

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPELLANT'S BRIEF

MARK BLACK
Plaintiff and Appellant,

vs.

DIVISION OF CRIMINAL INVESTIGATION
Defendant and Appellee.

DOCKET #27784

APPEAL FROM THE SOUTH DAKOTA CIVIL SERVICE COMMISSION
AND THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

HONORABLE JOHN L. BROWN
Presiding Circuit Judge

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JURISDICTIONAL STATEMENT

The Appellant was employed with the South Dakota Division of Criminal Investigation (DCI). The Appellant received notice from the DCI that disciplinary action would be taken against him and that his superiors at DCI intended to terminate his employment with DCI. The Appellant exercised his right to administrative remedies pursuant to ARSD 55:10:08:16 within the DCI framework, but all decisions within the DCI agency were adverse to the Appellant. Pursuant to ARSD 55:10:08:16(3) Appellant timely appealed the adverse decisions from the DCI agency to the Civil Service Commission of South Dakota (Commission). After a hearing, the Commission rendered a Memorandum Opinion and entered formal Findings of Fact and Conclusions of Law and Order affirming the termination of Appellant=s employment with DCI. Appx. 1, 2 and 3. The Appellant appealed the Commission decision to the Circuit Court, Sixth Judicial Circuit, State of South Dakota in accordance with and pursuant to ARSD 55:10:08:16 and SDCL 1-26-30.2 et seq. The Honorable John L. Brown, Circuit Court Judge, Sixth Judicial Circuit, State of South Dakota, presided over the Circuit Court appeal. Following briefing and oral argument, Judge Brown entered a Memorandum Decision which was dated February 1, 2016. Appx. 4. Judge Brown, however, did not enter independent findings of fact nor conclusions of law. Pursuant to Judge Brown=s decision an Order was entered on February 1, 2016, and Notice of Entry of Order was served by mail and electronically on February 3, 2016. Appx. 5. The Appellant perfected this appeal by timely and properly filing the Notice of Appeal on March 1, 2016. Appx. 6. This appeal is from the entire Commission decision and the

Circuit Court=s affirmance thereof. This Court has jurisdiction over the Appellant=s appeal pursuant to SDCL 1-26-37 and 15-26A-3.

The Appellant shall hereinafter be referred to as ABlack@. The Appellee shall hereinafter be referred to as ADCI@. References to the Commission hearing will be by ACH@ followed by the page number and line number if necessary. References to Commission exhibits shall be by AExh.@ followed by the exhibit number or, if used, the exhibit letter.

STATEMENT OF THE LEGAL ISSUE

ISSUE 1: Whether there was good cause under the governing law, rules and regulations and the facts as presented to the civil service commission to terminate Black=s employment with the South Dakota Division of Criminal Investigation.

The Commission held that there was good cause under the law and facts for DCI to terminate Black=s employment and the Circuit Court affirmed this decision.

Relevant South Dakota Supreme Court cases:

1. Hollander v. Douglas County, 2000 S.D. 80, 683 N.W.2d. 181.
2. Wendell v. State Dept. of Transportation, 1998 S.D. 130, 587 N.W.2d. 595.
3. Green v. City of Sioux Falls, 2000 S.D. 33, 607 N.W.2d. 43.
4. Certiifiability of Jarman, 2015 S.D. 8, 860 N.W.2D. 1.

ISSUE 2: Whether the South Dakota Division of Criminal Investigation complied with the governing law, rules and regulations when it terminated Black=s employment.

The Commission held that the DCI complied with the governing law, rules and regulations when it terminated Black=s employment and the Circuit Court affirmed this

decision.

Relevant South Dakota Supreme Court cases:

1. Hollander v. Douglas County, 2000 S.D. 80, 683 N.W.2d. 181.
2. Wendell v. State Dept. of Transportation, 1998 S.D. 130, 587 N.W.2d. 595.

STATEMENT OF THE CASE

Black was employed by DCI as a Special Agent for over eight (8) years. On February 13, 2014, Black was placed on administrative leave by his supervisor, Brian Zeeb (Zeeb) due to allegations made against him by his ex-wife in a Petition and Affidavit for a Protection Order (Domestic Abuse). On February 21, 2014, Black was notified by Zeeb that DCI intended to terminate his employment based upon the allegations in the aforesaid petition. Black responded to the February 21, 2014, notice and defended against the intended termination of his employment, but his efforts were to no avail and his employment was terminated effective March 14, 2014. Black appealed the decision to terminate his employment to DCI Director Brian Gortmaker (Gortmaker) and Gortmaker affirmed Zeeb=s decision by a letter dated March 27, 2014. Black appealed Gortmaker=s decision to South Dakota Attorney General Marty Jackley, but Attorney General Jackley affirmed Zeeb and Gortmaker=s decisions by a letter dated April 10, 2014. Black timely appealed the termination of his employment and the adverse decisions from the DCI administration to the Commission on April 16, 2014. A hearing was held before the Commission on September 16, 2014, and the Commission entered its Memorandum Decision on April 12, 2015, and its Findings of Fact and Conclusions of Law and Order on May 18, 2015. Black appealed the Commission

decision to the Circuit Court, Sixth Judicial Circuit, State of South Dakota, and the Honorable Judge John L. Brown presided over said appeal. Judge Brown rendered a Memorandum Decision affirming the Commission decision in all respects and entered an Order pursuant thereto. The Circuit Court, however, did not enter independent findings of fact nor conclusions of law. Black perfected his appeal to this Court and appeals the entire Commission decision and the Circuit Court=s affirmance thereof.

STATEMENT OF THE FACTS

Black was hired by the DCI on August 25, 2009. Exhibit #6, CH., p. 13. Prior to becoming employed by the DCI, Black served over seven years in the United States Navy and was honorably discharged therefrom. Exh. A, CH., p. 228. Black had extensive experience in law enforcement before being hired by DCI. CH., p. 229. Black=s law enforcement experience was all with the Pennington County Sheriff=s Office where he entered the law enforcement profession as a jailor in 1997, was promoted to Deputy Sheriff in 1999, and eventually became a narcotics investigator assigned to the DCI drug task force until he applied for and was hired by DCI in 2005. CH., 229. Black received extensive and specialized training while employed with the DCI. CH., pp. 64, 120, 237-238. During Black=s tenure with the DCI and up to the time his employment was terminated, he was considered one of the DCI=s top five agents. CH., 110, 113-114, 139, 260. Black received several commendations while with the DCI for the exceptional manner in which he performed his work and received the first ever awarded Distinguished Service Award (DSA) in 2009. Exhs. B, C, D, E, and F; CH., pp. 62-63.

Black, like all DCI employees, was subject to regular work performance

evaluations. Exhs. #6 and H. Black received exceptional marks on his work performance evaluations. Exhs. #6 and H; CH., pp. 52-75. In fact, Black met or exceeded DCI expectations in all categories of his evaluations for all years that he was employed by DCI, including the year his employment was terminated. *Id.* The terms Black=s DCI superiors used to describe his work ethic, productivity and attitude included, but were not limited to, the following: impressive, adaptable, quick learning, driven, intense, passionate, dedicated, excellent, meticulous, relentless, and resilient. Exhs. #6 and H. Notations on Black=s work performance evaluations that he needed improvement in certain areas of his work were standard and routine, as no one who worked for the DCI ever received a work performance evaluation without a notation of something that need improvement. CH., 98. This is so because, according to the DCI administration, everyone who worked for DCI had room for improvement in their work performance in some respect. *Id.*

In 2007 Black participated in a criminal investigation involving a Nick Berbos (Bebos). CH., pp. 238-241. Black became frustrated with the fact that Berbos was making serious threats to him and his family, engaging in activities that were intended to intimidate Black, and engaging in activities that Black believed violated Berbos= conditional release on bond. *Id.* On numerous occasions Black had requested assistance from the South Dakota Attorney General=s Office with regard to the problems he was encountering with Berbos, but Black=s requests were to no avail and the problems with Berbos persisted. *Id.* As a result, Black sent a strongly worded e-mail to the Assistant Attorney General handling the Berbos matter and submitted his resignation to his

superiors at DCI. *Id.* Black=s resignation was withdrawn, but he was disciplined for his actions relative to the Berbos matter, received a 2 day work suspension, and was placed on a 60 day work improvement plan. CH., pp. 241-242. Black served his suspension period and successfully completed his work improvement plan. *Id.* Black was also referred to Dr. Magnavito for a counseling session as a result of the Berbos incident, but was cleared to return to work without restrictions by Dr. Magnavito on the basis that his actions were not out of the ordinary given the circumstances with the Berbos case. CH., pp. 280-281. Black also received a disciplinary action for a comment he made on Facebook relative to a citizen complaint aired on KELO News about law enforcement officers training near a school. CH., pp. 100-101. Black received a one day suspension which was served and completed and no work improvement plan was ordered or implemented. CH., pp. 101-102. There were two additional occasions (boat and YouTube incident) where Black met with his superiors regarding work related matters, but those matters did not result in disciplinary action nor a work improvement plan. CH., pp. 27, 244-249. It is important to note that although Black received the above described disciplinary actions and his conduct was discussed from time to time by his superiors, his evaluations remained excellent and after the discipline had been implemented and completed, Black had later been awarded the first ever DSA. *Id.*; CH., pp. 241-242.

Black was married to Patricia Black (Patty) for approximately 22 years. CH., p. 278; Exh. #2. Black and Patty became involved in a divorce that was clearly hostile and contentious due to Patty=s actions. CH., pp. 225-226; 251-252; 265-278; Exh. #2. Black=s divorce from Patty became final August 6, 2013. Exh. #2. During the

divorce proceedings and thereafter, Patty vowed to ruin Black=s career and his potential for future employment. CH., pp. 182, 225-226; 251-252; Exh. G. Patty also pledged revenge against Black=s new wife, Lynda. CH., pp. 224-226. Patty and her attorney made the divorce and post divorce proceedings a corn-a-copia of disputes and hostilities by virtue of hostile text messages, telephone calls, complaints, letters, visitation disputes, false reports to law enforcement, and generally making Black=s life a living hell. CH., pp. 224-226, 276-277; Exhs. #2 and #4. The divorce and post-divorce hostilities from Patty were regular and persistent and Black, out of frustration, wrote APatty Wins@ in paint on the parties= boat (boat incident) he had in his possession, but which was a marital asset, and delivered same to Patty=s home. Exh. #2; CH., pp. CH., pp 258-259. Black, however, cleaned the boat within 24 hours after conferring with Patty on the matter. Exh. #2; CH., pp. CH., pp. 122-123, 258-259. DCI was not concerned about the boat incident, but discussed the incident and Black=s behavior with him. CH., pp. 122-123. Patty=s contacts with Black and her harassment of him was not limited to his off duty hours, but was just as persistent while he was on duty. CH., p. 276; Exh. #4. In fact, Black was required to block text messages, e-mails and telephone communications from Patty on his personal and work electronic media due to the harassing, repeated and continuous nature of same. CH., p. 276.

Moreover, as a result of Patty and her attorney=s actions, the intricate details of Black=s private and personal life became the product of gossip and false reports to Attorney General Jackley. CH., pp. 253-256. In fact, the reports and complaints about

Black from Patty and parties affiliated with or representing her became so common place that Attorney General Jackley and Gortmaker decided that they were tired of hearing Black=s name and it was time for him to be dismissed. CH., pp. 253-256.

Further examples of Patty=s vindictiveness is shown by an occasion where Black and Patty had a dispute over money allegedly due Patty from Black=s State retirement account. When the divorce was concluded a Qualified Domestic Relations Order (QDRO) had been entered by the Court relative to Black=s State retirement. CH., pp. 266-267. A post divorce issue arose regarding Black paying Patty \$37,000 from his State retirement account. Black could not get the money from his retirement account with the State until he retired or his employment with the State was terminated either voluntarily or involuntarily . Id. Patty insisted on Black obtaining the money, but he assured her and her attorney that such action was not possible. Id. After Patty left the negotiation table unsatisfied over the \$37,000 payment pursuant to the QDRO, the DCI received the complaint about the Facebook posting regarding the KELO News matter. CH., pp. 25-26, 266-267 ; Exh. #6. Thereafter, Black was disciplined. CH., pp. 101-102.

In addition and, perhaps, the most telling event of Patty=s ruthless efforts to ruin Black=s career was the Petition and Affidavit for a Protection Order (Domestic Abuse) filed by Patty approximately 6 months after the parties= divorce had become final. Exh. #2. Patty and her attorney knew that once the protection order pleading was filed, all of the pleadings and orders would be a public record. Exh. #2. With full knowledge of the public nature of the protection order proceeding, Patty and her attorney included as part of the petition various documents which contained old and untrue information which had

no bearing on any alleged issue in the protection order matter, but which could prove to be harmful to Black, his career and his ability to continue to pursue and secure gainful employment once same became public. Exh. #2. The meritless claims and allegations in the protection order proceedings included, but were not limited, to the following: unfounded and malicious criminal complaints, complaints that Black displayed episodes of rage and engaged in physical violence during their marriage, accusations that Black physically assaulted Patty and held her against her will by restraining her against walls and floors, allegations that Black expressed his rage by punching and throwing inanimate objects in fits of anger, and that Black assaulted her and committed acts of domestic violence. CH., pp. 225-226; 251-252; 265-278; Exh. #2. Moreover, Patty was represented by counsel in the divorce and post-divorce proceedings and knew that when Black was served with the protection order pleadings he would not be allowed to possess firearms. CH., pp. 267-268. True to Patty=s malicious intent, upon Black being served with the protection order he was immediately placed on leave with pay because of the allegations in the protection order proceeding and since he could not possess firearms. CH., pp. 14-15. Black never returned to work and his termination was solely and exclusively based upon the petition for protection order and the allegations contained therein. CH., pp. 117-118; Exhs. #1, #3, and #5. Moreover, Patty=s petition found its way into the press and was published in the media outlets in the eastern part of the State. CH., p. 194.

The spitefulness and vindictiveness of Patty=s actions are further indicated by how Patty used a personal letter Black sent to her in October of 2013 in an eleventh hour

attempt to reconcile the broken marriage. Exh. #2. During the divorce, but prior to the protection order proceeding, Black counseled with his clergy and others regarding the divorce and whether he should return to Patty and reconcile with her. CH., pp. 269-270. In this regard, Black wrote a personal letter to Patty as a last attempt at saving the marriage and reconciling the broken family. CH., pp. 269-270. Instead of taking the letter as an attempt at reconciliation and an effort to make some reparations for a broken family, Patty used the letter in the malicious protection order proceedings to further her efforts to ruin Black=s career. Exh. #2. Further, DCI relied upon that letter as one of its strongest evidentiary nuggets in the termination of Black=s employment. CH., pp. 17-19; Exh. #3 and #5.

