

APPEALS TO THE IDAHO PERSONNEL COMMISSION

A GENERAL OVERVIEW AND LESSONS FOR DUE PROCESS

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DUE PROCESS – THE BASICS

- **Where the state creates a “property interest” in a job, the employee has due process rights**

- Property interest is created by state law – e.g., statute or regulation

See Cleveland Board of Educ. v. Loudermill, 470 U.S. 532 (1985)

IC § 40-503: The [ITD] director shall serve at the pleasure of the board and may be removed by the board for inefficiency, neglect of duty, malfeasance or nonfeasance in office.

Lowe v. Idaho Transportation Dept., 878 F.Supp.2d 1166 (D. Idaho 2012)

Today, IC § 40-503 reads: “Subject to the approval of the board, the director shall appoint a chief engineer of the department who shall serve at the pleasure of the director and the board, and who shall be exempt from the provisions of chapter 53, title 67, Idaho Code.”

- **State of Idaho classified employment: Exception to “at will”**

- **State of Idaho classified employees get 2-tier due process**

- Step 1 Pre-Decision: Advance notice and an opportunity to be heard
 - Less than a full evidentiary hearing = “an initial check against mistaken decisions”
- Step 2 Post-Decision: Post-termination proceeding per Idaho Code

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

IDAHO PERSONNEL COMMISSION

- **1965: IPC CREATED (see IC § 67-5307)**
- **1999: DIVISION OF HUMAN RESOURCES (DHR) CREATED (IC § 67-5301)**
 - * DHR takes over administration of the State of Idaho Personnel System
 - * DHR is located in the Office Of The Governor
 - * IPC left as a sub-agency of DHR
- **THE IPC**
 - * Consists of five governor-appointed commissioners.
 - * Hears classified employee appeals over which it has jurisdiction *IC § 67-5316*
 - * Disciplinary actions
 - * Denials of any right and/or benefit that employee is entitled to by law
- **DHR ADMINISTRATOR (IC §§ 67-5308 and 67-5309)**
 - * Appointed by governor, confirmed by senate, serves at the pleasure of governor
 - * Authorized to adopt, amend, and rescind **DHR/IPC Rules, at IDAPA 15.04.0**
 - * Provides Secretary to keep IPC records, process appeals and assign Hearing Officers
 - * DHR pays Hearing Officers, court reporters (for verbatim appeal record) and IPC expenses

DUE PROCESS: DISCIPLINARY ACTION

- **Property Interest In State Classified Employment**

- * IC § 67-5315(2) mandates two-tier due process for disciplinary action :
 - = Prior notice and an opportunity to be heard
 - = Post-action opportunity to appeal discipline to the IPC
- * DHR/IPC Rule 200.06 (IDAPA 15.04.01.200.06) mandates due process procedure:
 1. Notice of Corrective Action (NOCA)
 2. Opportunity to respond to NOCA
 - * Right to be represented by a “person of the employee’s own choosing”
 - * Must provide for “use of an impartial mediator” upon agreement
 3. Final decision is issued (Letter of Disciplinary Action [LODA])

- **Disciplinary Action is Defined by IC § 67-5316(1)(a)**
... with a Twist Added by Case Law

- * **Dismissal, demotion, or suspension** *I.C. § 67-5316(1)(A)*
- * **Involuntary transfer** *Sanchez v. IDOC*, 134 Idaho 523 (2000)
 - * *But see* Chief Justice Trout’s dissent: Majority opinion goes beyond the scope of IC § 67-5316(1)(A) on its face

CAUSE FOR DISCIPLINE- RULE 190

- BY FAR, THE TWO PREDOMINANT REASONS FOR DISCIPLINE SEEN IN IPC CASES ARE:
 - **Rule 190.01.b.-** Performance Based Discipline- “inefficiency, incompetency, or negligence in performing duties”
 - **Rule 190.01.e.-** Insubordination, conduct unbecoming, or conduct detrimental to the good order and discipline in the agency
- SOME OTHER REASONS:
 - **Rule 190.01.a.-** Failure to perform the duties and carry out the obligations imposed by the state constitution, state statutes, or rules of the agency or DHR and IPC
 - **Rule 190.01.c.-** Physical or mental incapability for performing assigned duties, if a reasonable accommodation cannot be made for the disabling condition

