

RICHARD BARRETT, CHAIRMAN
IDAHO PERSONNEL COMMISSION
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BEFORE THE IDAHO PERSONNEL COMMISSION

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)	
JOE COBURN,)	
)	
Employee/Appellant,)	
)	IPC NO. 95-05
vs.)	
)	DECISION AND ORDER
BUREAU OF OCCUPATIONAL LICENSES,)	ON PETITION FOR REVIEW
Employer/Respondent.)	
)	
_____)	

On petition for review from the Findings of Fact, Conclusions of Law, and Order issued on November 1, 1996 by the Hearing Officer, Kenneth G. Bergquist. The Bureau of Occupational Licenses (BOL) appeared through its counsel of record, Roger Gabel, Deputy Attorney General, Boise, Idaho. Joe Coburn (Coburn) appeared through his counsel of record William B. Latta Jr., Boise, Idaho.

Pending matters include a Motion to Disqualify the Office of the Attorney General, the BOL's Petition for Review of the Hearing Officer's decision, and Coburn's Petition for Review of the Hearing Officer's decision. For the reasons stated below, the Commission (1) denies the Motion to Disqualify the Office of the Attorney General; (2) modifies Conclusion of Law No.s. III, VII, IX and X, and affirms the Findings of Fact and remaining Conclusions of Law in the Hearing Officer's decision; (3) remands the matter for the recalculation of the amount of award due to Coburn; and (4) reverses the award of attorney fees to Coburn.

I.

INTRODUCTION AND PROCEDURAL HISTORY

This matter arises from the retirement of Joe Coburn (Coburn) from his employment as a classified state employee with the Bureau of Occupational Licenses (BOL). On November 28, 1994 Coburn injured his shoulder while on the job. As agreed to with the Director of the BOL, Coburn's last day of work for the State of Idaho was on January 15, 1995. Coburn had surgery on the injured shoulder on January 16, 1995. Coburn received workers' compensation payments after his surgery, but when he sought to supplement those payments with the value of unused sick leave, his request was denied. When Coburn filed a grievance appealing that action, he was refused access to the BOL's grievance procedures based on the BOL Director's determination that Coburn was no longer a classified employee when the grievance was filed and was not, therefore, an eligible grievant. Coburn appealed that determination to the Idaho Personnel Commission (Commission). After an evidentiary hearing, the Commission's Hearing Officer concluded, among other things, that Coburn should have been allowed to benefit from his unused sick leave. The BOL was ordered to pay Coburn \$2,656.29, attorney fees and reasonable expenses. Issues relating to the amount of the attorney fees are pending before the Hearing Officer.

Both parties petitioned to have the full Commission review the Hearing Officer's decision. In his petition, Coburn requests that we award him an additional \$5,773.40. In its petition, the BOL asserts that the Hearing Officer made a number of erroneous findings of fact and conclusions of law which should be reversed by the Commission; the BOL requests we deny Coburn any recovery, including attorney fees and costs.

Subsequent to filing a Petition for Review with the Commission, Coburn filed a Motion to Disqualify the Office of the Attorney General (OAG) from advising the Commission in this matter. After being granted the right to do so, the OAG intervened and filed a Memorandum and an

Affidavit opposing Coburn's Motion to Disqualify. The BOL filed its own Memorandum in support of the OAG's position.

II.

ANALYSIS

A. Coburn's Motion to Disqualify.

Coburn's Motion to Disqualify the Office of the Idaho Attorney General (OAG) as counsel to the Commission is based on two concerns. The first concern is founded on a potential conflict of interest with regard to Thorpe Orton, the Deputy Attorney General permanently assigned to the Commission. Another Deputy Attorney General, free from any previous involvement with this matter, has been assigned to the Commission for the purposes of these Petitions for Review, rendering the first concern moot. The second concern raised in Coburn's Motion to Disqualify takes issue with the fact that different individuals, who are both attorneys with the OAG (1) advise the Commission in consideration of petitions for review under Section 67-5317, Idaho Code, and (2) often represent agencies in the same matters. Coburn asks the Commission to issue an order prohibiting the OAG from providing legal services to the Commission in those matters where this situation occurs. As a practical consequence, Coburn suggests that the Commission either forego legal assistance, or obtain private counsel to ensure neutrality.