All of Black=s superiors at DCI knew of the divorce and its hostile nature. CH., pp. 15-16. Moreover, after DCI obtained copies of the protection order pleadings it instigated an independent investigation into Black and his family by the North Dakota Bureau of Criminal Investigation (NDBCI) . CH., pp. 37-38. The NDBCI investigation did not result in Black being prosecuted for anything and did not paint Black in a bad light with regard to his work nor his mental state. CH., pp. 37-38; Exh. #4. Moreover, four sitting sheriffs in the northeastern South Dakota area and Black=s partner, Dave Lunzman (Lunzman), who was currently employed by DCI, testified to Black=s effectiveness as a DCI Special Agent and that his relationship with them had not been harmed in any respect from the antics of Patty. CH., pp. 192-220. Also, the sheriffs and Lunzman clearly indicated that no Ablack eye@ had been given to DCI as a result of Black=s conduct, nor had the DCI lost any respect or credibility with other law

enforcement agencies or the public because of Black=s actions. Id. DCI did not interview or communicate with the sheriffs nor Lunzman prior to terminating Black=s employment and, in spite of the NDBCI report, DCI began the process of terminating Black=s employment. CH., pp. 37-38; Exh. #4.

The first letter to Black was from Brian Zeeb (Zeeb) dated February 13, 2014, and placed Black on administrative leave with pay. Exh. #1. The second letter to Black from Zeeb was dated February 21, 2014, and gave him notice of the DCI=s intent to terminate his employment and such action was based solely and exclusively on the contents of the protection order pleadings. CH., pp. 117-118; Exhs. #2 and #3. The validity and truthfulness of the allegations in the protection order pleadings, however, had not yet been determined, as the protection order hearing was scheduled for March 12, 2014, and had not yet been litigated. CH., pp. 117-118; Exhs. #2 and #3. Black responded to the notice of intent to terminate his employment with a written statement explaining his position and countering the allegations against him which had been made by Patty in the protection order pleadings. Exh. #4. Zeeb rejected Black=s explanation and terminated his employment effective March 14, 2014. Exh. #5. At this time, the protection order matter had been heard by the Honorable Eugene E. Dobberpuhl, but he had not made a decision thereon. Exh. I. Black timely appealed Zeeb=s decision to DCI Director Gortmaker. Exhs. #15, #16, #17, and #18. Gortmaker rejected Black=s appeal and affirmed the termination of his employment by virtue of a letter dated March 27, 2014. Exh. #18. Black appealed Gortmaker=s decision to Attorney General Jackley who

rejected Black=s appeal and affirmed the decisions by Zeeb and Gortmaker. Exhs. #19 and #20. The petition for protection order filed by Patty was dismissed on March 21, 2014, but the official Findings of Fact and Conclusions of Law and Order Dismissing Protection Order (Domestic Abuse) were not entered by Judge Dobberpuhl until August 15, 2014. Exh. I. The findings and conclusions entered by Judge Dobberpuhl exonerated Black of any wrong doing not only in reference to the protection order proceedings, but also in reference to all allegations of simple assault-domestic or any other type of spousal abuse. Id. The termination of Black=s employment and the appeals process for Black were administered and concluded before the Court presiding over the protection order proceedings had a chance to render a ruling on Patty=s malicious petition. Exh. I. DCI did not call as a witness any mental health professional of any nature or sort to establish the claims that Black was emotionally or mentally unfit or unstable and, therefore, not able to perform his work or function within the confines of the DCI and its policies, rules and regulations.

ARGUMENT

The standard of review for appeals from an administrative proceeding to the Supreme Court is governed by SDCL 1-26-37 and requires the application of SDCL 1-26-36. Hayes v. Rosenbaum Signs, 2014 S.D. 64, ¶7, 853 N.W.2d 878. Further, the standard of review regarding agency decisions is well settled. See, Certiability of Jarman, 2015 S.D. 8, 860 N.W.2d 1; Hayes, 2014 S.D. at 64; and Williams v. S.D. Dept. of Agriculture, 2010 S.D. 19, 779 N.W.2d 397. Specifically, the Supreme Court=s

... review of agency decisions is the same as the review made by the

circuit court. ... A[w]e perform that review of the agency's findings 'unaided by any presumption that the circuit court's decision was correct.'" ... [w]e "give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL 1-26-36. We "reverse only when those findings are clearly erroneous in light of the entire record." ... [q]uestions of law are reviewed de novo. ... (Citations omitted).

Jarman, 2015 S.D. at 8, &8. In light of the above authority, the Supreme Court reviews

the agency decision and not the Circuit Court=s review of that decision. Further, the

Supreme Court reviews the agency decision in this case in accordance with SDCL

1-26-36. Irvine v. City of Sioux Falls, 2006 S.D. 20, &4, 711 N.W.2d 607. SDCL

1-26-36 provides as follows:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. ...

A finding of fact is clearly erroneous if, A... after reviewing the entire record, ... [the court

is] ... left with the definite and firm conviction that a mistake has been made...@. Estate

of Schnell, 2004 S.D. 80, &8, 683 N.W.2d 415. The issue of whether there was sufficient

cause for a termination is A... fully reviewable as a legal question...@. Hollander v.

Douglas Co., 2000 S.D. 159, &20, 620 N.W.2d 181. Clearly, the issues in this appeal fall

squarely within the confines of SDCL 1-26-36(3), (4), (5), and (6) and are fully

reviewable by this Court on appeal.

ISSUE 1: Whether there was good cause under the governing law, rules and regulations and the facts as presented to the civil service commission to terminate Black =s employment with the South Dakota Division of Criminal Investigation.

The findings of fact entered by the Commission and the conclusions of law are clearly erroneous based upon the facts that were presented at the commission hearing and the lack of evidence produced by the DCI at said hearing. The significance of the error is shown by a detailed analysis of the administrative rule Black allegedly violated, the policies he allegedly violated, the letters sent to Black to terminate his employment, and the timing of the actions by DCI. Furthermore, it is critical to the proper analysis of the issues on this appeal to remember that the administrative rules and policies relied upon by the DCI to prosecute Black were drafted by State officials and not Black nor other employees. Since the State created the rules, policies, and the governing language thereof, they most certainly should be required to adhere to the standard that they created and the logical interpretation of those rules and policies in disciplinary actions such as the one before this Court on appeal. Finally, the issue of whether there was sufficient cause for a termination is A... fully reviewable as a legal question...@. Hollander, 2000 S.D. at 159, &20.

A. Burden of Proof.

The rules of civil procedure do not necessarily apply in administrative agency proceedings. Perrine v. Dept. of Labor, 431 N.W.2d. 156, 159 (S.D. 1988). However, the general rule that the proponent of a cause bears the burden of proof thereof remains a cornerstone in our system of justice and is applicable to the matter before this Court. See, Kaberna v. Brown, 2015 S.D. 34, &16, C N.W.2d. C (partition sales); St. John v.

Peterson, 2015 S.D. 41, & 15, C N.W.2d.C (evidence); Wilcox v. Vermeulen, 2010 S.D. 29, & 25, 781 N.W.2d 464(agreement); Estate of Palmer, 2007 S.D. 133, 744 N.W.2d 550(probate and will contest proceedings). Moreover, the black letter law in administrative agency proceedings regarding employee disciplinary matters provides that

... [t]he employing agency generally bears the burden of proof by a preponderance of the evidence that the employee engaged in the conduct on which the disciplinary charge was based and that such conduct constituted a cause for discipline under the applicable statutes. ...

63C Am.Jur.2d Public Officers and Employees ' 458; see also, Shatz v. U.S. Dept. of Justice, 873 F.2d 1089 (8th Cir. 1989). Clearly, the burden of proof to show that Black=s employment was terminated for good cause was on DCI. The burden of proof DCI must meet is by a preponderance of the evidence. See, Jarman, 2015 S.D. at 8, & 15; ARSD 2:01:04:02:01.

B. Grounds for Dismissal.

The grounds for the dismissal of Black from the DCI, based upon Zeeb=s letters and Gortmaker=s letter, are Black=s violation of ARSD 55:10:07:04(26) and DCI policies 7.0101 and 7.0103. The facts relative to this type of appeal necessarily apply to both of the issues herein. Consequently, the arguments, both factual and legal, are applicable to both issues and cannot easily be separated, but Black will attempt to do so. To the extent possible Black will attempt to refrain from repetition of essential facts and argument.

1. ARSD 55:10:07:04(26).

ARSD 55:10:07:04(26) provides in pertinent part that an employee with the DCI

may be dismissed, for conduct within or without the scope of his employment, for just cause, where the employee engaged

... in conduct, either prior to or during employment with the state that reflects unfavorably on the state, destroys confidence in the operation of the state services, or adversely affects the public trust in the state ...

Just cause is a legal determination to be made by the Courts and is fully reviewable on appeal as indicated above. In order to show that the termination of Black=s employment was for just cause, DCI must first show that there was misconduct. Hollander, 2000 S.D. at 159, &21. Further, there must be some causal nexus between the alleged misconduct by Black and his work performance. Wendell v. State Dept. Of Transportation, 1998 S.D. 130, &8, 587 N.W.2d. 595.

In this case the DCI relied upon Black=s alleged violation of the above administrative rule. Consequently, it is incumbent upon DCI to show that the actions and conduct of Black were such that it reflected unfavorably on the state, destroyed confidence in the operation of the state services, or adversely affected the public trust in the state. It is important to note from a plain and simple reading of the rule that the proof from a factual proof standpoint requires that DCI show something more than that the conduct offend an administrative officer of the state, such as Gortmaker. There must be facts produced by way of witnesses that show Black=s alleged misconduct resulted in the consequences to the state, not just DCI, as defined by the administrative rule. DCI did not call any witnesses who could testify or provide any evidence that Black=s conduct reflected unfavorably on the state, destroyed confidence in the operation of the services provided by the state, or adversely affected the public trust in the state. DCI produced

four of its administrative personnel to testify against Black, but, again, the standard is not whether Black offended his superiors, but whether the evidence shows that Black=s conduct affected the Astate@ and those persons or entities who make up the state. No witnesses were called by DCI to show that any person, group, agency, or other entity was offended by Black=s actions or that his actions reflected unfavorably on the state, destroyed confidence in the state operations, or adversely affected the public trust. Black=s superiors accused him of these things, but, again, under the requirements of the administrative rule at issue here, they are not the determinative factor. The best evidence of Black=s violation of the above administrative rule is from parties independent of the DCI administration who would testify that they were adversely affected by Black=s conduct as provided by this administrative rule. DCI simply did not produce facts that would support this contention. Black, on the other hand, produced four sitting sheriffs and his partner who was still employed by the DCI to show that his actions had not effected his ability to perform his work. Moreover, Black=s witnesses testified and produced evidence that Black=s relationship with other law enforcement agencies was solid, nothing that he did either on duty or off duty reflected unfavorably on the state or destroyed confidence in the operation of the state services or adversely affected the public trust in the state. The failure of the DCI to produce independent witnesses on this issue is fatal to their case from a burden of proof standpoint.

Additionally, DCI was highly critical of Black and his alleged Amisgivings@, but the entire time that he was allegedly Aunable to control is emotions@ he was still charged

with training new DCI agents, supervising other DCI agents and investigations, and interacting with other law enforcement agencies. If Black=s conduct were as horrific as DCI portrayed at the hearing before the Commission, certainly some action would have been taken to remedy the problem. No such action occurred, because DCI was not concerned about Black and his behavior. Moreover, DCI failed to produce any evidence from any mental health professional that indicated in any respect that Black was emotionally unstable or unable to control himself either on or off duty. Consequently, the DCI failed to meet its burden under this administrative rule and did not show just cause to believe that Black violated the aforesaid administrative rule.

Furthermore, in order to meet the criteria of this administrative rule, DCI relied largely on old disciplinary matters to support its current actions against Black. Black=s evaluations, however, clearly show that DCI=s reliance on same to support Black=s termination are grossly misplaced. At the Commission hearing DCI referenced comments made in evaluations from 2006, 2007 and 2008. The most obvious problem with DCI relying upon these evaluations is that in 2009, Black was awarded the first ever DSA. CH., pp. 27, 241-242, 244-249; Exh. H. If there were any support for the termination of Black=s employment in any evaluation prior to 2009, then it would certainly be extinguished by the DCI=s actions of recognizing Black as a superior agent and employee and awarding him the above service award.

In order to put DCI=s specious use of the evaluation reports in perspective, it is necessary to view the evaluation reports in their entirety. The evaluation reports contain on the first page of each report a section entitled ADefinition of Performance Ratings@

(Ratings) which defines the various rating categories as follows:

O - Outstanding. Performance is exceptional in all areas.

E - Exceeds Expectations. Results clearly exceed most position requirements. Performance is of high quality and is achieved on a consistent basis.

M - Meets Expectations. Competent and dependable level of performance. Meets performance standards of the job.

B - Below Expectations. Performance is deficient in certain areas. Improvement is necessary.

U - Unsatisfactory. Results are generally unacceptable and require immediate improvement. No merit increase, or promotion should be granted to individuals with this rating.

NR - Not Rated. Category does not apply.

Exh. H. The Ratings portion of the evaluation reports further indicates that a rating of either O or U requires a comment of the supervisor. In the eight (8) plus years Black worked for DCI and in seventeen (17) performance evaluations Black had he never received a U rating in any category and only received five B ratings. The first B rating was on his 1-1-08 to 6-30-08 evaluation report in the ADecision Making/Risks@ category and was solely as a result of the Berbos matter. Black was disciplined for his actions in regard to the Berbos matter and his ratings in the ADecision Making/Risk@ category were either an E or M for all time periods thereafter. The next two B ratings were on his 7-1-08 to 12-31-08 evaluation report and his 1-1-09 to 6-30-09 evaluation report, both B ratings were in the ACase activity@ category, and the rating was specifically in relation to LEINs (Law Enforcement Intelligence Network). It is interesting to note that in the 1-1-09 to 6-30-09 evaluation Mark received two O ratings; one for the Distinguished Service Award and the other for his attendance of the National Forensic Academy for 10

weeks and his commitment to service. Exh. H. The next B rating was on his 7-1-09 to 12-31-09 evaluation report and, again, was in the ACASE activity@ category with regard to his overall case numbers and his inactive cases. The final B rating was on his 12-31-09 to 6-30-10 evaluation report and, once again, was in the ACASE activity@ report with regard to his LEINs. After the final B rating, Black never again received a B rating in any category on his performance evaluations. In order to fully understand the paltry nature of the negative remarks and ratings Black received it is important to compare that portion of the evaluation reports with the rest of same. Specifically, during all evaluation periods, Black received 2 O ratings for outstanding work; 65 E ratings for his work exceeding the expectations of DCI; and 104 M ratings for his work meeting DCI expectations. In short, out of a possible 176 rating marks, Black received 5 poor marks which equates to approximately 3 percent. It was a travesty for the Commission and the DCI to center in on a few old evaluation comments and ratings as well as stale and remote disciplinary matters in order to support a rash decision to terminate Black=s employment.

2. DCI Policy 7.0101.

DCI policy number 7.0101 defines conduct unbecoming as follows:

Unbecoming Conduct - Agents shall conduct themselves on and off duty in a manner that reflects favorably on the Division. Conduct unbecoming to an agent means conduct contrary to professional standards that shows an unfitness to discharge duties or conduct which adversely affects morale or efficiency of the Division or diminished public confidence.

