

misconduct), constituting a violation of Rule 190(a), and thus the basis for IDOC terminating Schilling. The Hearing Officer granted summary judgment for IDOC finding that Schilling's refusal to submit to a polygraph examination was a failure to comply with IDOC policy 227, thus IDOC's dismissal was proper.

The Hearing Officer additionally found: Schilling's statements that triggered the polygraph examination request were inconsistent but did not make a finding that they were dishonest under IDOC Policy #217; IDOC is a "law enforcement agency" for purposes of Idaho Code § 44-904, thus Schilling could be required to undergo a polygraph examination as a condition of continued employment; there is no constitutional 5th Amendment right to refuse to submit to the polygraph examination; and that there was no evidence in the record regarding Schilling's allegations that his dismissal was pre-textual or in retaliation for testimony in a different case and a potential workers compensation claim for injuries Schilling received while working at IDOC.

Schilling timely appealed the Hearing Officer's January 10, 2014 decision on February 14, 2014 and set forth issues as listed in Section II, below.

I.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The relevant facts are undisputed. IDOC employed Schilling from July 10, 2006 until August 20, 2013. (Aff. Of D Hoopes ("Hoopes Aff."), Exhibit C, p. 1); (Aff. Of K Nielson ("Nielson Aff."), Exhibit A, p. 2). Schilling's final job title at IDOC was "Correctional Corporal." (Hoopes Aff. p. 1). An IDOC inmate informed an Ada County Detective, Jared Watson, that Schilling had delivered documents to MacKenzie Law Offices for that inmate. *Hearing Officer Decision*, p. 2.

Detective Watson interviewed Schilling on or about March 4, 2013 pursuant to an investigation regarding alleged improprieties that occurred at IDOC facilities and allegations that Schilling, while in uniform and showing his badge, served process. (*Id.*); (Hoopes Aff., Ex. B); (Schilling's Response to IDOC's Motion For Summary Judgment, p. 1). IDOC initiated an investigation of Schilling's conduct pursuant to Schilling's

answers to Detective. Watson. (Hoopes Aff., Ex. B). IDOC's objective was to determine whether Schilling violated IDOC policies. (*Id.*) IDOC Investigator, Kara Nielson, interviewed Schilling on June 12, 2013, and believed that Schilling provided her answers that were inconsistent with the answers he provided Det. Watson¹. Affidavit Of Kara Nielson In Support Of Idaho Department Of Correction's Motion For Summary Judgment ("Nielson Aff."), pp. 12-13, ¶ 20); *Hearing Officer Decision*, p. 2.

Schilling indicated that the perceived inconsistencies in his responses were actually memory issues he has as a result of a brain injury and a subsequent surgery. (*Id.* at 13); (Schilling Appellate Brief ("Appellate Brief"), p. 8). Investigator Nielson informed Schilling that she would likely request a polygraph examination and that pursuant to IDOC policy, he was required to cooperate fully with IDOC investigations. (*Id.*)

Investigator Nielson received approval from IDOC senior management, including Director Bret Reinke, on June 27, 2013, to conduct a polygraph examination on Schilling. (Nielson Aff. P. 7, ¶¶ 23-24). Investigator Nielson informed Schilling on June 28, 2013, that IDOC was requesting that he undergo a polygraph examination, to which he refused. (*Id.* at ¶ 25). Investigator Nielson contacted Schilling on July 5, 2013, to provide Schilling an opportunity to comply with the polygraph request to which Schilling again refused. (*Id.* at ¶ 26). Investigator Nielson clarified that Schilling understood the consequences for not participating with an IDOC investigation, including and up to termination; Schilling stated that he would not be participating in a polygraph examination. (*Id.* at pp. 7-8, ¶¶ 26-27); (Appellate Brief p. 11).

IDOC provided Schilling with a Notice of Contemplated Action ("NOCA") on July 27, 2013, stating that IDOC was contemplating disciplinary actions due to Schilling's refusal of the polygraph examination, and the aforementioned violations. *Hearing Officer Decision*, p. 3, ¶ 21; (Schilling's Response to IDOC's Motion For Summary Judgment, p. 1). Schilling responded to the NOCA on August 9, 2013, disputing the NOCA's allegations. (*Id.* at ¶22); (Schilling's Response to IDOC's Motion For Summary

¹ While Schilling assigns error to the Hearing Officer's finding that Neilson believed Schilling provided answers to her that were inconsistent with answers Schilling provided Detective Watson (See Appellate Brief, p. 1 disputing factual item 10 of the *Hearing Officer Decision*), there is no basis for a factual dispute on this issue based on the record. There is clearly a factual basis and substantial and competent evidence supporting a finding of a belief of inconsistency.