PERFORMANCE BASED DISCIPLINE (RULE 190.b)

- **Pattern of Performance Problems Over Time, with Documented Support**
 - Letters of reprimand
 - Performance improvement plans
 - Personnel evaluations
- **“Patience Is a Virtue”**
 - Goes hand in hand with sufficient documentation of performance issues
 - * Good faith and fairness- Show attempts to work with employees, give chances, but document issues
- **Itchy Trigger Finger Risks Prevailing Before the IPC**
 - Lack of documentation of performance issues
 - *Hmm*, is the problem really a personality conflict with a supervisor?

NOTICE OF CONTEMPLATED ACTION (NOCA)

- **Sufficient Pre-decision Notice in the NOCA**

- * Case law requires:
 - (1) Notice of what action is being contemplated
 - (2) Notice of the basis and evidence relied upon for the contemplated action
 - (3) Provision of an opportunity for the employee to respond and show why the action shouldn't be taken
- * There is no need for exhaustive evidence being presented
 - * Employee is not entitled to receive ALL evidence relied upon by an employer
- * Key is to provide a sufficient account of the charges
 - * Puts employee on notice of what he/she did wrong
 - * Allows employee to prepare a meaningful response
- * Each distinct base for discipline must be stated in the NOCA

NOCA: GIVING NOTICE OF CAUSE REASONS

- **Tip: Avoid a “Shotgun Approach” in the NOCA**
- **Tip: Quality Over Quantity – Include Only Well-Based Allegations Supported by Sufficient Evidence**
- **Why? Hearing Officer and IPC Will Reject Shotgun Approach**
 - Shotgun Approach = citing multiple grounds for discipline, without solid evidence for each and every allegation
 - Risks a results-based analysis by the Hearing Officer and IPC
 - Legitimate bases for discipline are discounted or weakened by association with weaker, “let’s throw it up on the wall and see if it sticks” charges of cause for discipline
- **Tip: When Identifying Multiple Reasons, Identify Them As Alternative Grounds For Disciplinary Action**

EMPLOYEE'S RIGHT TO BE HEARD

- **NOCA Must Give Notice of Right to Respond to the Charges**
- **Tip: Take the Employee's Response Seriously - It Is an Important Part of Due Process that Tends to be Undervalued**
- **Tip: Don't Treat Response As a Token Step Towards a Decision Already Made**
 - * Tactic is transparent to Hearing Officers and the IPC
 - * Response allows an opportunity to correct mistakes in the facts
 - * Even where a response does not change a decision-maker's mind, it:
 - Offers further evidence for the IPC hearing
 - Provides insight to arguments that employee may present on appeal
 - Can facilitate confirmation that the level of discipline is proper
 - * Don't put blinders on - what might seem cut and dry may not be

LETTER OF DISCIPLINARY ACTION (LODA)

- **LODA Can Mirror the NOCA or Incorporate It**
- **New Cause Reasons for Discipline That Were Not In the NOCA Can Not Be Added to the LODA**
 - * If new information comes to light after a NOCA is issued or is gathered from employee's response that may provide for additional or new cause for discipline, evaluate whether a new or revised NOCA should be issued
 - * Peska v. South Central Health District, IPC Case No. 03-12 (July 28, 2004)
 - Significant discrepancy between LODA, NOCA (and what was discussed at "opportunity to respond" meeting with employee)
 - Further differences arose when compared with majority of evidence presented at the evidentiary hearing
 - Much of the evidence had no connection with the basis for termination identified in the NOCA
 - IPC held due process was not provided and ordered reinstatement

APPEALS & HEARINGS

WHY APPEAL TO THE IPC?

