisite due process required in the disciplinary process.

V.

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; and

(3) That the findings of fact by the Commission do not as a matter of law support the decision.

Idaho Code § 67-5318.

DATED THIS 5th day of July, 2023.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

Chairman, Idaho Personnel Commission

Commissioners Mark Holubar, Nancy Merrill and Sarah E. Griffin CONCUR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of July, 2023, a true and correct copy of the foregoing was delivered via electronic mail to the following parties:

Bryan McClure
bryanmcclure@hotmail.com

Nathan Austin
Deputy Attorney General
Counsel for Idaho Department of Correction
naustin@idoc.idaho.gov

Secretary to Idaho Personnel Commission