Judgment, p. 1). IDOC responded by letter on August 20, 2013, and terminated Schilling for violating IDOC Policies 217, 227, and 318. (*Id.* at ¶ 23); (Schilling's Response to IDOC's Motion For Summary Judgment, p. 1).

II.

ISSUES

1. Whether the Hearing Officer erred in determining that IDOC is a "Law Enforcement Agency" under Idaho Code § 44-904, and therefore whether IDOC could lawfully require Schilling to submit to a polygraph examination.
2. Whether IDOC violated Schilling's constitutional rights by requiring that he submit to a polygraph examination.
3. Whether the Hearing Officer erred in determining there was no genuine issue of material fact regarding whether Schilling's statements to IDOC and Ada County investigators were inconsistent.
4. Whether the Hearing Officer erred in determining as a matter of law that Schilling was not wrongfully terminated.

III.

STANDARD OF REVIEW

IDOC has the burden to prove cause for discipline by a preponderance of the evidence. IDAPA 15.04.01.201.07. Discipline must be based upon one of the reasons set forth in IDAPA 15.04.01.190.01 ("Rule 190"). Any one violation of 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.

Summary judgment is appropriate before IPC when there is no genuine issue of material fact. *Fry v. Idaho Dept. of Correction*, IPC NO. 94-38. 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 that the moving party is entitled to judgment as a matter of law. *Kaufield v. Idaho Personnel Commission*, IPC No. 96-06 (*Order Granting Summary Judgment*, November 6, 1996).

IV.
DISCUSSION

Ultimately, the crux of this case falls on whether IDOC had authority to require Schilling to submit to a polygraph examination as part of its internal administrative investigation into employee misconduct. If so, Schilling's refusal to do so in this case constitutes failure to cooperate fully with IDOC's investigation, and is considered misconduct subject to disciplinary action up to, and including dismissal under Rule 190.01.a. for violation of IDOC Policy # 227².

In turn, as discussed below, the answer hinges on whether IDOC is a "law enforcement agency" as set forth in Idaho Code § 44-904 and whether Schilling has a 5th Amendment right against self-incrimination to refuse to submit to the polygraph as part of IDOC's administrative investigation.

A. IDOC is a Law Enforcement Agency for Purposes of Idaho Code §44-904.

Idaho employers are generally prohibited from requiring employees to submit to polygraph examinations as a condition of initial employment or continued employment. Idaho Code § 44-903 provides that:

Polygraph tests prohibited. No person, firm, corporation or other business entity or representative thereof, shall require as a condition for employment or continuation of employment any person or employee to take a polygraph test or any form of a so-called lie detector test. A violation of this section shall constitute a misdemeanor.

However, Idaho Code § 44-904 provides an exception to the prohibition contained in Idaho Code § 44-903:

Polygraph tests -- Exclusions. The provisions of this act shall not apply to any law enforcement agency of the United States of

² IDOC Policy # 227 reads: "An employee accused of misconduct, or who is the focus of the investigation, must be interviewed during the investigation. The employee shall cooperate fully with the investigation and answer all questions truthfully and completely. Failure to cooperate is considered misconduct and will result in disciplinary action, up to and including dismissal." (Emphasis added).

America, the state of Idaho, or any political subdivision or governmental entity thereof.

Therefore, law enforcement agencies of the state of Idaho are not prohibited from requiring a polygraph as a condition for continuation of employment under Idaho law. This issue arises here because there is no definition of law enforcement agency contained in Idaho Code, Title 44, Chapter 9, which would be directly applicable in the relevant context.

The Hearing Officer received briefing from the parties and conducted thorough research and analysis on the issue whether IDOC is a law enforcement agency for purposes of Idaho Code § 44-904. We have reviewed the *Hearing Officer's Decision* including the multitude of statutes that shed light on the issue, and have also reviewed the briefs submitted by the parties. We find that IDOC is, indeed, a law enforcement agency for purposes of Idaho Code § 44-904.