Under this policy conduct unbecoming must be shown by one of two ways.

A. The First Means of Showing Conduct Unbecoming.

First, one must have engaged in conduct contrary to professional standards AND such unprofessional conduct must be directly related to AND show an unfitness to discharge duties. Consequently, one can engage in unprofessional conduct, but if that conduct does not show unfitness to discharge duties, it is not unbecoming conduct under the policy and not grounds to terminate employment.

Conduct unbecoming an officer is the most evasive, overly-broad, and wide reaching reason for disciplinary action against a law enforcement officer that exists today. It is the proverbial catchall for disciplinary action or termination of employment. Conduct unbecoming is largely undefined by the administrative rules and is purely a subjective standard that can be applied in a variety of ways by a variety of personnel. The definition of conduct unbecoming varies from jurisdiction to jurisdiction, state to state, and agency to agency. See, Green v. City of Sioux Falls, 2000 S.D. 33, 607 N.W.2d. 43. The policy provides that conduct unbecoming is that conduct which is contrary to professional standards, or shows unfitness for duty, or that adversely affects morale or efficiency of an agency or diminishes the public confidence. The problem with this language is that in any given case one public official may determine that certain conduct falls within the purview of the above language, another official may conclude the conduct is egregious, yet another may conclude none of the given conduct falls within the meaning of the rule, but yet a fourth official may simply believe that a given case some conduct is unbecoming but other conduct is not. Clearly, this was true with the case at bar because the DCI determined that Black engaged in offending conduct, but the independent witnesses called by Black did not agree with

their conclusions.

The Green and Hollander cases are instructive on this issue as well. In Green the officer engaged in offensive and potentially dangerous conduct and risked the safety of the public by his actions and used his position as a police officer to intimidate the public in his patrol area. Id., at 33. Green engaged in out right hostile actions while on duty and risked the safety of a prisoner and his co-workers by doing so. Id., at 33. Green was also the subject of an internal police investigation based upon his actions. Id., at 33. The finding that Green engaged in conduct unbecoming was upheld by the courts. Green, 2000 S.D. at 33. In Hollander the alleged conduct attributable to the officer was intentional mistreatment of a victim while on duty, inappropriately signing another officer=s name to a ticket, and the Sheriff concluding that he simply could not trust the officer any longer based upon his on duty actions. Both Green and Hollander dealt with actions which were much more egregious than Black and actions that were directly related to their work performance.

Black further argues that in order to show a violation of the first category of this policy, DCI was required to produce an independent expert witness who is qualified in the professional standards for law enforcement officers to establish the standard of conduct which is to be applicable to Black. This argument is directly related to matters of proof and is not subject to any specific legal definition. There were no professional standards provided nor identified by independent witnesses before the Commission. Under these circumstances, the Commission did not have the evidence it needed to fully and fairly adjudicate the claims against Black. The only evidence produced by DCI as to

any standards of performance was the four administrative staff from DCI. Since DCI had the burden to produce evidence and witnesses to support their claims, it was incumbent upon them to bring forth and identify the professional standards to which Black was to adhere. This did not happen and as a consequence DCI clearly failed to meet its burden of proof.

Further, the professional standard cannot be established by the administration for DCI because their testimony is self-serving and is biased since they are the ones who terminated Black=s employment. Self-serving testimony is not always relied upon nor found to be credible and has been rejected by the Courts on occasion. See, Estate of Regennitter, 1999 S.D. 26, &16, 589 N.W.2d. 920; Muenster v. Muenster, 2009 S.D. 23, &35, 764 N.W.2d. 712; Martinson v. Holso, 424 N.W.2d. 664 (SD 1988). Moreover, the evaluations are inconsistent with the conclusions reached by the DCI administration which brings into question their ability to independently establish the requisite professional standard. Consequently, without establishing the appropriate standard of conduct by an independent expert witness, DCI cannot prevail on this issue and no termination can be based upon a violation of this policy.

Assuming, for the sake of argument, that the DCI could show unprofessional conduct on the part of Black, the evidence was clear and uncontradicted that Black was fit for duty and his actions and conduct associated with Patty and his divorce and post-divorce proceedings had absolutely no affect on his ability to perform his work. Quite the contrary, in fact, as the testimony of the four sitting sheriffs, his partner, and the evaluations rendered by his superiors all support Black=s fitness for duty.

B. The Second Means of Showing Conduct Unbecoming.

The second means of showing a violation of the unbecoming conduct policy requires that one must have engaged in conduct which adversely affects the morale or efficiency of the Division or diminishes public confidence. In order to prove this policy violation, DCI was required to produce witnesses who could testify that the morale or efficiency of other officers or special agents with the DCI who worked with Black was adversely affected. Again, as with the administrative rule, DCI did not call any witnesses to testify that their morale or efficiency or the morale or efficiency of the DCI employees was affected in any respect by Black=s conduct. Moreover, the DCI had the burden of producing evidence or witnesses who could show that the public confidence was diminished by Black=s actions. DCI failed in all respects to meet this burden and make the required showing to establish a violation of this policy. As with the administrative rule, the only witnesses who testified for the DCI were the administrative officers for DCI who had investigated and made the decision to dismiss Black. These administrative officials were not independent of the disciplinary matter and are not the category of persons who make up the Division, nor are they the general public as contemplated by this policy. The general public would be the citizens in Black=s work area and/or the law enforcement community with whom he worked. None of these types of witnesses were produced by DCI, but Black produced favorable and credible witnesses in this regard. The evidence from Black=s witnesses did not in any respect show that Black=s actions had adversely affected the morale or efficiency of the Division or diminished public confidence. Quite the contrary, Black=s witnesses proved that Black performed his work

in a most professional fashion while dealing with a complete emotional basket-case of an ex-wife.

3. DCI Policy 7.0103.

DCI policy 7.0103 addresses officer integrity and states as follows:

Integrity - Agents shall be truthful in all matters relating to the operation of the Division. Any conduct act, neglect, error or omission regarding these matters may subject an agent to disciplinary action.

The alleged violation of the integrity policy was never made by Zeeb and was never a part of the disciplinary action against Black until Gortmaker received the case on appeal. Consequently, Black did not have an opportunity to address the integrity issue until his employment had been terminated and he had been part way through the administrative appeal process. The new allegation was not work related and did not have anything to do with the operation of the division as contemplated by the above policy. The sole basis for the integrity allegation is that on June 28, 2013, almost 8 months prior to Black=s dismissal, Gortmaker asked Black if he had a sexual relationship with his now current wife, Lynda. Black denied the allegation as it was put to him by Gortmaker. Gortmaker then takes a comment made by Black in a text message to Patty during a heated and emotional exchange out of context and cites it in his letter to Black as the sole basis for Black=s violation of this policy. CH., pp. 182-183, 277. The cited exchange is Black expressing his frustrations with the divorce proceedings and capitulating an issue to Patty telling her that he will give her what she wants. The exchange and Black=s comments have nothing to do with the operation of the DCI. After the above, Gortmaker bootstraps the exchange and his conversation with Black into a matter that is related to the operation

of the DCI. Gortmaker=s actions in this regard are incredulous. Gortmaker=s personal belief, feelings or opinions have absolutely nothing to do with the operation of the DCI, but are merely, and only, a matter of his personal preferences.

Clearly, in light of the above, the Commission made an error in its findings and conclusions on this issue and its decision should be reversed.

C. Erroneous Findings of Fact.

The findings by the Commission contain matters which are not supported by the facts solicited at the hearing and which are clearly erroneous. Specifically, the Commission findings repeatedly reference matters alleged in the petition for protection order and the accompanying documents. Black responded to, explained and contradicted those allegations in detail, not only in his testimony at the hearing, but specifically in Exhibit #4. This Court must make a detailed examination of Exhibit #4 in order to obtain a firm grasp of the events surrounding Black=s life and what he was dealing with from Patty and her attorney. Moreover, it is imperative for this Court to realize that DCI acted on the allegations in the protection order matter without a complete investigation of same and before the presiding court in the protection order matter could resolve the accusations against Black. Such action by DCI was fatal to its cause against Black in this matter.

Commission Finding number 6 indicates that the boat that was defaced by Black was in Patty=s possession. This is not true. The boat was in Black=s possession with Patty=s consent and after the painting incident the boat was returned to Black=s possession. CH., pp. 259. Consequently, this finding is simply wrong. Further, Findings numbered 7 and 8 indicate that Black admitted to allegations made against him

in the protection order proceeding and that DCI was concerned Black committed a crime of domestic violence. These findings are untrue. The letter referenced in these findings was made in an attempt by Black to reconcile with Patty, was not intended as an admission of wrong doing, and did not contain any admissions of wrong doing as represented by the DCI. Moreover, Judge Dobberpuhl specifically found that Black had not engaged in any actions which would constitute domestic violence nor spousal abuse as concluded by DCI. See Exh. I. Consequently, the Commission could not have made a finding that was inconsistent with or contrary to the very same fact issue that was already determined by a higher court of competent jurisdiction.

Commission Findings numbered 9-17 address past disciplinary matters which had already been resolved. Moreover, these findings are inconsistent with the evaluation evidence which directly contradict same. Specifically, Black=s evaluations were excellent and routinely showed that he met or exceeded the DCI expectations and work performance parameters set for him. The Commission ignored the evaluations and relied upon old disciplinary matters that had been resolved and which had no bearing on the protection order matter which was the sole and exclusive basis for terminating Black=s employment. Moreover, there is no evidence in the record that shows in any respect that Black was regularly counseled for misconduct or other work performance related matters. The evidence relied upon relative to the publications on the internet of certain materials and the protection order pleadings were beyond Black=s control and instigated and carried out by someone other than Black.

Commission Findings numbered 18-24 are completely inconsistent with the

record. More particularly, Attorney General Jackley and Director Gortmaker made it clear to the DCI administration that they were simply tired of hearing Black=s name. The reason they were hearing Black=s name was because Patty and her representatives were repeatedly contacting either Attorney General Jackley or DCI administration directly and complaining about Black. The motivation for these contacts was not work related and had nothing to do with Black=s actions, but were solely related to the divorce and post-divorce proceedings with Patty and were instigated by Patty or someone on her behalf. Moreover, Patty and her cohorts do not under any circumstances constitute the general public, the division, the DCI, nor the state as those terms and phrases are used in the administrative rule and the DCI policies. The meetings of the DCI administration referenced in the findings had nothing to do with Black=s work performance, but everything to do with the complaints from Patty and her entourage. Further, no agent, law enforcement officer, member of the public or other independent witness was called by DCI to support these findings. The only DCI staff complaining about Black was the four administrative officers and Attorney General Jackley and the reasons were completely unrelated to work or Black=s integrity or other character traits, but were solely associated to Patty and those acting on her behalf. The findings referencing the basis for the termination of Black=s employment were inconsistent with the evidence produced at trial, particularly the letters sent by Zeeb and Gortmaker, as these letters clearly indicated that the sole and exclusive basis for Black=s dismissal was the protection order proceeding. Gortmaker added the issue of integrity regarding the alleged lie attributed to

Black, but that issue was wholly inconsistent with the truth and with the facts presented at the hearing. However, the findings clearly indicate that the DCI made its decision to dismiss Black based upon prior, resolved disciplinary matters and upon matters that were clearly personal in nature which had no impact whatsoever on Black=s ability to perform his work.

Commission Finding number 49 indicates that Black identified himself as a DCI agent on the KELO News blog. This is not true. Black made the comment after work hours and KELO made the connection with DCI and identified Black as a DCI agent. CH., pp. 262-263, 287. Moreover, the source of the complaint to Attorney General Jackley was not a member of the public, but, according to Even, was reportedly attributable to an adversary of Black=s and a party close to Patty. CH., p. 263.

Commission Findings numbered 69-72 are completely contrary to the testimony from the four sitting sheriffs and Black=s partner, Special Agent Lunzman. All of these witnesses testified favorably for Black in all respects. Further, these witnesses were the only witnesses to provide any testimony about the views and attitudes of Black outside of the four DCI administrative staff that testified at the hearing. DCI provided absolutely no evidence of other agencies, persons or the general public having any concern about Black. Moreover, these findings are completely inconsistent and contrary to Black=s evaluations which were made by the very same DCI administrators who testified against Black. Consequently, the testimony of the DCI administration in this matter is contradicted by their own actions and conduct relative to the exceptional evaluations they provided to

Black. If Black truly were a problem as described by the findings and as alleged by DCI, then the evaluations certainly should have reflected poorer marks.

In light of the above factual arguments, it is clear that the Commission's findings of fact are clearly erroneous, it abused its discretion in this matter, and the Commission decision should be reversed.

ISSUE 2: Whether the South Dakota Division of Criminal Investigation complied with the governing law, rules and regulations when it terminated Black's employment.

The law required the DCI and the Commission to follow the governing administrative rules and procedures when seeking to discipline Black. Consequently, the law governing employment relationships in South Dakota is relevant herein. South Dakota is an at-will employment state and an employer can terminate the employment of an employee with or without cause unless the employer has taken steps to relinquish the at-will relationship created by statute. Hollander, 2000 S.D. 159, at ¶13. An employer can relinquish the at-will relationship with an employee if it creates a for cause only termination provision by a personnel manual or by enactment of ordinances or policies to this effect. Hollander, 2000 S.D. 159, at ¶14. If an employer creates a for cause only termination policy, then the employee subject to said policy has a significant and protected property interest in his employment. Hollander, 2000 S.D. 159, at ¶16. DCI has relinquished any at-will relationship it may have had with Black in this case by virtue of the administrative rules enacted by the State of South Dakota. See, ARSD 55:10:07:04. Consequently, Black had a significant and protected property interest in his employment and was entitled to a due process hearing before his employment with DCI

was terminated.

The due process hearing Black was entitled to must have been fair and impartial. The South Dakota Supreme Court has held that A... [f]undamentally, due process requires notice and an opportunity to be heard ... [and that] ... [t]hese basic guarantees must be granted at a meaningful time and in a meaningful manner ...@ (citations omitted).

Hollander, 2000 S.D. 159, at ¶17. Further, Black had a right to the due process hearing required by the administrative rules before he is deprived of his employment which is a significant and protected property interest. Black did not receive the due process hearing that complies with the settled law in South Dakota.

The first letter dated February 13, 2014, cited the protection order matter as the sole and exclusive grounds for the suspension of Black=s employment, but also assured Black that no action would be taken against him until the protection order matter was resolved. This letter proved to be false and misleading, as the next letter received by Black was the February 21, 2014, letter notifying him that his employment would be terminated based solely and exclusively upon the protection order matter, even though the protection order hearing had not yet been held. The DCI administration testified that they had considered prior disciplinary actions and measures regarding Black and relied upon those matters in support of their decision to terminate Black=s employment. The problem with this assertion is that Black was not notified of the fact that those prior disciplinary actions would be a basis for the decision on his employment in 2014. Black had suffered the discipline meted out to him in the past and had successfully completed any and all work improvement plans implemented against him. Since DCI was

resurrecting old disciplinary matters, Black was now paying for those sins once again. Both letters from Zeeb used and relied upon only the protection order matter to wage the employment war against Black. However, Black was exonerated of all of the wrong doing ascribed to him by Patty in the falsified protection order proceedings by the Court=s decision in the protection order matter dated March 21, 2014. Unfortunately, DCI did not wait for Judge Dobberpuhl to render his decision on the facts that they were relying upon, but acted without solid evidence and in contradiction to the evidence that they did have from the NDBCI. This anxiousness to jump the gun and get rid of Black as per Attorney General Jackley and Gortmaker=s direction caused Black to be deprived of a fair due process hearing, or a hearing that was meaningful in nature.