The Idaho Personnel Commission has used the OAG for its legal services for many years. In fact, under consolidation statute enacted in 1995, the Commission is required to use the OAG for its legal services. Idaho Code § 67-1401(1). That law, and similar specific laws, see e.g. Idaho Code § 67-2618, require that other state agencies also use the OAG for their legal services. We have never found the Deputy Attorney General assigned to the Commission to be anything but neutral and impartial when advising the Commission in its consideration of petitions for review. We are confident that the OAG has taken all measures necessary to ensure no legal conflict of interest is

created despite its multiple responsibilities. *See Berg v. Forney*, Case No. CV-95-00791 (Dist. Ct., 1st Dist., March 5, 1996). At the same time, however, the Idaho Personnel Commission's jurisdiction is limited to those powers assigned to it by the Idaho Legislature in Sections 67-5316 and -5317 of the Idaho Code. *Sheets v. Idaho Dep't of Health and Welfare*, 114 Idaho 111 (1988); *Stroud v. Department of labor and Indus. Serv.*, 112 Idaho 891 (Ct. App. 1987). Coburn's Motion to Disqualify asks us to exceed our limited jurisdiction. The issues raised and relief requested are simply not within the scope of our authority. For this reason, we dismiss Coburn's Motion to Disqualify the Office of the Attorney General for lack of jurisdiction.

B. The Parties' Petitions for Review of the Hearing Officer's Decision.

Both parties petitioned to have the full Commission review the Hearing Officer's decision. In his petition, Coburn asks us to affirm the Hearing Officer's award of \$2,656.29 to Coburn, which is the face value of his unused sick leave. Coburn also requests that we award him the additional sum of \$5,773.40 representing retirement benefits and interest Coburn claims he lost as a result of the BOL's refusal to pay him the value of his unused sick leave.

In its Petition for Review, the BOL asserts that the Hearing Officer made a number of erroneous findings of fact and conclusions of law which should be reversed by the Commission. Based on these assertions, the BOL requests that the Commission deny Coburn any recovery, including attorney fees and costs.

In considering a petition for review, the Commission shall review the record of the proceeding below, and any briefs and transcripts submitted by the parties. Idaho Code § 67-5317. Findings of acts made by the hearing officer must be supported by substantial, competent evidence. *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257 (1986); *Department of Health and Welfare v. Sandoval*, 113 Idaho 186 (Ct. App 1987). The Commission exercises free review over issues of law. *Soong v. Idaho Dep't of Health and Welfare*, IPC No. 94-03 (February 21, 1996). As a consequence

of its review, 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. Idaho Code § 67-5317(1).

The BOL asserts that the Hearing Officer made numerous erroneous findings of fact. Having reviewed the Hearing Officer's findings of fact, we conclude that they are supported by substantial, competent evidence in the record. At the same time, it is our determination that as a matter of law, Coburn was a classified employee until - but not after - the effective date of his retirement on February 1, 1995. Based on this general premise, we conclude specifically that the Commission has jurisdiction over this matter as set forth in Conclusion of Law No. 1. We further conclude that Conclusion of Law No. III, as written in the November 1, 1996 decision, is misleading when read in combination with Finding of fact No. XXI. For this reason, Conclusion of Law No. III is modified to read: "Coburn never resigned from the Bureau. Nor was he dismissed for cause. Coburn retired effective February 1, 1995 and remained a classified employee following his last day of work on January 15, 1995 until February 1, 1995." We also conclude that the second sentence of Conclusion No. VII is inconsistent with the use of the word "some" in the first sentence of that Conclusion of Law, and with Finding of Fact No. XXI, the modified Conclusion of Law No. III and Conclusion of Law No. VIII. For this reason, Conclusion of Law No. VII is modified to read: "Coburn has proved by a preponderance of the evidence that he was entitled by law to use a portion of his accrued sick leave to supplement his worker's compensation benefit and that he was denied that right. For the period between his last day of regular work on January 15, 1995 and the effective date of his retirement of February 1, 1995, Coburn is entitled to receive the value of certain sick leave benefits. Those benefits equal the monetary value of that portion of his accrued sick leave attributable to the working days included in that period less the amount of any workers' compensation payment actually received by Coburn for that period." Based upon the legal effect of this modification, we remand this matter so that the Hearing Officer can recalculate the value of the

award which is due to Coburn. If necessary to make the recalculation, the Hearing Officer shall make further findings of fact and take further evidence.