Looking first to Idaho Code §§ 19-510A, 20-209C (current codifications), which were enacted during the same legislative session as Idaho Code §§ 44-903 and 44-904 (*Hearing Officer Decision*, p. 8), it is clear these statutes created "peace officer" status for IDOC correctional officers that are POST certified. See I.C. §19-510A (emphasis added) ("All employees of the state board of correction who received certification from the Idaho peace officer standards and training advisory council shall have all the authority given by statutes to peace officers of the state of Idaho.") Therefore, correctional officers are considered peace officers in Idaho and were considered such at the same time that the legislature exempted "law enforcement" from the prohibition against polygraph examinations by employers.

In addition, there are multiple other statutes that define IDOC and/or its correctional officers as "law enforcement." See I.C. §§ 6-610(1), 9-337(7), 19-5101(c), 19-5801(6), 59-1303(3). Under every current and prior understanding of the phrase "law enforcement," IDOC is a "law enforcement agency." Correctional officers are "peace officers" and the IDOC has the authority to investigate crimes and issue subpoenas. See I.C. §§ 20-209C, -209G. Correctional officers are required to attend and be certified by the Peace Officer Standards Training Council through Idaho State Police. See IDAPA 11, Title 11, Chapter 4. IDOC is defined as a "law enforcement"

agency several times through Idaho Code. See I.C. §§ 6-610(1), 9-337(7), 19-5101(c), 19-5801(6), 59-1303(3).

Citing to an IDAPA 11.11.04.010.04 definition of "correctional officer", Schilling argues, as a correctional officer, he has no authority to investigate crime or arrest suspected criminals (See Appellate Brief, p. 3), and this fact, somehow impacts whether IDOC, as a state agency, is a law enforcement agency. This is without merit. Further, Schilling's argument ignores the aforementioned code provisions that provide "peace officer" status to 'correctional officers" and clearly provide authority to do what he claims he cannot. In any event, the question is whether IDOC as a whole is a law enforcement agency, not whether Schilling, himself, is a "law enforcement officer", "peace officer" and "correction officer".

Based on review of the many statutes listed above, we adopt the thorough analysis and finding of the Hearing Officer that the Idaho Legislature regards IDOC as a law enforcement agency and the exemption set forth at Idaho Code § 44-904 applies to IDOC. IDOC is not prohibited by Idaho Code § 44-903 from directing and requiring Schilling to submit to a polygraph examination as a condition of continued employment as part of its administrative investigation.

B. Schilling Had No Constitutional Right to Refuse the Polygraph Examination

Schilling asserts IDOC violated his 5th Amendment constitutional rights by requiring him to submit to the polygraph examination, so he was within his rights to refuse it. He cites *Garrity v. New Jersey*, 385 U.S. 493 (1967) in support. This argument is without merit and is based upon a misreading or misinterpretation of what *Garrity* and subsequent controlling case law stand for.

Garrity and its progeny stand for the basic premise that no person/employee can be forced to waive their 5th amendment right against self-incrimination on the threat of loss of their job. Therefore, *Garrity* held that any statements garnished by an employer forcing answers, under threat of job loss, from an employee during an investigation into employee misconduct cannot be, and, in fact, are prohibited from use during any subsequent criminal proceedings. *Garrity* acts purely as an evidentiary bar in criminal prosecutions.

This protects the employer's right and authority to investigate employee

misconduct and force cooperation. In fact, the Ninth Circuit, in *Aguilera v. Baca*, 510 F.3d 1161 (9th Cir. 2007) added that:

The *Garrity* court was careful, however, to preserve the right of a public employer to appropriately question an employee about matters relating to the employee's possible misconduct while on duty. In *Gardner*, the Court noted that the constitutional violation arose not when a public employee was compelled to answer job-related questions, but when that employee was required to waive his privilege against self-incrimination while answering his employer's legitimate job-related questions. See 392 U.S. at 278, 88 S.Ct. 1913.

510 F.3d 1161, 1171.

The *Aguilera* court further noted that:

Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity.

510 F.3d 1161, 1172.

In this case, although Schilling disputes the Hearing Officer's finding that he was at no time required to waive immunity from prosecution based upon his answers to Watson or Nielson or as a condition of a polygraph examination (See Appellate Brief, p. 1, disputing factual item 17 of the *Hearing Officer Decision*), there is no basis for this claim. He was not requested to waive immunity, nor was he ever charged with a crime or subjected to a criminal prosecution. *Garrity* clearly offers no protection from a lack of cooperation with an employer investigation into misconduct, and has no applicability to this case.