Further DCI error on this issue appears when on March 27, 2014, after Black began the administrative appeal process, Gortmaker asserts an additional ground for Black=s termination. Gortmaker relied on an alleged lie by Black relative to Black=s personal life and his relationship with his current wife, Lynda. Gortmaker asserted that on June 28, 2013, he had asked Black if he was having a sexual affair with Lynda. Black responded that he was not; however, Gortmaker relied upon one personal text message, taken out of context, between emotionally driven parties in a hostile divorce to show that Black had previously admitted to the adulterous conduct. Based upon this, Gortmaker asserts that Black engaged in conduct that violated the DCI policy on integrity. Black, however, did not have an adequate opportunity to fully address this issue prior to Gortmaker making his decision. Moreover, Gortmaker=s basis for the dismissal of Black in this regard was not authorized by any policy or administrative rule. Consequently,

Black was deprived of a meaningful due process hearing as required by law.

In addition, the record clearly shows that Patty and parties on her behalf were contacting Gortmaker and Attorney General Jackley to complain about Black. These complaints, however, were not about his work, but about old issues and about divorce and post-divorce related matters. Gortmaker and Attorney General Jackley concluded that they were tired of hearing Black=s name and he needed to be dismissed.

Consequently, the determination to dismiss Black was made before any evidence existed to justify the dismissal. In short, the DCI got the cart before the horse and now is attempting to justify its actions by hind sight. After Gortmaker and Jackley met, then Zeeb, Satterlee and Even met with Gortmaker and they decide to terminate Black=s employment. This conclusion, as with Attorney General Jackley=s conclusion, occurs before any facts exist to terminate Black=s employment. Given the status of the process, Black had no chance to prevail in any hearing before DCI administration nor appeal before the Commission. As a result of the above, Black did not receive a fair and impartial hearing during the administrative appeal process and did not receive the due process hearing he was entitled to in a meaningful time and meaningful manner.

Moreover, the Commission is not well versed in the law governing dismissal actions and relied upon the advice of Administrative Hearing Office Thomas Lee (Lee). Lee clearly failed to advise the Commission of the applicable law and the manner in which the administrative rule and the policies should have been applied to Black=s case. Further, given the nature of the Commission Findings and Conclusions, it is clear that the Commission did not understand the burden of proof in this matter, the factual

requirements to sustain the dismissal, nor the correct manner in which to apply the governing law, rules and regulations. In short, absent the proper guidance and direction as to how to apply the law and the proper facts necessary to meet the burden of proof in this matter, the Commission could not have been functioning in a fair and impartial manner required by law and the due process hearing for Black was legally tainted and invalid.

CONCLUSION

Black prays that the Commission and Circuit Court decisions be reversed and he be awarded all benefits he lost as a result of the termination of his employment..

REQUEST FOR ORAL ARGUMENT

Black hereby requests oral argument.

Dated this 1st day of June, 2016.

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CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellant hereby certifies that the Appellant=s Brief complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Appellant=s Brief contains 49,942 characters and 9623 words. Further, the undersigned relied upon the word count of the word processing system used

to prepare the Appellant=s Brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the Appellant=s Brief on the attorney for the Appellee at his address as follows: Robert B. Anderson, May, Adam, Gerdes & Thompson, P.O. Box 160, Pierre, SD 57501, rba@magt.com by e-mail and by depositing same in the United States first class mail, postage prepaid, on the 1st day of June, 2016, at Lake Andes, South Dakota.

Further, the undersigned hereby certifies that the original and two copies of the above and foregoing Appellant=s Brief were mailed to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070 by depositing same in the United States first class mail, postage prepaid, on the 1st day of June, 2016. Further, one copy of the Appellant=s Brief was e-mailed to the aforesaid Clerk of the Supreme Court on the 1st day of June, 2016, at her e-mail address as follows: SCClerkBriefs@ujs.state.sd.us.

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APPX. 1

CIVIL SERVICE COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE GRIEVANCE OF:)
Mark Black)
v.) MEMORANDUM DECISION
Division of Criminal Investigation)

Mark Black (Grievant) was hired in 2005 by the South Dakota Division of Criminal Investigation. On February 21, 2014, Special Agent Black was notified by letter that disciplinary action was proposed. In a letter dated March 14, 2014, in response to a request to reconsider a proposal for termination, director Brian K. Zeeb acknowledged review of specified information, and developed a timeline of events beginning in September, 2006 and culminating in an evaluation dated January 29, 2014, indicating a history of action taken which adversely affected the Division of Criminal Investigation. In a February 21, 2014 letter Special Agent Mark Black was terminated. That disciplinary action was appealed, and the appeal was heard by the South Dakota Civil Service Commission on September 16, 2014.

The Civil Service Commission met in Room 412 at the South Dakota Capitol Building on September 16, 2014 for purposes of a contested hearing and consideration of Grievant's appeal. Commission members Ingemunsen, Greff, Garnos, Grandpre and Mosteller were in attendance, with Barbara Christianson presiding.

The issue before the Civil Service Commission was whether just cause existed to terminate the employment of Grievant. The South Dakota Department of Criminal Investigation was represented by attorney Robert B. Anderson of Pierre. The Grievant was represented by attorney Tim Whalen of Lake Andes.

The Commission heard testimony that Grievant had been a valued asset of the Department of Criminal Investigation and worked well with other agencies. He had worked skillfully to assist prosecutors and support local law enforcement. There were many positive aspects of his employment, but Grievant displayed frustration, anger and vindictiveness on repeated occasions that caused alarm in and outside the agency. Whether it was marking defamatory messages on a boat parked outside his residence, relationships with other individuals, censure of decisions made by co-workers in a very public manner, or other expressions of frustration and anger, it became clear to his supervisors that Grievant could not or would not effectively manage his anger. Work improvement plans, warnings and administrative measures were not effective in curtailing the displays of unhappiness and lack of objectivity. Grievant described himself as a passionate and

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emotional guy. He testified that when he placed the message on the boat, he "knew that it was not smart", yet he did it anyway. It was this recurring loss of control that led the agency to terminate.

The Civil Service Commission cannot put itself in the position of managers or supervisors, but is obligated to determine if just cause existed for disciplinary action under these circumstances. The Commission finds that the agency had just cause to terminate the Grievant in this matter.

Counsel for the South Dakota Department of Criminal Investigation is requested to serve proposed findings of fact and conclusions of law consistent with this memorandum decision upon the hearing officer and Grievant within ten days of receipt of this decision. If Grievant wishes to submit his own proposed finding of fact and conclusions of law and any objection to those produced by the South Dakota Department of Criminal Investigation's counsel, he shall do so within 15 days from receipt of this decision. The Commission will thereafter adopt findings and conclusions and an order will be entered, with notice of entry given as provided by law.

Dated this 12th day of April, 2015.

SOUTH DAKOTA CIVIL SERVICE
COMMISSION

BY Barbara Christianson
Barbara Christianson
Acting Chair

APPX. 2

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CIVIL SERVICE COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE GRIEVANCE OF: MARK BLACK V. DIVISION OF CRIMINAL INVESTIGATION	FINDINGS OF FACT AND CONCLUSIONS OF LAW
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The hearing in this appeal was held on September 16, 2014, in room 412 of the South Dakota Capitol Building in Pierre, SD, before the Civil Service Commission of the State of South Dakota. The hearing was held before a quorum of the Civil Service Commission with Commission members Ingemunsen with Chairman Barbara Christianse were experienced in law enforcement was Thomas Lee.

Mosteller in attendance and
ssion members in attendance
L § 3-6D-1, Hearing officer

The Appellant, Mark Black appeared in person and his attorney Timothy Whalen of Lake Andes, SD. The Division of Criminal Investigation appeared through its director Bryan Gortmaker, and through its attorney Robert B. Anderson, both of Pierre, SD.

The Civil Service Commission heard all witnesses testify and observed all witnesses in person other than the following witnesses who testified telephonically, by agreement of the parties and permission of the Commission: Dave Ackerman, Mark Milbrandt, Barry Hillstead, Dave Lunzman and Dale Elsen. The Commissioners in attendance were able to observe the witnesses who testified personally and make their judgments as to the reliability and credibility of the testimony presented by all witnesses. All of the Commissioners present heard all of the

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testimony and reviewed all of the exhibits and other portions of the record. After considering the record in its entirety, the testimony of the witnesses, the evidence produced, and the argument of the parties and their counsel, and good cause appearing therefore, and the Commission having previously voted to affirm the termination of Mark Black by his employer, the Division of Criminal Investigation, and a written memorandum decision dated April 12, 2015, having previously been entered, which Memorandum Decision is attached hereto, labeled as Exhibit A and incorporated fully herein by reference, now the Civil Service Commission of the State of South Dakota does hereby make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Mark Black (Black) was hired as an agent with the Division of Criminal Investigation (DCI) in 2005. When initially hired Brian Zeeb (Zeeb) was his immediate supervisor in a region which covered northeastern South Dakota.
2. On February 13, 2014, Zeeb became aware that a protection order had been served on Black that among other things required Black to surrender his duty weapons. As a result, Black was placed on administrative leave.
3. The DCI placed Black on administrative leave because he was required to carry a firearm in the course of his employment and being unable to do so could no longer serve as an agent.
4. The Petition for Protection Order was brought against Black by his then ex-wife Patricia.
5. Black and Patricia had been involved in a lengthy, unfriendly divorce that had been finalized in August, 2013.

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6. In June, 2013, it came to the attention of the DCI that Black had spray painted on a boat which was marital property and in the possession of Patricia. He spray painted on the boat in large letters "Patty Wins" at a time when the boat was parked in or near a house inhabited by Patricia.

7. Attached to the petition for protective order was a letter written by Black to Patricia which acknowledged prior violent behavior on his part and an inability to control his temper.

8. DCI was concerned that Black may have committed a crime of domestic violence based on the information they reviewed after obtaining a copy of the protection order petition.

9. Prior to February 13, 2014, the DCI had concerns about Black's behavior, his tendency to make decisions based on emotion rather than judgment, and his periodic loss of control. On at least six prior written personnel evaluations, Black had been criticized for making decisions based on emotion and not judgment.

10. At one time Black sent an email to everyone in the DCI as well as the Attorney General criticizing a prosecuting attorney with the Attorney General's office and submitted his resignation (which was not accepted). This act was the result of an emotional impulse on the part of Black.

11. Black's written personnel evaluation done in July, 2013, noted that: "Mark was placed on WIP (work improvement plan) based upon a documented history of his difficulty with stressful/emotional reactions to situations. Mark needs to keep his head down and make sound decisions at all time."

12. Black made very negative and ill considered and potentially damaging comments which were recorded on a tape recording that he had been making during the course of

investigation done in the Brown County Courthouse in Aberdeen. Portions of the tape eventually made it on to the internet through others. The tape was potentially damaging to the confidence and trust of the public and other law enforcement officials.

13. Black was in many ways a skilled agent and valuable to the DCI when he was able to control his emotions and make good judgments.

14. Despite being counseled periodically from 2006 onward Black continued to make similar mistakes and allow his emotion to control his behavior and performance.

15. The DCI views good judgment as an important characteristic of an agent because their agents must deal with complex situations involving victims, suspects, other law enforcement agencies and the public.

16. A paragraph from the hand written letter Black wrote to Patricia was obtained by someone and placed on the internet for the public to review. The letter was damaging to Black's credibility and his continuing ability to serve as an agent.

17. During the course of an investigation Zeeb conducted in response to the filing of the protection order and the information he gathered during the course of that investigation he became justifiably concerned that Black's prior behavior had affected or would affect his ability to work as an agent and testify effectively in the future.

18. Because of these concerns, Zeeb discussed Black's situation with Black's immediate supervisor Jason Even (Even) and Assistant Director, Dan Satterlee (Satterlee) as well as DCI Director Bryan Gortmaker (Gortmaker).

19. Zeeb thought discipline was necessary based on the information he had acquired and Black's disciplinary and service history with the DCI.

20. One concern related to the fact that DCI agents are often asked to investigate other law enforcement agencies or officers across the State and the fact that Black had admitted conduct that may have been criminal in nature (regardless of whether it resulted in a conviction) would affect his ability to conduct such investigations.

21. Some of these investigations relate to charges of domestic abuse against other officers and based on the information now on the internet and in other places, Zeeb and the DCI justifiably felt Black's ability to conduct such investigation was compromised.

22. The conversations Zeeb had with the other identified DCI officials caused them to be concerned about Black's ability to perform as a DCI agent.

23. It was determined that Black should be terminated and the facts required such action, Zeeb personally agreed.

24. After lengthy discussion, Gortmaker, Satterlee, Zeeb and Even all agreed that discipline was necessary and that termination should be the discipline imposed.

25. As a result of their decision, DCI through Zeeb wrote a letter dated February 21, 2014, giving Black notice of intent to terminate his employment with DCI. The letter explained the reasons in detail.

26. The basis for discipline described in the notice of intent to terminate letter included allegations contained in Patricia's application for protection order involving acts of physical violence and Black's inability to control his temper, as well as Black's own hand written letter acknowledging many of these allegations all of which the DCI was unaware of prior to February 13, 2014.

27. In addition, the letter stated that Black had committed what appears to have been the crime of simple assault (domestic violence) whether he was charged or not. The DCI was likewise unaware of this prior to February 13, 2014.

28. Black's conduct which was the basis for the notice of intent to terminate letter dated February 21, 2014, was outside the scope of his employment but administrative rules of the State of South Dakota specifically permit discipline for such acts.

29. The acts complained of by Black reflected unfavorably by the State, tended to destroy confidence in the operation of state services or adversely affected the public trust particularly since these allegations became known to the public through publication on the internet.

30. The facts described in the notice of intent to terminate letter also constitute a violation of DCI policy 7.0101 regarding how agents must conduct themselves both on and off duty. Black's conduct as described in the notice of intent to terminate letter exhibited conduct contrary to professional standards and unfitness to discharge duties as well as conduct which adversely affected morale or efficiency of the DCI and diminish public confidence.

31. Zeeb and others correctly felt that through the history of the documentation Black had not represented the DCI in a positive way and therefore violated the DCI policy noted above.

32. Given Black's behavior and the DCI's legitimate concern about his exercise of judgment it was too great of risk to maintain Black as an active agent.

33. After Black exercised his right to reply in writing to the notice of intent to terminate letter Zeeb and DCI conducted additional investigation into Black's statements to determine whether their decision to terminate was justified. This investigation included the review of documents at the Brown County Courthouse, review of audio recordings, review of

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voluminous text messages and having the North Dakota Bureau of Criminal Investigation conduct a separate investigation.

