

**ARIZONA STATE PERSONNEL BOARD
MEETING MINUTES
SEPTEMBER 15, 2016**

The Arizona State Personnel Board meeting was called to order by Joe Beers at 11:14 a.m. The meeting was held at 1400 West Washington Street, Suite 280, Phoenix, Arizona. Board members in attendance were Mark Ziska and Kevin Donnellan. Chad Kirkpatrick appeared telephonically. Staff members present were Jeff Bernick as Counsel for the Board, Laurie Barcelona, Executive Director and Robin Van Staeyen, Administrative Assistant II.

The board called for comments from the public. There being no public comments, Mark Ziska moved to adopt the minutes from the August 10, 2016 meeting. Kevin Donnellan seconded the motion which carried unanimously.

The board considered the prohibited personnel practice complaint of **Elizabeth Grigg vs. Department of Economic Security, et al.**

Kevin Donnellan proposed the following motion:

"I move that the Elizabeth Grigg case be continued to the next regular scheduled board meeting."

Mark Ziska seconded the motion which carried unanimously.

The board then elected the position of vice chair for the remainder of the calendar year 2016. Kevin Donnellan proposed the following motion:

"I move that Mark Ziska serve as Vice Chair."

Joe Beers seconded the motion which carried unanimously.

Next, the board considered the dismissal appeal of **Javier Jimenez vs. Department of Corrections.**

Mr. Jimenez, who appeared telephonically, asked that the board reinstate him and added that there was another employee with a similar offense who kept his employment. Mr. Jimenez apologized for his offense and stated he is taking steps to improve himself.

James Green, Assistant Attorney General representing the Department of Corrections, stated that maintaining a valid driver's license was an essential function of Mr. Jimenez's position at the department; adding that Mr. Jimenez's license was suspended for one year for not cooperating with the police and he was found driving under the influence (DUI). Mr. Green continued by stating that Mr. Jimenez had two prior

disciplines and alcohol was believed to be a contributing factor in both. Mr. Green stated that the employee referenced by Mr. Jimenez who had also received a DUI was terminated from the department, but the employee settled with the department. Additionally, the employee's driver's license was never suspended and he was only allowed to drive his personal vehicle for state business and not allowed to drive a state vehicle. Mr. Green asked that the board uphold the hearing officer's findings.

There being no discussion, Kevin Donnellan proposed the following motion:

"Finding that the Department of Corrections has proven by a preponderance of the evidence that the material facts on which the dismissal was based and that the dismissal was not arbitrary and capricious, I move we adopt the Hearing Officer's Findings of Fact and Conclusions of Law as our own. I further find that just cause existed for discipline to be imposed and then move that the appellant's appeal be denied and the agency's action of dismissal be upheld."

Chad Kirkpatrick seconded the motion which carried unanimously.

Next, the board considered the dismissal appeal of **David Deem v. Department of Corrections.**

Martin Bihn, Attorney at Law representing Mr. Deem, asked that he reserve some of his time to speak after the Assistant Attorney General. Mr. Bihn stated that the correctional officers were asked to write simulated reports and in Mr. Deem's report profanity was used, but it did not violate set policy according to Mr. Bihn.

Michelle Kunzman, Assistant Attorney General representing the Department of Corrections, stated that profane language is explicitly prohibited by Department Order 601. Furthermore, Ms. Kunzman explained that Mr. Deem had been disciplined four times in the past for similar conduct, knew that profanity was prohibited and chose to use profane language in his simulated report. Continuing, Ms. Kunzman stated that Mr. Deem admitted at the hearing that he could have written the report without using profanity. As explained by Ms. Kunzman, the hearing officer's recommendation of a 240-hour suspension is arbitrary and when considering the department's chart of discipline on similar conduct, the discipline is already beyond dismissal. Furthermore, Mr. Deem refused to accept responsibility and Ms. Kunzman asked the board to uphold the dismissal.

Kevin Donnellan inquired as to how many prior disciplines were related to taking sick time. Ms. Kunzman stated that this was not part of the evidence and there was no testimony at the hearing regarding sick time. She added that the department would focus on the totality of prior discipline, as well as the kind of offenses, in determining discipline and Mr. Deem's past disciplines included four other offenses of using

profanity. Even though the department did not have a policy regarding the use of profanity in simulations, Ms. Kunzman questioned how much a department must have to put in writing regarding "do's and don'ts".

Mr. Bihn quoted a document from the department stating that the regulation is clear that profanity and improper language should never be used; however, profanity and improper language are used throughout the disciplinary letter. Mr. Bihn stated that if the regulation is so cut and dry regarding the use of profanity and improper language in any document, how then was the department's document, which included profanity and improper language and also considered to be a "public" document, be acceptable but Mr. Deem's simulated, internal document was not. Mr. Bihn asked that the board uphold the hearing officer's recommendation.

Kevin Donnellan inquired as to whether he understood Mr. Bihn in the beginning that part of the 14 disciplines included taking sick leave. Mr. Bihn answered in the affirmative and they are not being challenged and were not contested at the time of discipline.

Chad Kirkpatrick inquired as to whether the simulated report was required to be graphic. Mr. Bihn stated that instructions were given to write a fictitious report that perhaps would have been written under the Prison Rape Elimination Act. In other words, it should be written as if a rape was witnessed and the report would reflect that experience.

There being no further discussion, Mark Ziska proposed the following motion:

"Finding that the Department of Corrections has proven by a preponderance of the evidence that the material facts on which the dismissal was based and that the dismissal was not arbitrary and capricious, I move we adopt the Hearing Officer's Findings of Fact and Conclusions of Law as our own, except that Conclusions of Law 5, 6 and 7 are rejected and find that just cause existed for termination and the agency's action of dismissal be upheld. This is based on the totality of appellant's disciplinary history of 14 past disciplinary actions including three specific actions for the use of profanity. The appellant's appeal is denied and the agency's action of dismissal is upheld."

Kevin Donnellan seconded the motion which carried unanimously.

There being no further business before the board, Kevin Donnellan proposed the meeting be adjourned. Mark Ziska seconded the motion which carried unanimously. The meeting adjourned at 11:45 a.m.

(Quotations of board members in these minutes have been reviewed by staff for grammatical content, and certain grammatical changes may have been made by staff administratively. No changes to content have been made by staff administratively or otherwise.)

Respectfully submitted:

Robin Van Staeyen
Robin Van Staeyen, Administrative Assistant II
Arizona State Personnel Board

October 4, 2016
Date Prepared