- The IPC or a Hearing Officer
 - “Shall order **reinstatement** of the employee, with or **without loss of pay**, or
 - May order another **appropriate remedy**
- **IF**
- A discharge, demotion, or suspension is
 - Without “**proper cause**” or
 - Was by reason of **illegal discrimination**

IC §67-5316(4)

WHO CAN APPEAL DISCIPLINE?

- ✓ A classified employee **who has**
- ✓ Completed an entrance probationary period **and has**
- ✓ Completed the agency's due process procedure for the disciplinary decision
- ✓ **Can appeal** a disciplinary dismissal, demotion, or suspension ... or an involuntary transfer

IC § 67-5316(1)(a);

Sanchez v. IDOC, 134 Idaho 523 (2000)

HOW TO APPEAL

- A written appeal must
 - State (1) the decision appealed and (2) the IPC action requested, and
 - Be filed with the Division of Human Resources (the office of the IPC)
 - Within 35 days of written notice of the Rule 190 decision

IC 67-5316(2); IPC Rule 201

Millich v. Idaho State Treasurer's Office, IPC Case No. 13-07

WHAT'S THE BIG DEAL?

- **If there is no IPC jurisdiction, the appeal “will” be dismissed without any motion**
 - By the Hearing Officer
 - By the IPC Chair (or designee)

IPC Rule 201.04

- **If no timely appeal, there is no IPC jurisdiction**
- **Subject matter jurisdiction:** “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.”

Plummer v. Idaho Industrial Commission, IPC No. 17-1 (May10, 2013)

PREPARING FOR THE HEARING

What should you do first?

1. Review the Hearing Officer designation
2. Check IPC jurisdiction (e.g., is the appeal untimely?)
3. Notice of Appearance (not required but I file one)
4. No need to file an answer to the appeal
5. Review the IDAPA rules for IPC appeals
 - IPC Rule 201 governs
 - The IDAPA Rules of Administrative Procedure of the Attorney General (AG Rules, IDAPA 04.11.01)
 - Exemptions from AG Rules for IPC cases *DHR/IPC Rule 201.01*

THE PRE-HEARING CONFERENCE

- Scheduled within 15 days of the Hearing Officer's receipt of an appeal
- After this initial conference, a Hearing Officer may then postpone or continue a hearing for good cause *IPC Rule 201.05*
- Purposes of the pre-hearing conference *AG Rule 510*
 - Formulate or simplify the issues
 - Obtain concessions of fact or identification of documents and limit witnesses, for the purpose of avoiding unnecessary proof
 - Schedule discovery (if authorized before the agency)
 - Arrange for an exchange of exhibits and prepared testimony
 - Discuss any settlement offers
 - Schedule the hearing
 - Establish procedures at the hearing
 - Address other matters to expedite orderly conduct and disposition of case

THE PRE-HEARING CONFERENCE

Preparing for the pre-hearing conference

- **TIPS by Hearing Officers – Be prepared to discuss**
 - The number of witnesses
 - How long the hearing will take
 - Discovery
 - Pre-hearing motions (which require a briefing schedule)
 - Checklist, if Hearing Officer uses one
- **TIPS by Practitioners**
 - Know the theme of your case
 - Need only ONE violation to uphold disciplinary action
 - Know your burdens of proof *DHR/IPC Rule 201.07*
 - Prior to Conference, identify available hearing dates for witnesses
 - Discuss a protective order if needed to share confidential information

WHAT ABOUT DISCOVERY?

- **No routine entitlement to discovery, but . . .**
- AG Rule 521 provides:
 - “Parties may agree between or among themselves to provide for discovery without reference to an agency’s statutes, rules of procedure, or orders.”
 - “Otherwise no party before the agency is entitled to engage in discovery unless discovery is authorized before the agency, the party moves to compel discovery, and the agency issues an order directing that the discovery be answered.”
 - *Whittier v. Dept. of Health & Welfare*, 137 Idaho 75 (2002)
- Discovery permitted: depositions, RFP’s, ROG’s, RFA’s, subpoenas, inspections and examinations *AG Rule 520*

WHAT ABOUT SUMMARY JUDGMENT?