34. As a result of Black's response to the notice of intent to terminate letter and the additional investigation conducted by DCI, Zeeb provided a letter dated March 14, 2014, to Black outlining in detail the factual basis for maintaining the DCI decision to discipline Black and in fact terminate him. Among other things this additional investigation resulted in the DCI stating additional factual reasons for the discipline against Black, all of which are outlined in hearing exhibit 5.

35. Black's continued behavior throughout his employment with the DCI showed a lack of ability to deal with stressful situations and an inability to keep his emotional reactions in control.

36. Black displayed frustration, anger and vindictiveness on repeated occasions that caused alarm in and outside the DCI.

37. Black over time proved that he could not or would not effectively manage his anger and emotion.

38. DCI repeatedly notified Black of their concerns over the behavior identified in the proceeding finding and attempted to work with him to improve his conduct. Those efforts are described in hearing exhibit 5.

39. Of the examples described in hearing exhibit 5 beginning on page 2 continuing through the bottom of page 3 were proven by a preponderance of evidence on the record and represent separate basis for Black's termination. Hearing exhibit 5 is attached hereto, labeled as Exhibit B and incorporated herein by reference.

40. Black's continued history of conduct and emotional behavior was a significant factor in his determination.

41. The fact that DCI had noted their concerns over Black's prior behavior on numerous occasions and attempted to assist him through evaluations and two work improvement plans was also a legitimate factor in DCI's decision to terminate Black.

42. Although Zeeb had been a personal friend of Black and had a long working relationship with him, he was justifiably convinced after the investigation and findings that Black needed to be terminated.

43. The evidence in the record shows that DCI made continuous efforts over a period of years to keep Black in the field as an agent and attempted to deal with his problems and improve his performance.

44. The tape recording which Black made in the Brown County Courthouse made its way onto the internet and did not show agent Black or the DCI in a positive light.

45. Black had difficulty during his career as a DCI agent in dealing with good and bad on an even level. His emotions often affected his judgment.

46. Black had been placed on one work improvement plan as a result of his spray painting the boat discussed above. DCI saw that as evidence of his inability to control his emotions and make bad decisions.

47. Black testified that when he spray painted the message on the boat he "knew that it was not smart". Yet, he did it anyway.

48. Black was criticized for how he handled a disagreement with a prosecuting attorney in sending negative comments to everyone in the DCI through an email. DCI

administration correctly determined that such criticism should be handled in a different way and in a more limited fashion.

49. Black received a one day suspension without pay for commenting on a Keloland Blog and identifying himself as a DCI agent in a manner that the DCI was concerned would be interpreted as an official comment on their behalf.

50. On June 28, 2013, Black had been placed on a 60 day work improvement plan by his immediate supervisor Even.

51. At that time that work improvement plan was imposed on Black, the DCI specifically relied on the tape recording that he had made and which found its way to the internet, the spray painting of the boat discussed above, and 15 other notations in his personnel file that addressed his communications ability with others and his emotional reactions in regard to relationships with others and the impact of that on his decision making.

52. One purpose of the work improvement plan in June, 2013, was to get the message across to Black that they didn't want any more of these type of events involving emotional reactions or poor judgment to occur. Shortly after the work improvement program was completed, Black was again disciplined for the blog comment identifying himself as a DCI agent.

53. During the course of events concerning Black which became public, various law enforcement officers and agencies contacted Even and asked him what was going on, why did this happen and the like.

54. There were articles concerning Black in the Aberdeen Newspaper and on the internet. They were affecting public knowledge and confidence.

55. Black explained the incident where he spray painted the boat as representing an impulsive reaction to his frustration with his divorce proceedings.

56. Black's response to the Keloland blog identifying himself as a DCI agent was noticed by the Attorney General's Office and brought to the attention of the DCI by that office.

57. The letter written by Black to Patricia during the course of their divorce which was ultimately placed on the internet by unidentified parties admitted to acts of violence in breaking and destroying personal property and physical contact between Black and Patricia.

58. By statute, the DCI is the law enforcement agency charged with the duty and obligation to assist other agencies including both local and state agencies, municipal police departments, county sheriffs and others engaged in law enforcement.

59. The role of the DCI is unique and law enforcement in South Dakota. As explained by assistant director Satterlee they "police the police".

60. When Black sent an email to all DCI employees state wide criticizing and blaming an assistant attorney general for the manner in which they prosecuted a case, Gortmaker intervened with then Attorney General Larry Long to save Black's job. Gortmaker correctly viewed it as an example of Black's emotions overcoming his reason and judgment.

61. The tape recording which ultimately made it to the internet and which involved Agent Black among others was in the eyes of Director Gortmaker very inappropriate and harmful to the DCI and its image.

62. Gortmaker was justifiably concerned about the incident where Black spray painted the boat because it also showed a continuation of Black's emotions overcoming his judgment.

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63. Gortmaker was justifiably concerned about Black's response on the Keloland news blog criticizing a mother who had posted remarks about a swat team exercise, and identifying himself therein as a DCI agent. He viewed that as a continuation of poor judgment on the part of Black.

64. Gortmaker and the DCI determined that Black's behavior over a period of time reflecting poor judgment and a tendency to react emotionally affected him, his credibility and his ability to carry out his duties as a DCI agent.

65. After the initial of intent to terminate letter dated February 21, 2014, and Black's response, the DCI conducted additional investigation which among other things revealed 540 pages of text messages many of which were sent by Black. Director Gortmaker reviewed all of those and he had never seen them prior to that time.

66. Gortmaker's review of the text messages confirmed his decision that Black should be terminated.

67. Among other things Black admitted to his wife in a text message that he would take the stand and admit to adultery when he had previously specifically denied such actions to Director Gortmaker in response to a specific and direct question.

68. Gortmaker made the determination that if Black would lie to his wife, Black would lie to him in the course of his duties and responsibilities. That has always been Gortmaker's rule in dealing with other employees of the DCI.

69. Throughout the course of his employment with DCI, Black had been furnished written personnel evaluations commenting on his need to improve his control of emotion, he was offered counseling, he was placed on two work improvement plans in an effort to improve his performance and save him as an agent.

70. Black's inability to control his emotional response to stressful events as set forth above negatively affected the confidence of others in him as an agent and in the DCI as well as their respective relationships with other law enforcement agencies and individuals.

71. Black's repeated behavior in permitting his emotions to overcome his better judgment and reasoning reflected unfavorably on the State and the DCI and destroyed confidence in the operation of the DCI as well as adversely affecting the public trust in the State and the DCI.

72. Black's behavior and in particular his tendency to react emotionally to stressful situations and not use his better judgment became known to other law enforcement agencies and individuals and to the public in general.

73. Black's emotional responses to stressful situations and his tendency to allow emotion to overcome better judgment and reason caused his supervisors at the DCI to lose trust and confidence in his ability to effectively act as an agent and a representative of the DCI.

74. Black violated rule 7.0101 of the DCI personnel policy manual in that he failed to conduct himself on and off duty in a manner that reflected favorably on the DCI.

75. Black violated rule 7.0101 of the DCI personnel policy manual in that his conduct both on and off duty adversely affected the morale and efficiency of the DCI and diminished public confidence.

76. Black's conduct and violation of the DCI policy set forth in the preceding two findings of fact negatively impacted the trust of others in the DCI and those in other law enforcement agencies in regard to Black's ability to perform the duties of his position and reflected poorly on the DCI.

77. The evidence presented at the hearing is sufficient to establish good cause for Black's termination by DCI.

78. Black's actions as set forth in these findings of fact disrupted the efficiency or morale of the DCI.

79. Black violated standard work rules and DCI policies established for the safe, efficient or effective operation of the DCI.

80. Black violated the provisions of ARSD 55:10:07:04(26).

81. The basis for termination given to Black in the initial notice of intent to terminate letter dated February 21, 2014, and in the supplemental notice of termination dated March 14, 2014, was supported by credible evidence in the record and persuasive facts.

82. Good cause and factual support exist to support the discipline which was imposed on Black as a result of the facts and circumstances described in these findings of fact.

83. Good cause existed for the termination of Black by the DCI.

CONCLUSIONS OF LAW

1. The Civil Service Commission of the State of South Dakota has jurisdiction over both the subject matter of this proceeding and the parties.

2. All of the evidence and testimony was heard by a quorum of the Civil Service Commission for the State of South Dakota. Of those members present, three were experienced in law enforcement as that term is utilized in SDCL 3-6D-1.

3. The DCI met its burden of going forward, its burden of proof, and its burden of persuasion to establish there was good cause for discipline to be imposed on Black.

4. The DCI met its burden of going forward, its burden of proof, and its burden of persuasion to establish there was good cause for Black's termination.

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5. Given the facts and circumstances which existed and which are described in these findings of fact and conclusions of law, there was good cause for the DCI to terminate Black's employment.

6. These conclusions of law are based on the facts and other evidence presented at the hearing held on September 16, 2014 and on the Commission's assessment of the credibility of the various witnesses as well as on the memorandum decision dated April 12, 2015, which is attached hereto, labeled as Exhibit A and incorporated herein by reference.

7. Black's appeal is dismissed and the decision of the DCI in regard to the termination of Black's employment is upheld.

8. The memorandum decision entered by the Civil Service Commission dated April 12, 2015, is hereby incorporated fully by reference.

9. An order consistent with these findings of fact and conclusions of law shall be issued by the Civil Service Commission.

Dated this 18th day of May, 2015.

SOUTH DAKOTA CIVIL SERVICE COMMISSION



BY:
It's Chairman

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CIVIL SERVICE COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE GRIEVANCE OF:)
Mark Black)
v.) MEMORANDUM DECISION
Division of Criminal Investigation)

Mark Black (Grievant) was hired in 2005 by the South Dakota Division of Criminal Investigation. On February 21, 2014, Special Agent Black was notified by letter that disciplinary action was proposed. In a letter dated March 14, 2014, in response to a request to reconsider a proposal for termination, director Brian K. Zeeb acknowledged review of specified information, and developed a timeline of events beginning in September, 2006 and culminating in an evaluation dated January 29, 2014, indicating a history of action taken which adversely affected the Division of Criminal Investigation. In a February 21, 2014 letter Special Agent Mark Black was terminated. That disciplinary action was appealed, and the appeal was heard by the South Dakota Civil Service Commission on September 16, 2014.

The Civil Service Commission met in Room 412 at the South Dakota Capitol Building on September 16, 2014 for purposes of a contested hearing and consideration of Grievant's appeal. Commission members Ingemunsen, Greff, Garnos, Grandpre and Mosteller were in attendance, with Barbara Christianson presiding.

The issue before the Civil Service Commission was whether just cause existed to terminate the employment of Grievant. The South Dakota Department of Criminal Investigation was represented by attorney Robert B. Anderson of Pierre. The Grievant was represented by attorney Tim Whalen of Lake Andes.

The Commission heard testimony that Grievant had been a valued asset of the Department of Criminal Investigation and worked well with other agencies. He had worked skillfully to assist prosecutors and support local law enforcement. There were many positive aspects of his employment, but Grievant displayed frustration, anger and vindictiveness on repeated occasions that caused alarm in and outside the agency. Whether it was marking defamatory messages on a boat parked outside his residence, relationships with other individuals, censure of decisions made by co-workers in a very public manner, or other expressions of frustration and anger, it became clear to his supervisors that Grievant could not or would not effectively manage his anger. Work improvement plans, warnings and administrative measures were not effective in curtailing the displays of unhappiness and lack of objectivity. Grievant described himself as a passionate and



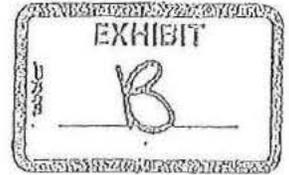
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MARTY J. JACKLEY
ATTORNEY GENERAL

STATE OF SOUTH DAKOTA
DIVISION OF CRIMINAL INVESTIGATION
OFFICE OF ATTORNEY GENERAL
GEORGE S. MICKELSON CRIMINAL JUSTICE CENTER,
PIERRE, SOUTH DAKOTA 57501-8505
PHONE (605) 773-3331
FAX (605) 773-4629



Law Enforcement Training
State Forensic Laboratory

March 14, 2014

Mark Black
38396 132nd St.
Aberdeen, SD 57401

CERTIFIED -- RETURN RECEIPT REQUESTED

Dear Mr. Black:

I am in receipt of your February 23, 2014, letter in which you indicated that you would like me to reconsider proceeding with your termination. I have had the opportunity to review and consider your correspondence dated February 23, 2014, and also additional information to include the following items:

- Brown County Protection Order documents, Petition and Affidavit for Protection Order (Domestic Abuse), dated 2-13-14, 5 pages;
- Brown County Protection Order documents, Notice of Hearing, dated 2-13-14, 2 pages;
- Brown County Protection Order documents, Order for Protection, dated 2-13-14, 3 pages;
- Brown County Protection Order documents, Petitioner's Affidavit in Support of Petition for Protection Order, dated 2-13-14, 40 pages;
- Brown County Protection Order documents, Brown County Sheriff's Office Receipt of Service, dated 2-14-14, 2 pages;
- North Dakota Bureau of Criminal Investigation (ND BCI) Investigative Report of Domestic Violence Allegations, 8 pages;
- Brown County Sheriff's Office Report dated 12-9-13 Investigative Report of Theft, 8 pages;
- Aberdeen Police Department Report dated 1-27-14 Investigative Report of Identity Theft, 7 pages;
- Correspondence among yourself, Patty Black, and Patty Black's attorney, 19 pages;
- Audio recording of your interview with ND BCI, dated 2-19-14, 1 hour 7 minutes;
- Audio recording of Morgan Black's interview with ND BCI, dated 2-19-14, 24 minutes;
- Audio recording of conversation between you and Patty Black, 5 minutes;
- Copy of text messages between you and Patty Black, dated 12-19-12 to 12-8-13, 540 pages.

Your continued conduct has had an irreversible effect on your ability to continue to perform your duties as a Special Agent. Your conduct has not only damaged your reputation as an agent, but it has also

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Mark Black
March 14, 2014
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destroyed the public and Division's confidence in your ability to maintain professional standards at all times while on and off duty. You have shown a lack of ability to deal with stressful situations and an inability to keep your emotional reactions in control. You have also continued to fail in the ability to consider consequences of your actions and communications insuring your decisions do not bring discredit to yourself, the Division, and the Attorney General's Office.

The Division has repeatedly attempted to work with you over the years to help improve your conduct. This has occurred in many ways including supervisors addressing areas of weakness and needs improvement in your evaluations, coaching you in your day-to-day development and relationships, holding you accountable by disciplinary action, implementing a Work Improvement Plan, and offering a relocation of your duty station. These progressive discipline attempts have obviously failed to change your behavior. Building and maintaining relationships are core functions of the Division. It is made abundantly clear to each and every current and future employee of the Division that relationships are of the utmost importance.