C. Did Schilling Make Inconsistent Statements to Detective Watson and Ms. Neilson?

Schilling maintains that he was not inconsistent in his statements to Watson and Nielson, and that there is, at the very least, a factual dispute worthy of a hearing on this issue and therefore, the Hearing Officer erred in finding he did, indeed, make inconsistent statements to Watson and Nielson.

We do not need to reach this issue. We decline to decide whether the Hearing Officer was correct in making a factual finding without further evidentiary hearing (in essence, granting summary judgment) on the question whether Schilling provided inconsistent statements to Watson and Nielson.

Ultimately, the Hearing Officer did not uphold termination of Schilling based upon a violation of Policy 217 (Dishonesty) for making inconsistent statements. Schilling's termination was upheld for failing to cooperate fully with an investigation under IDOC Policy 227, and specifically, for failure to submit to the polygraph examination, both undeniably factually established in the record.

D. There is No Credible Evidence to Support Schilling's Allegation That His Termination Was a Pretext

Schilling failed to present any facts to show that IDOC's disciplinary action was improper or pre-textual. Schilling argues that IDOC's discipline was in retaliation for his apparent willingness to testify against a Deputy Superintendent in federal court and for having a potential worker's compensation claim.

First, beside bare assertions without supporting evidence, Schilling has not effectively raised a question of material fact so as to preclude summary judgment on this issue. Further, Schilling has not actually alleged that he participated in protected activity. He only alleges that he contemplated a worker's compensation claim and that he had potentially adverse testimony against an IDOC deputy warden. Schilling did not show any knowledge on the part of IDOC of any contemplated worker's compensation claim and has not alleged that he filed a worker's compensation claim. Schilling's "testimony" does not demonstrate anything more than Schilling being called as a potential witness and then not ever having testified. There is no evidence, other than Schilling's broad-sweeping arguments and theories, to support the allegation that his discipline was a pre-text. The Hearing Officer was correct in summarily dismissing this claim and granting summary judgment.

V.

CONCLUSION

IDOC is a law enforcement agency for purposes of Title 44, Chapter 9, Idaho Code and is not prohibited from requiring a polygraph examination as a condition for continued employment. By refusing to submit to a polygraph examination after being directed by IDOC management to do so, Mr. Schilling failed to comply with IDOC Policy 227, which requires full cooperation with such an investigation. Such failure constitutes a violation of Rule 190(a) which provides cause for discipline based upon:

- a. Failure to perform the duties and carry out the obligations imposed by the state constitution, state statutes, or rules of the agency or the Division of Human Resources and Idaho Personnel Commission.

On this issue there is no dispute of material fact. It was not a violation of Idaho statutes or the United States Constitution for IDOC to direct Mr. Schilling to submit to a polygraph examination during its investigation into his potential misconduct. Finally, Schilling produces nothing but bare assertions that his termination was a pretext and the Hearing Officer was correct to grant summary judgment on that issue.

We affirm the Hearing Officer and uphold Schilling's termination on the bases set forth herein.

VI.

STATEMENT OF APPEAL RIGHTS

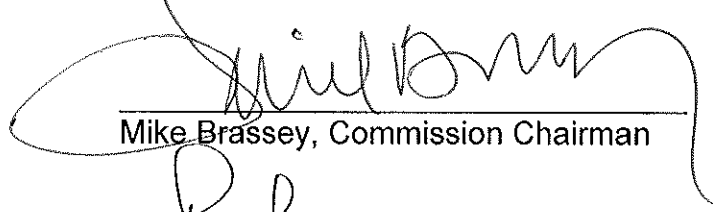
Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon 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;

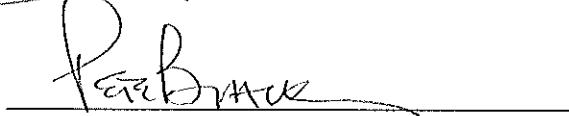
- (3) That the findings of fact by the commission do not as a matter of law support the decision.

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

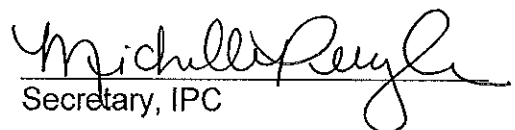
CERTIFICATE OF SERVICE

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 22nd day of July, 2014.

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**DECISION AND ORDER
ON PETITION FOR REVIEW - 11**