- **The Law**

- Hearings “shall be as summary and simple as reasonably may be.”
IC 67-5316(5)
- A Hearing Officer “may consider and decide prehearing motions with or without oral argument or hearing.”
AG Rule 565

- **TIPS by Hearing Officers**

- Will consider summary judgment for lack of IPC jurisdiction of uncontested facts
- Will offer a hearing if *pro se* appellant, but may not if parties have counsel
- Summary Judgment granted by Hearing Officer upheld
Black v. Idaho State Police, IPC No. 09-22 (April 12, 2011)

THE HEARING

- **Burdens of Proof**

- In disciplinary actions, the agency has the burden of proving cause for the discipline by a preponderance of the evidence.” *DHR/IPC Rule 201.07*
- “In all other actions, the appellant has the burden of proof by a preponderance of the evidence.” *Id.*

- **Transcript of Hearing**

- The IPC or Hearing Officer may require a hearing to be transcribed *IC § 67-5316(5)*
- A party who requests a stenographic record shall pay the costs of transcribing *IC § 67-5316(5)*

THE EVIDENTIARY HEARING

- **Admissibility of Evidence**

- Evidence is taken to “assist the parties’ development of the record, not excluded to frustrate that development”
 - No informality in the manner of taking of testimony invalidates an order
- Evidence is admissible “if it is of a type commonly relied upon by prudent persons in the conduct of their affairs”
- Hearing Officer is not bound by the Idaho Rules of Evidence
 - Hearing Officer may exclude evidence that is irrelevant, unduly repetitious, or inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege
- The agency’s experience, technical competence and specialized knowledge may be used in evaluation of evidence

AG Rule 600

THE EVIDENTIARY HEARING

- **TIPS by Hearing Officers**

- Provide proposed exhibits to the Hearing Officer a week early
- AG Rule 600 allows leeway to Hearing Officer to consider evidence
 - “My criteria is usually relevance, reliability and redundancy”
 - Generally allow hearsay evidence, particularly with *pro se* appellants
 - But may discount the weight of hearsay evidence
 - More willing to exclude double or triple hearsay
- Take the lead in showing respect for the process
 - Be an example to the other side
 - Jeopardizing due process jeopardizes the decision on appeal
- Consider mediation of appeal
- Don't allow the hearing to devolve into discovery for other cases

THE HEARING DECISION

- **The Hearing Officer issues a Preliminary Order**
DHR/IPC Rule 201.10
 - States findings of fact and conclusions of law
 - Explains right to petition for review *IC § 67-5317*
 - Makes findings on *IC § 12-117* attorney fees and costs
(*IC § 12-117* applies if agency is “authorized by law to make rules or to determine contested cases”) *DHR/IPC Rule 201.11 Horne v. Idaho State University, 138 Idaho 700 (2003)*
 - Filed with the IPC, with orders and the record
- **No motions for reconsideration** *DHR/IPC Rule 201.10*

PETITION FOR IPC REVIEW

DHR/IPC RULE 202

- Must file a written petition for IPC review within **35 days** of the Hearing Officer's decision
 - Cite all alleged errors of fact or law
 - Hearing Officer's decision and orders are stayed
- IPC may allow briefing
- If questions of fact, appellant must provide a hearing transcript
- Tip: Make sure the agency record is complete with all petitions, responses, witness and exhibit lists, evidence (admitted and excluded), decisions and orders

IPC REVIEW OF PETITION

DHR/IPC RULE 202

- IPC has *de novo* review
- IPC hearing on petition is limited to oral argument
- IPC may affirm, reverse, or modify the decision
- IPC can also remand the case
 - Remands have occurred, but are very rare
- IPC may award attorney fees and costs on appeal
- Decision of IPC shall include a statement of appeal rights to district court *IC § 67-5318*

CONCLUSION