The following are several examples of attempts made by the Division to address these issues and to correct your conduct:

9-7-06 Evaluation – Needs Improvement section – Notation to remind yourself to maintain your composure and not allow your emotions to take over;

8-1-07 Evaluation – Needs Improvement section – Notation to remind yourself to maintain a positive attitude when things are difficult or do not turn out the way you hoped;

2-13-08 Evaluation – Relations with Others/Public – Notation regarding a traffic stop in your personal vehicle by the South Dakota Highway Patrol when you became frustrated and vocal toward a trooper. Needs Improvement section – Notation regarding maintaining your composure during stressful times when dealing with others in law enforcement;

5-18-08 – Email resigning your position as a DCI Agent due to frustration over the Attorney General's Office's handling of the Nick Berbos case and harassment by Berbos;

6-4-08 – Memo regarding your email to all DCI Agents and Attorney General Long and your perception of Assistant Attorney General Mayer's incompetent manner in dealing with the case. This unbecoming conduct was cause for a two-day suspension without pay and required meetings with Dr. Magnavito on a monthly basis;

8-12-08 Evaluation – Relations with Others/Public – Notation regarding disagreements with other investigators in Aberdeen and taking the high road. Needs Improvement section – Notation regarding the need to seek out avenues to relieve your stress and not allow your emotions to get the best of you;

9-3-08 – Memo to all agents from you regarding your frustration with the Berbos case and your apology to Assistant Attorney General Mayer and to all agents. You explain your regret for acting hastily;

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Mark Black
March 14, 2014
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3-13-09 Evaluation -- Relationships with Superiors/Peers -- Notation regarding the need to remain in control of your emotions and not let others affect how you do your job. Needs Improvement section -- Notation regarding the need to continue to work on your relationships with others in this assigned area, which at times can be a challenge;

8-30-11 Evaluation -- Relationships with Others/Public -- Notation regarding ironing out differences that you may have with people and not to let things fester. Needs Improvement section -- Notation regarding the need to deal with work issues when they arise so it does not affect parties involved for a prolonged time period;

3-20-12 Evaluation -- Relationships with Superiors/Peers -- Notation regarding involvement in an office conflict and encouraging to learn from this situation and apply to future relationships. Needs Improvement section -- Notation regarding the need to do a better job of dealing with things on the front side so they do not turn into bigger issues down the road;

9-6-12 Evaluation -- Needs Improvement section -- Notation regarding the need to make sure that your passion does not become the focal point of your investigations and dealing with things on the front side and moving on;

2-7-13 Evaluation -- Relations with Others/Public -- Notation regarding the need to make sure to take things in stride and work toward remedies. Written and Oral Communications -- Notation regarding a recording that made its way to the internet. Needs Improvement section -- Notation regarding dealing with issues that are positive or negative on an even level;

6-3-13 -- Meeting regarding spray painting your boat with "Patty Wins" due to frustrations with Patty Black over the divorce process;

6-28-13 Work Improvement Plan -- Notice regarding your continued conduct and the adverse effect on the ability of both the DCI and Attorney General's Office to conduct business effectively with other officers and the public;

7-30-13 Evaluation -- Needs Improvement section -- Notation regarding being placed on a Work Improvement Plan regarding your history with stressful and emotional reactions to situations and making sound decisions at all times;

10-8-13 -- Notice with Intent to discipline regarding a one-day suspension without pay due to a 9-18-13 response to a KELOLAND.com story about a SWAT training event and response as a South Dakota DCI Agent stating the story was a waste of time by the media and the mother would rather whine to get her face on camera than explain to her child the need for law enforcement training;

1-29-14 Evaluation -- Written and Oral Communication section -- Notation regarding a one-day suspension without pay for a written comment on KELOLAND.com where you identified yourself as a DCI Agent. Needs Improvement section -- Notation regarding the need to understand that others in the

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Mark Black
March 14, 2014
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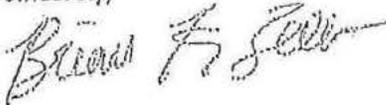
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agency can recognize when you are not happy and Isolating yourself from others is not a positive way to deal with issues.

I have fully considered all the information you have provided to me. After consideration, I stand by my decision to terminate your employment with the South Dakota Division of Criminal Investigation as I referenced in my February 21, 2014, letter to you. The reasons given in this letter in support of my decision to terminate your employment with the DCI are based on additional review of documents and are intended to supplement and further explain my initial decision. Effective at 5:00 PM on March 14, 2014, you are terminated.

Pursuant to the Administrative Rules of South Dakota (ARSD) 55:10:08:16, you have the right to appeal this decision. You have 14 days from the date at the top of this letter (March 14, 2014) to go to the next step in the appeal procedure. If you want to appeal this decision, this letter will allow you to proceed to Step 2 of the appeal procedure. Step 2 is an appeal to Director Gortmaker. Your failure to meet any of the time limits in the appeal process will be considered a withdrawal of your appeal in accordance with ARSD 55:10:08:14.

Sincerely,



Brian K. Zeeb
Assistant Director
SD Division of Criminal Investigation

cc: Director Gortmaker
Attorney General Jackley
Personnel File

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APPX. 3

CIVIL SERVICE COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE GRIEVANCE OF: MARK BLACK V. DIVISION OF CRIMINAL INVESTIGATION	ORDER
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The hearing on the grievance and appeal of Mark Black was held September 16, 2014, in Pierre, SD, before a quorum of the Civil Service Commission for the State of South Dakota. Included in those members present were three of the Commission members who were experienced in law enforcement as that terms is utilized in SDCL § 3-6D-1. A memorandum decision dated April 12, 2105, was entered by the Civil Service Commission. Based on all the evidence produced at the hearing, and based on the findings of fact and conclusions of law entered by this Commission, and good cause appearing therefore, it is

ORDERED, that there was good cause established for the termination of grievant and appellant Mark Black and that the termination of Mark Black's employment by the Division of Criminal Investigation is affirmed and his appeal is dismissed.

Dated this 18th day of May, 2015.

SOUTH DAKOTA CIVIL SERVICE COMMISSION

Barbara Christenson

BY:
It's Chairman

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APPX. 4

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CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

HUGHES COUNTY COURTHOUSE
P.O. BOX 1238
PIERRE, SOUTH DAKOTA 57501-1238

JOHN BROWN
PRESIDING CIRCUIT COURT JUDGE
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February 1, 2016

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Re: Hughes County Civ. No. 15-125: Mark Black v. Division of Criminal
Investigation

MEMORANDUM DECISION

This is an appeal from the Civil Service Commission regarding Mark Black's termination of employment. The Division of Criminal Investigation terminated Mark Black for cause. Mark Black eventually appealed that decision to the Commission, which affirmed termination. Mark Black now appeals to this Circuit Court. This Court affirms the Commission.

BACKGROUND

Mark Black ("Black") began employment as an agent with the Division of Criminal Investigation ("DCI") on August 5, 2005. AR. at 110. He was terminated on February 24, 2014. AR. at 88. Before being terminated, Black was considered

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one of DCI's top five agents. HT. at 110 (Even); HT. at 139 (Satterlee). Black was awarded the Distinguished Service Award in 2009. AR. at 254. Everyone agreed that Black was recognized as a good agent who performed his work exceptionally.

However, the record shows a long history of temper, emotional imbalance, and poor judgment when under stress. These have been continuous concerns of DCI since Black's first year of employment. Within his first year, he received high marks and praise on his evaluation of September 7, 2006, but was told that he needed "to continue to remind himself to maintain his composure and not allow his emotions to take over." AR. at 112. For the first part of 2007, his evaluation read, "Mark needs to remind himself to maintain a positive attitude when things are difficult or do not turn out the way he hoped." AR. at 115. Another evaluation six months later in February of 2008 revealed the same problem: "Mark needs to maintain his composure during stressful times when dealing with others in" law enforcement. AR. at 118. Later that year, his evaluation advised that "Mark on occasion makes poor decisions with regards to his relationship with others. Mark had at times a very difficult 6 month period and became frustrated and disappointed. This became an issue when he sent a resignation email to all agents in the DCI and to the Attorney General." It continued on to recommend improvement by seeking "out avenues to relieve his stress and not allow his emotions to get the best of him. Mark understands what is expected of him, but has in the recent past made poor choices in how he expresses himself." AR. at 121. The email resulted in 2-day work suspension and 60-day work improvement plan, and Black saw a counselor. He received an additional five similar evaluations outlined in Zeeb's second letter. AR. at 105; 122-36. Black was put on a work improvement plan "based upon a documented history of his difficulty with stressful/emotional reactions to situations. Mark needs to keep his head down and make sound decisions at all times." AR. at 140; 226.

Outside of work, Black commented on the KELOland blog about a SWAT training event. Because he indicated he was a DCI agent on his Facebook page, his comment was linked, and it appeared that the comment was made on behalf of the DCI. He wrote: "This story is an excellent example of a waste of time by the media. This 'mother' would rather whine to get her face on camera than be a parent and explain to her child, it is the people that protect us practicing to keep us safe from bad guys." AR. at 105; 229. Black was disciplined with a 1-day suspension.

Black had a pending divorce occurring around 2013 that was very hostile. Black was very frustrated and spray-painted the phrase "Patty wins" on his boat

that was parked on the street in front of his home. On February 13, 2014, his ex-wife filed a petition for a protection order. That same day, Black's supervisor, Brian Zeeb, wrote to Black advising him that because he had to relinquish his service weapon, he had to be "on administrative leave with pay until this issue [of the protection order] is resolved or until further notice from me." AR. at 35. The Protection Order alleged many things, of which none were the basis of termination for cause. Instead, the only basis in the protection order was found in an attached document, one handwritten letter by Black himself to his then-wife. That letter dated October 23, 2013 included these passages:

"As for my temper, rage, and razor tongue, I finally figured out how bad I hurt everyone around me. Especially you. I said numerous hateful things . . .

"I know you feel like a victim . . .

"Yes babe I know I punched walls and doors, broke dishes, pictures.

"I pushed and shoved you as well for that I am sorry too. A[n] honest reflection is that we both mistreated each other. . ."

AR at 59-60. Because of the admission in the letter of physical contact that may arise to domestic simple assault and a clear showing of Black's continued lack of emotional control and poor judgment, DCI (through Zeeb) sent a letter dated February 21, 2014, stating that it intended to terminate Black's employment. AR. at 88-91.

The notice of termination letter cited ARSD 55:10:07:04(26) and DCI Policy 7.0101 as a basis for finding just cause to terminate. AR at 88-89. In response, Black was given the opportunity to be heard and wrote a lengthy letter explaining his side of the story. AR. at 92-102. This response letter caused Supervisor Zeeb to reconsider. Zeeb reviewed numerous documents and information and outlined his findings in another letter. He stood by his decision and advised Black on the appeal process afforded to him. AR. at 103-106. Black appealed to Director Gortmaker who reinvestigated and reconsidered. In doing so, he instead found more support for termination and affirmed Zeeb's decision. AR. at 170-71. Specifically, Black texted his ex-wife on May 17, 2013, the following, "Not after I take the stand and admit to adultery. I told you I'll give you what u want. Btw [by the way] I broke up w/Lynda." AR. at 170. Gortmaker had asked Black if he committed adultery, to which Black said no. In light of this text, Gortmaker considered Black was lying to him or lying to his wife, in either case being a violation of DCI Policy 7.0103

"Integrity" and "unbecoming conduct" of an agent under 7.0101. Gortmaker stood by Zeeb's decision.

Then, Black appealed to the Attorney General, Marty Jackley, who also affirmed Zeeb's decision and denied the appeal. AR. at 197.

Next, Black appealed to the Civil Service Commission. At the hearing, DCI presented witnesses who testified about Black's long history of emotional imbalance and poor judgment. Black presented numerous commendation exhibits and witnesses who testified about his character and being a great agent. The Commission considered all of the above acts and found that just cause existed to terminate the employment of Black. AR. at 279-80. Findings and Conclusions were entered. AR. at 315-28.

Black now appeals to this Circuit Court. This Court heard oral arguments by counsel on January 6, 2016. This Court now affirms the decision of the DCI administrators and the Commission.

STANDARD OF REVIEW

Agency decisions concerning questions of law are fully reviewable.¹ "Whether the facts establish just cause for termination is a legal question reviewed *de novo*." *Irvine v. City of Sioux Falls*, 2006 S.D. 20, ¶ 4. "In reference to the civil service board's factual findings, we have said that 'we do not judge witness credibility, a matter left to those presiding first hand.'" *Id.* Otherwise, this court's review of a decision from an administrative agency is governed by SDCL 1-26-36. "The court shall give great weight to the findings made and inferences drawn by [the Commission] on questions of fact" and reverse only when those findings are "clearly erroneous in light of the entire evidence in the record."² Documentary evidence is reviewed *de novo*.³

ANALYSIS

I. Whether the facts relied on by DCI establish just cause to terminate Black's employment?

¹ *Hayes v. Rosenbaum Signs & Outdoor Adver., Inc.*, 2014 S.D. 64, ¶ 7, 863 N.W.2d 878, 881.

² *Williams v. S.D. Dep't of Agr.*, 2010 S.D. 19, ¶ 5, 779 N.W.2d 397, 400; SDCL 1-26-36.

³ *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 14, 857 N.W.2d 413, 417.

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DCI cited one regulation and one policy that were violated by Black continuously throughout his employment as support for just cause to terminate Black's employment. The Commission cited the same two authorities for finding just cause existed to terminate.

The first regulation, ARSD 55:10:07:04, is entitled, "Causes for disciplinary action." It reads in relevant part,

Disciplinary action under this section may be taken for conduct within or outside the scope of employment. Disciplinary action may be taken for just cause as reported to the commissioner, including the just causes listed in this section: . . . (26) The employee has engaged in conduct, either prior to or during employment with the state that reflects unfavorably on the state, destroys confidence in the operation of state services, or adversely affects the public trust in the state.

ARSD 55:10:07:04(26).

Black's main argument is that DCI did not present the right witnesses to prove that Black "engaged in conduct that reflects unfavorably on the state, destroys confidence in the operation of state services, or adversely affects the public trust in the state." Black would require DCI to present witnesses from the general public, outside of the agency, to testify whether Black's conduct spoiled their personal view of, confidence in, and trust of the state and DCI. To take this proposal to its logical extreme, Black would require a parade of individuals to the court and having them polled without suggesting what level of personal knowledge each person would have, where these people need to reside, or how many members of the public are needed for DCI to meet its burden of proof. Black would have some amount of random individuals testify about their opinion that would somehow be a reflection of the general public's opinion. Additionally, this proposal has judicial economy concerns.

Instead, to meet its burden, DCI presented the directors and assistant directors of the DCI who had substantial experience working in DCI, observing and working with the agents and the public, and who are charged with the duty of managing DCI. One way it manages the DCI is handling and improving the public's opinion of the DCI. "A witness may testify to a matter only if evidence is

introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." SDCL 19-19-602. Those members of DCI testified as laypersons with personal knowledge of what is expected of an agent with regard to public opinion, public trust, and public appearance. These witnesses also had personal knowledge of the events that occurred surrounding Black. These witnesses are the best witnesses available for determining whether conduct may destroy confidence in the agency or adversely affect public trust in the agency. They are best able to effectively gauge the potential impact an agent's actions may have before actual damage to the agency or its public image occurs.