Coburn's claim in his Petition for Review that he is entitled to an additional sum of \$5,773.40 representing retirement benefits and interest assertedly lost as a result of the BOL's refusal to pay him the value of the unused sick leave, has no legal basis given the fact that we conclude he retired effective February 1, 1995 and that he is entitled to the value of a portion of his unused sick leave benefit only through his effective retirement date. With the exception of the modifications to Conclusions of Law Nos. III and VII described above, and the modifications to Conclusion of Law Nos. IX and X described below, we affirm the Conclusions of Law set out in the Hearing Officer's decision.

Finally, there is a need for us to note that it has been a continuing frustration to this Commission that the majority of grievances we are asked to review could have been avoided had the parties involved been more careful and communicated better before decisions were made and actions were taken. Surely that is the case in the matter before us. We encourage and admonish state agencies and their employees to be more deliberate about documenting understandings and researching the foundation for decisions before taking actions or agreeing to outcomes which might affect the rights and benefits of a state employee. With more thorough analysis, communication, and record-keeping at the outset, there can be no questions that the number of misunderstandings will be reduced, preserving the resources of the agencies and this Commission for pursuits other than grievances and their appeals.

C. Attorney Fees.

The Hearing Officer granted Coburn's request for attorney fees, concluding that, pursuant to Section 12-117 of the Idaho Code and IDAPA 28.01.01.201.10, the BOL acted without "a

reasonable basis in fact or law.” Conclusion of Law Nos. IX and X. The Idaho Supreme Court has stated that the purpose of Section 12-117 in the administrative setting is

- (1) to serve as a deterrent to groundless or arbitrary agency action; and
- (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never ha[ve] made.

Lockhart v. Department of Fish and Game, 121 Idaho 894, 898 (1992) (quoting *Bogner v. State Dep’t of Revenue & Taxation*, 107 Idaho 854 (1984)). It is a matter of record that BOL obtained and acted consistently with the opinions of the director of the Personnel Commission and a former attorney for the Commission. The facts and law in this case were confusing and complex. We do not think that any actions on the part of the BOL in the sequence of events which gave rise to this matter were unsupported by a reasonable basis in law and fact. For this reason, we reverse the Hearing Officer’s award of attorney fees and modify Conclusion of Law Nos. IX and X accordingly.

D. Coburn’s Untimely Filing of a Responsive Brief.

At the request of the attorney for Coburn, and with the approval of the attorney for the Bureau of Occupational Licenses, the Commission granted an extension of time for Coburn to file his brief in response to the BOL’s petition to Review. The Order granting the motion for extension of time stated “Employee/Appellant [Coburn] has an extension of one **week which would make [his] brief due on February 7, 1997.**” [emphasis added] The Responsive Brief in question, as well as Coburn’s Memorandum in Support of his own Petition for Review, which made up a combined total of 35 pages, were received by the Commission on February 11, 1997, three days before oral argument on the petitions for Review and four days after the responsive brief was due. Coburn’s failure to timely file these documents was not only burdensome on the Commission, it was

inherently unfair to opposing counsel. We note here that while we considered the late filings in making our deliberations in this case, we have the prerogative to be less forgiving in the future.

III.

CONCLUSION

As set forth above, we affirm the Hearing Officer's decision with modifications to Conclusion of Law Nos. III, VII, IX and X, reverse the award of attorney fees, and remand this matter to allow the Hearing Officer to recalculate the value of the award which Coburn is due. **AFFIRMED WITH MODIFICATIONS, REVERSED IN PART, AND REMANDED.**

IV.

STATEMENT OF APPEAL RIGHTS

This decision is final and conclusive between the parties, unless within 42 days of the filing of this decision either party appeals to the district court. Idaho Code § 67-5317. If either party appeals this decision, the district court may 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.

IT IS SO ORDERED

DATED this 2nd day of April, 1997.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

/s/ _____

Richard Barrett, Chair

/s/ _____
Sherry Dyer, Vice Chair

/s/ _____
Peter Boyd

/s/ _____
Ken Wieneke

/s/ _____
Don Miller

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 2nd day of April, 1997.

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/s/ _____
Secretary to Executive Secretary