Further, Black presents no authority for his proposal that "the test is to show that parties independent of the DCI administration were adversely affected as provided by this administrative rule." *Black's Brief* at 14. While the failure to cite authority is fatal for an issue at the Supreme Court level,⁴ it is illustrative to this circuit court that the witnesses who testified, being charged with managing and supervising the agency, were competent and provided appropriate opinions that Black's conduct fit within the just cause described in section 26 of this Rule.

DCI also found Black's conduct was unbecoming of an agent, in violation of DCI Policy 7.0101, which provides that

agents shall conduct themselves on and off duty in a manner that reflects favorably on the division. Conduct unbecoming to an agent means conduct contrary to professional standards that shows an unfitness to discharge duties or conduct which adversely affects morale or efficiency of the division or diminished public confidence.

Black argues that an expert witness is necessary to explain to the court the professional standards required of an agent to discharge his duties, before determining whether Black was unfit. Black argues that that expert must come from outside of the agency because the administrators are biased, and their testimony would be self-serving.

First, there is no rule of evidence prohibiting bias or self-serving testimony to be admitted. That only goes to the weight of the evidence that the court will give it. *See Donat v. Johnson*, 2015 S.D. 16, ¶ 17, 862 N.W.2d 122, 128 (citing *State v.*

⁴"As has been stated many times by this Court, [Appellant's] failure to cite authority is fatal." *Steele v. Bonner*, 2010 S.D. 37, ¶ 35, 782 N.W.2d 379, 386 (citing SDCL 15-26A-60(6)).

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Bergeron, 452 N.W.2d 918, 926 (Minn. 1990) (“explaining that the objection that testimony is ‘self-serving’ appears to be a variation on the objection that a defendant is incompetent to testify because of an ‘interest’ or ‘bias’ in the case, an objection that is no longer valid under the modern rules of evidence.”).

Second, expert testimony is necessary when the “expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.” SDCL 19-19-702. “To be helpful, of course, expert opinion must offer more than something jurors can infer for themselves.” *State v. Guthrie*, 2001 S.D. 61, ¶ 32, 627 N.W.2d 401, 415. The professional standards of an agent are not a matter of scientific, technical, or specialized knowledge. This court, sitting as the trier of fact, does not need testimony to help it understand any of the evidence presented. The court can infer for itself the professional standards of a law enforcement agent, and how those standards were violated in this circumstance. An expert is not needed to establish that emotional control is a professional standard for a law enforcement officer. An expert is not needed to explain that a history of emotional imbalance and a hot temper may cause one to be unfit for law enforcement duties or adversely affect morale in the division.

Even if an expert was required to help the court understand what conduct is “professional” for an agent, Director Gortmaker and other supervisors who testified are such experts qualified to give such opinions.

DCI also presented Black’s evaluations as exhibits. The evaluations show the expectations and standards required of an agent and how each is assessed. In this case, those evaluations show a history of conduct that Black was unable to keep a cool head and deal with his stress and anger in a very stressful job.

Additionally, one of his job duties is to investigate other law enforcement agents, sometimes those accused of domestic violence. The admission in the letter that he “pushed and shoved” his ex-wife prevents him from performing that duty because he has lost all credibility specific to that issue. But further, his course of conduct and the way he handles stressful situations gives one pause as to how well Black will testify at trial. Testifying is a very stressful but very important duty of an officer. This record is full of impeachable other acts (whether those are admissible is not an issue before this court) making it dangerous for him to testify in any case on behalf of the State. His credibility has been damaged.

DCI also met its burden of proof that Black's actions adversely affected the morale or efficiency of DCI or diminished public confidence. There were examples of conduct including exposure of embarrassing communications or documents on the internet, and public displays of frustration and anger, and an agency-wide email criticizing an assistant attorney general's work performance. Zeeb even received calls about people concerned over Black's actions. HT, at 92.

Combining the long, continuous course of conduct and the episodes of public outbursts, Black's actions were contrary to professional standards, which show he is unfit to discharge the duties of an agent. DCI met its burden of proof that Black did not conduct himself on and off duty in a manner that reflects favorably on DCI, contrary to DCI Policy 7.0101.

Findings of Fact

Black points to several factual findings that he argues were erroneous and require reversal. No finding was wholly unsupported by the record or so egregiously erroneous to warrant reversal of the Commission's decision.

First, FOF 6 said the boat was in "Patty's" possession when in fact it was in front of Black's home. The significance of this finding is to describe that Black spray-painted his boat with angry words, "Patty Wins," in frustration of the divorce. Also, it was still marital property, so both parties had property rights to it. This finding does not require reversal.

Black contends that FOF 7 and 8 indicate that Black admitted to allegations in his handwritten letter. The words "admit" or "admission" are not in those findings. Instead, FOF 7 summarizes the content of that letter where Black acknowledged that he "pushed and shoved" his wife. FOF 8 explains DCI's concerns about this letter. Neither is erroneous.

Black alleges that Gortmaker and Jackley "made it clear to the DCI administration that they were simply tired of hearing Black's name." Appellant's Br. at 21. Black fails to cite the record for this alleged motivation. Instead, Exhibits 3, 5, 18, and 20 are letters from Zeeb, Gortmaker, and Jackley. Those letters are absent of any "clear" intention to fire Black because of gossip or annoyance. Those exhibits lead to the reasonable inference that DCI had dealt with Black's constant and repeated unacceptable and inappropriate behavior, which is well documented in the record.

The rest of Black's complaints with the Findings are consistent with the record and have already been addressed elsewhere in this opinion. The court cannot say the Commission's factual findings were clearly erroneous in light of the entire evidence in the record. *See* SDCL 1-26-36.

Lastly, Black spends a considerable amount of time proving he was a good agent. That is undisputed and irrelevant. Black was not terminated for inadequate work performance or poor case management. He was terminated because his emotions and anger cause him to act without thinking in a manner contrary to professional standards and unbecoming of a state employee and a law enforcement officer. Under this Court's *de novo* standard of review, the facts establish that just cause existed for DCI to terminate Black's employment. The Court affirms the Commission's and DCI's decision to discipline Black in the form they chose, termination.

II. Was Black provided his full due process rights?

Black complains that he was not afforded due process during his termination proceedings. First, Black argues that he did not have notice that prior disciplinary actions would be a basis for termination.

He had notice on February 21, 2014 that he may be terminated due to specific acts alleged in the protection order and Black's statements in his handwritten letter. The decision became final when Zeeb gave notice on March 14, 2014 outlining several examples of how Black had destroyed his own reputation but also the public's and DCI's confidence in Black to maintain professional standards. This served as notice that all those prior acts showed a course of conduct that Black was unable to control his emotions in stressful situations and to consider the consequences of his actions. He has been afforded every opportunity to be heard at every level of this appeal process.

Second, Black cites no authority that prohibits prior conduct already subject to discipline, from being used in consideration of just cause for a future termination. Prior conduct *can* be the basis for just cause when an employee has a history of bad conduct and continues to act adversely to their employer. *See Irvine v. City of Sioux Falls*, 2006 S.D. 20, ¶ 15, 711 N.W.2d 607, 612 (finding a long and continuous history of attitude problems recorded in employee's evaluations).

Finally, Black argues that after he was terminated, additional reasons and grounds were added. While Gortmaker *did* add another fact of just cause after

termination, there was no added "ground" or policy violation. Gortmaker merely cited the Integrity expectation at 7.0103. Lying, or violating this "golden rule," is a violation of Policy 7.0101, unbecoming conduct of an agent. Even if there were some violation of due process for adding another cause or a new ground, without the alleged fact of lying about adultery, the record still supports the agency's decision that just cause existed for disciplinary action by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons, the Commission's decision is AFFIRMED.

Dated this 1st day of February, 2016.



Honorable John Brown
Presiding Sixth Circuit Court Judge

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

MARK BLACK,)
)
Plaintiff/Appellant,)
)
vs.)
)
DIVISION OF CRIMINAL)
INVESTIGATION.)
)
Defendant/Appellee.)

CIV15-125

NOTICE OF ENTRY OF ORDER

TO: MARK BLACK AND TIMOTHY WHALEN, HIS ATTORNEY

YOU WILL PLEASE TAKE NOTICE that the Order affirming the decision of the Civil Service Commission, which Order incorporated by reference the Court's Memorandum Opinion of February 1, 2016, attached hereto as Exhibit A, was signed by the Court on February 1, 2016, and filed for record in the Office of the Hughes County Clerk on February 1, 2016.

Dated this 3 day of February, 2016

MAY, ADAM, GERDES & THOMPSON

BY: 

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CERTIFICATE OF SERVICE

3 Robert B. Anderson of May, Adam, Gerdes & Thompson LLP hereby certifies that on the day of February, 2016, he electronically filed a true and correct copy of the foregoing in the above captioned action to the following at his last known addresses, to-wit:

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ROBERT B. ANDERSON

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APPX. 5

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STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES) :SS

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

MARK BLACK,
Appellant,

CIV NO. 15-125

v,

DIVISION OF CRIMINAL
INVESTIGATION,
Appellee.

ORDER

WHEREAS, the court having entered its Memorandum Decision on February 1, 2016, and having expressly incorporated the same herein, now, therefore, it shall be and hereby is

ORDERED that the decision of the Civil Service Commission be AFFIRMED.

Dated this 1st day of February, 2016.

BY THE COURT:



John L. Brown

Honorable John Brown
Presiding Sixth Circuit Court Judge

ATTEST:

Maya Mast Deputy
Hughes County Clerk of Courts
(SEAL)

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED

FEB 01 2016

Kevin Straman Clerk
By TF Deputy

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APPX. 6

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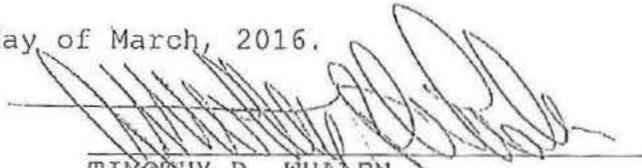
STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

MARK BLACK,) FILE NO. 32CIV15-000125
Plaintiff/Appellant,)
) vs.) NOTICE OF APPEAL
))
DIVISION OF CRIMINAL INVESTIGATION,)
Defendant/Appellee.)

TO: Robert B. Anderson, May, Adams, Gerdes & Thompson, P.O. Box
160, Pierre, SD 57501-0160:

HEREBY TAKE NOTICE, that pursuant to SDCL 1-26-37 and
15-26A-3, et seq., the above named Plaintiff/Appellant, Mark
Black, appeals to the Supreme Court of South Dakota from the final
Order rendered in the above entitled action on the 1st day of
February, 2016. The final Order appealed from was served on the
Plaintiff/Appellant on the 3rd day of February, 2016, by mail, as
shown by the Notice of Entry of Order which is on file in this
matter. Further, take notice that the appeal in this matter is
from the entire Order entered by the court. A copy of said Order,
together with the Notice of Entry of Order, is attached hereto.

Dated this 1st day of March, 2016.



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whalawtim@cme.coop

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STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

)
) :SS
)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

MARK BLACK,
Appellant,

CIV NO. 15-125

V.

DIVISION OF CRIMINAL
INVESTIGATION,
Appellee.

ORDER

WHEREAS, the court having entered its Memorandum Decision on February 1, 2016, and
having expressly incorporated the same herein, now, therefore, it shall be and hereby is

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Dated this 1st day of February, 2016.

BY THE COURT:



Honorable John Brown
Presiding Sixth Circuit Court Judge

ATTEST:

Mary Hart Deputy
Hughes County Clerk of Courts
(SEAL)

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED

FEB 01 2016

Kelli Stroman Clerk
By TF Deputy

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STATE OF SOUTH DAKOTA)
)SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

MARK BLACK,)
)
 Plaintiff/Appellant,) CIV15-125
)
 vs.) NOTICE OF ENTRY OF ORDER
)
 DIVISION OF CRIMINAL)
 INVESTIGATION.)
)
 Defendant/Appellee.)

TO: MARK BLACK AND TIMOTHY WHALEN, HIS ATTORNEY

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Dated this 3 day of February, 2016

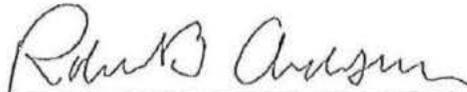
MAY, ADAM, GERDES & THOMPSON

BY: Robert B. Anderson
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CERTIFICATE OF SERVICE

3 Robert B. Anderson of May, Adam, Gerdes & Thompson LLP hereby certifies that on the day of February, 2016, he electronically filed a true and correct copy of the foregoing in the above captioned action to the following at his last known addresses, to-wit:

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ROBERT B. ANDERSON

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
) :SS	
COUNTY OF HUGHES)	SIXTH JUDICIAL CIRCUIT
<hr/>		
MARK BLACK,)	
Appellant,)	CIV NO. 15-125
)	
V,)	
)	
DIVISION OF CRIMINAL)	ORDER
INVESTIGATION,)	
Appellee.)	
)	
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Dated this 1st day of February, 2016.

BY THE COURT:



John L. Brown

Honorable John Brown
Presiding Sixth Circuit Court Judge

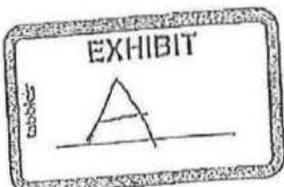
ATTEST:

Mary Mast Deputy
Hughes County Clerk of Courts
(SEAL)

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED

FEB 01 2016

Kelli Stroman Clerk
By TF Deputy



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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 27784

MARK BLACK
Plaintiff and Appellant,

vs.

DIVISION OF CRIMINAL INVESTIGATION
Defendant and Appellee.

**APPEAL FROM THE CIRCUIT
COURT
SIXTH JUDICIAL CIRCUIT,
HUGHES COUNTY, SOUTH
DAKOTA**

HONORABLE JOHN L. BROWN
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE

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Notice of Appeal filed March 1, 2016

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<i>SDCL §3-6D-16</i>	2, 14
<i>SDCL §19-14-2 (Rule 602)</i>	19
<i>SDCL §19-15-1 (Rule 701)</i>	2, 25

SDCL §19-15-2 (Rule 702).....25

OTHER REFERENCES

ARSD 55:10:07:04 (26).....16, 21

DCI Policy 7.0101..... 11, 16, 22, 27, 32

DCI Policy 7.0103.....23

PRELIMINARY STATEMENT AND ABBREVIATIONS

Appellee Division of Criminal Investigation will utilize the following references throughout this brief:

- Appellant Mark Black – “Black”
- Appellee Division of Criminal Investigation – “DCI”
- South Dakota Civil Service Commission – “Commission”
- Sixth Judicial Circuit Court for Hughes County and Honorable John L. Brown – “Circuit Court”
- Administrative record of the State of South Dakota Civil Service Commission – “(AR____)” and the page number referred to.
- Circuit Court record – “(CR____)” and the page number referred to.
- Transcript of the Civil Service Commission hearing of September 16, 2014 – “(T____)”.
- Hearing exhibits from the September 16, 2014 hearing before the Civil Service Commission will be referred to as “Ex” and exhibit number.

JURISDICTIONAL STATEMENT

Black appeals from the Circuit Court’s affirmance of a Commission Order which in turn affirmed the DCI’s termination of Black’s employment. (AR 335), (CR 481). In affirming the Commission, the Circuit Court authored a Memorandum Decision (CR 408). Black’s Notice of Appeal to this Court was timely (CR 422). This Court has jurisdiction pursuant to SDCL § 1-26-37 and 15-26A-3(1).

STATEMENT OF LEGAL ISSUES

I. WHETHER THERE WAS GOOD CAUSE UNDER THE GOVERNING LAW, RULES AND REGULATIONS, AND THE FACTS AS PRESENTED TO THE CIVIL SERVICE COMMISSION TO TERMINATE BLACK'S EMPLOYMENT WITH THE SOUTH DAKOTA DIVISION OF CRIMINAL INVESTIGATION.

The Circuit Court held in the affirmative when it affirmed the Commission's determination that the DCI's termination of Black's employment was appropriate.

Most relevant statutes: *SDCL §19-15-1 (Rule 701), SDCL §3-6D-15 and §3-6D-16*

Most relevant cases:

Schroeder v. Dept. of Social Services, 545 NW 2nd 223, 1996 SD 34

Donat v. Johnson, 2015 SD 16, 862 NW 2nd 122

State v. Guthrie, 2001 SD 61, 627 NW 2nd 401

Grievance of O'Neill, 347 NW 2nd 887 (SD 1984).

II. WHETHER THE SOUTH DAKOTA DIVISION OF CRIMINAL INVESTIGATION COMPLIED WITH THE GOVERNING LAW, RULES AND REGULATIONS WHEN IT TERMINATED BLACK'S EMPLOYMENT.

The Circuit Court held in the affirmative and affirmed the Commission.

Most relevant statutes: *SDCL §3-6D-14 and SDCL §3-6D-15*

Most relevant cases:

Schroeder v. Dept. of Social Services, 545 NW 2nd 223, 1996 SD 34

Lee v. South Dakota Dept. of Health, 411 NW 2nd 108 (SD 1987)

Irvine v. City of Sioux Falls, 711 NW 2nd 607 (SD 2006).

STATEMENT OF THE CASE

Black's employment as an agent with the DCI was terminated by letters dated February 21 and March 14, 2014. (Ex. 3 and 5). Black followed the grievance process and ultimately the Commission held a hearing on Black's appeal.

The hearing was held on September 16, 2014, before a quorum of the Commission and resulted in a written Memorandum Decision entered by the Commission dated April 12, 2015. (AR 279, App. 1).

The Commission entered an order dated May 18, 2015 (AR 335) consistent with the Memorandum Decision. The Order affirmed the termination of Black's employment by the DCI and was based on thorough and extensive Findings of Fact and Conclusions of Law (AR 281, App. 2).

Black appealed to the Circuit Court in a timely manner. After briefing was complete, the Circuit Court held oral argument on January 6, 2016, and entered its Memorandum Decision dated February 1, 2016 affirming the Commission. (CR 408, App. 3). The Circuit Court entered an Order of Affirmance (CR 418) and this timely appeal followed.

The decision of the Commission which is the basis of this appeal was rendered after a lengthy evidentiary hearing which was conducted pursuant to the provisions of SDCL §1-26. The hearing lasted from 8:30 a.m. to approximately 6:00 p.m., involved eleven witnesses, generated 319 pages of transcript (T) and involved the admission of numerous exhibits from both parties. The Commission, as finder of fact, had the opportunity to evaluate the credibility of all witnesses who appeared on behalf of the DCI, and most of those who appeared on behalf of Black.

STATEMENT OF THE FACTS

The DCI witnesses who testified generally agreed that Black had the potential to be a skilled and very capable agent. As noted by Black in his brief, he had been recognized as such on several occasions by the DCI. However, the uncontested record shows that for years, Black's lack of emotional control and questionable judgment had been a concern to DCI. Progressive discipline regarding those issues and comments in his periodic evaluations failed to improve the situation.

The Commission, in its Memorandum Decision, recognized this:

“There were many positive aspects of his employment, but Grievant displayed frustration, anger and vindictiveness on repeated occasions that caused alarm in and outside the agency. Whether it was marking defamatory messages on a boat parked outside his residence, relationships with other individuals, censure of decisions of co-workers in a very public manner, or other expressions of frustration and anger, it became clear to his supervisors that Grievant could not or would not effectively manage his anger.” (AR 279, App. 1).

The Findings of Fact entered by the Commission recognize and acknowledge this statement. The Findings are based on substantial evidence developed on the record.

Black was hired as an agent with the DCI in 2005 and assigned to the northeastern region of South Dakota. (T 13). His immediate supervisor at that time was Brian Zeeb (“Zeeb”). Zeeb became an assistant director of the DCI in 2011 and was transferred to the Pierre office. Between 2005 and 2011, Zeeb worked directly with Black and became very familiar with him (T 13). At the time the discipline at issue in this appeal was imposed, Jason Even (“Even”) was Black's direct supervisor in the region (T 81). During that same time frame, Dan Satterlee (“Satterlee”) was assistant director of the DCI with

approximately 20 years of service and had likewise known and worked with Black for many years. (T 120).

Almost from the inception of Black's employment with the DCI, his supervisors had observed and been concerned about his judgment, behavior under stress, and lack of emotional control (T 19, 20). On a number of occasions, these concerns were documented during the course of personal meetings to discuss periodic written evaluations of his performance and independent acts of discipline taken against Black by his superiors. The record reflects a considerable number of such events, for example:

- In a 2006 evaluation conducted by Zeeb, a comment cited Black's need for better composure and control, and a concern that he not let his emotions take over. (T 20, Ex. 6).

- In an August 1, 2007 evaluation also performed by Zeeb, he comments that Black needed to maintain a positive attitude when things were difficult and not regress or become complacent. (T 21, Ex. 7)

- A February 13, 2008 evaluation again by Zeeb cited that it was important for Black to retain his composure during stressful times. (T 21, Ex. 8).

- An August 12, 2008 evaluation by Zeeb expressed concern about poor decision making, Black's relationship with others and his composure. (T 22, Ex. 9).

Black had acted inappropriately by sending an email criticizing an Assistant Attorney General by communicating with every single employee of the DCI, as well as the Attorney General. As a result of the incident, Black submitted his resignation, but it was not accepted by his superiors at that time. (T 22, 233).

- In the same August 2008 evaluation, Zeeb noted:

“Mark needs to seek out avenues to relieve his stress and not allow his emotions to get the best of him.” (T 23, Ex. 9).

- In a March 20, 2012 evaluation by Jason Even, Even made the statement:

“Mark could do a better job of dealing with things on the front side so they do not turn into bigger issues down the road.” (T 23, Ex. 11).

- During an admittedly heated divorce, Black spray painted the words

“Patty Wins” on a boat parked in front of a residence in Aberdeen where his wife resided.

That incident led to the imposition of a formal work improvement plan in June, 2013

which – although based at the time on the boat painting incident – recognized the incident

as a symptom of Black’s inability to exercise good judgment in stressful or emotional

times. (T 24, 84, Ex. 22). In a written evaluation performed shortly after the work

improvement plan was put in place, Even made the statement:

“Based upon a documented history of his difficulty with stress/emotional reactions to situations, Mark needs to keep his head down and make sound decisions at all times.” (T 84, Ex. 13).

- In an evaluation of February 7, 2013 (prior to the “boat painting”

incident), Even performed an evaluation and mentioned the fact that Black had

inadvertently tape recorded a discussion he had with another agent. The record fell into

the hands of someone who placed it on the internet. (T 82, Ex. 12). In somewhat of an

understatement, Zeeb testified that the tape recording contained unwise or “incautious”

comments made by Black which found their way into the public domain. (T 24, 25). In

his February 2013 evaluation, Even noted:

“SA Black needs to understand that when things happen, positive or negative, then he needs to deal

with it on an even level.”

- Gortmaker and Even met with Black after the “boat painting” incident to discuss with him “where Mark was at” (T 89). This was about the time of the work improvement plan. Black’s supervisors were concerned that all Black’s issues arose from the same problem – “they all seemed to revolve around emotions and decisions that are made in regards to how he handles those things” (T 87).

- An evaluation of January 29, 2014 notes that shortly after the work improvement plan was completed, Black had made an ill-considered comment on a Keloland Blog which gave the appearance that he was speaking in his official capacity as a DCI Agent in response to a posting by a citizen. (T 25, 26, 86, Ex. 15). As a result, Black received a one-day suspension – primarily because the event occurred so soon after the work improvement plan had been completed. (T 25, 26). Supervisor Even testified that he was concerned about the Keloland comment, mainly because it occurred so soon after Black had been warned about his repeated, similar behavior, the need to keep his “head down” and respond appropriately. (T 90).

Because all of the above events were discussed in written evaluations or separate acts of discipline, Black was fully aware of his record and his supervisor’s concern about his emotional responses to stressful situations. Two of these situations were serious enough that they jeopardized Black’s employment. DCI Director Gortmaker personally intervened on two occasions to save Black’s job. The first such intervention resulted after Black’s emotional response which resulted in him sending a late night email to everyone in the DCI and the Attorney General, which email criticized an Assistant Attorney General. Gortmaker intervened with then-Attorney General Larry Long to save Black’s

job in the wake of his actions (T 148). After the incident which involved the tape recording being placed on the internet, Gortmaker again intervened to save Black's job (T 151).

The events which directly precipitated Black's termination began to unfold in February, 2014, when a protection order was served on Black by his ex-wife. The protection order was detailed and included a number of attached documents – one of them a letter written by Black himself, which indicated that Black may have been involved in a crime of domestic violence (T 14, 15). The DCI, and in particular Black's supervisors, knew that the divorce was very hostile in nature. In recognition of that, the DCI did not take all the allegations made in the application for the protection order at face value, but the letter written by Black had enhanced credibility for the reason that he authored it. (T 132). The DCI had known nothing about these statements by Black until February, 2014, when the application was filed. (T 132).

Because the filing of a protection order required Black to surrender all his firearms, and because all DCI agents are required to carry firearms, Black was immediately placed on administrative leave by written letter dated February 13, 2014 from Assistant Director Zeeb. (T 15, Ex. 1). During the time Black was on administrative leave, the DCI investigated the matters which had come to light during the course of the protection order application. (T 15).

The letter written by Black to his ex-wife where he acknowledged his uncontrollable temper and rage described events which caused concern with his supervisors at the DCI because of the possibility that the actions he admitted to in the letter could constitute a crime of domestic violence. (T 18, 19, 28, 131). Further, and

similar to the tape recording which contained unwise and incautious comments made by Black, Black's letter was evidently obtained from the Court files and placed by someone (not connected with the DCI) on the internet. Therefore, it became available for everyone – including litigants, defense lawyers and judges – to view. The DCI officials were concerned that this would affect Black's ability as a law enforcement officer, and his credibility as a witness. (T 18).

Some of the things that DCI officials observed in the protection order application related to were the very same problems that had been repeatedly documented in personnel evaluations and independent acts of discipline over the prior eight years (T 19, 23).

After the tape recording and letter had been placed on the internet for all to view, and after Black had made his comment on the Keloland blog, Even received several contacts from people in the Aberdeen area community asking him what was going on with Black (T 92). In addition to affecting Black's general credibility, the DCI was concerned that statements made by Black would compromise his ability to investigate cases, including investigation of other law enforcement officers and departments, which is one of the roles of the DCI (T 30). By that time, Black had been counseled and warned or disciplined about behavior involving lack of emotional control (T 29). Although it should be a matter of common sense, the DCI officials testified about the need for good judgment on the part of their agents. (T 27, 28).

Zeeb, Even, and Satterlee all testified that Black's problem was not necessarily his ability as an agent or his work ethic, but his inability to exercise good judgment due to his emotions sometimes controlling his common sense and decision-making abilities.

Whenever negative evaluations or discipline had been imposed, it had always been for this reason. (T 23, 83, 124). Director Gortmaker acknowledged that the ultimate decision to terminate Black was made more difficult because of Black's ability as an agent. However, Gortmaker stated that Black's continued emotional reactions which overcame his better judgment caused the DCI to be greatly concerned regarding his ability to act as an effective agent and retain his credibility (T 157, 158).

After the filing of the protection order application, Black's placement on administrative leave and follow up investigation, Satterlee (T 132-137), Even (T 94), Zeeb (T 33), and Gortmaker (T 157-158) as a group discussed Black and determined that discipline was necessary. This was based on his history, conduct and disciplinary record, and prompted by the information learned during the course of the protective order application. The decision was that Black would be terminated (T 159). They determined that Black's problems had always originated from the same cause – emotions controlling his judgment – that his situation was not improving, and that it jeopardized his ability to act as an agent (T 137). His behavior – now publicized to some degree on the internet – had affected his credibility in the eyes of his superiors (T 158).

Black was given written notice of intent to terminate his employment by letter dated February 21, 2014 (Ex.3, App. 4) which was personally delivered to him by Zeeb (T 36). Exhibit 3 cited administrative rules which specified causes for disciplinary action and recounted the facts which the DCI had recently learned through the filing of the application for protective order. Exhibit 3 noted that Black's own handwritten letter admitting to such behavior had become a public document posted on the internet. In

addition to administrative rules as the basis for termination, DCI Policy 7.0101 “Unbecoming Conduct” was also cited as a basis for termination.

In response to Exhibit 3, Black provided a letter raising certain facts and issues in his defense. (Ex. 4). As a result of that letter from Black, the DCI conducted further consideration and investigation exactly as requested by Black. The DCI obtained 454 pages of text message primarily between Black and his ex-wife as part of this investigation. (T 36). In the meantime, the DCI took the extra step of submitting information to their counterparts in North Dakota to investigate the potential of criminal prosecution against Black (T 37, 38). Although North Dakota did not recommend the charges be filed, the DCI still felt the termination of Black’s employment was necessary (T 37, 38).

A letter confirming the decision to terminate was provided to Black on March 4, 2014 (T 39, Ex. 5, App. 5). After reviewing the additional information that had come to light, the DCI was convinced to an even greater degree that termination was the only answer. (T 41, 157, 158, 161, 166).

The second letter, Exhibit 5, advised Black, among other things, that:

“The reasons given in this letter in support of my decision to terminate your employment with the DCI are based on additional review of documents, and are intended to supplement and further explain my additional decision.” (Ex. 5, P 4).

Exhibit 5 also advised Black that:

“You have shown a lack of ability to deal with stressful situations, and an inability to keep your emotional reactions in control. You have also continued to fail in the ability to consider consequences of your actions and communications, ensuring your decisions do not bring discredit to

yourself, the Division, and the Attorney General's Office." (Ex. 5, P 2).

The letter reminded Black that the DCI had repeatedly tried to work with him and improve his conduct. The record reflects many instances where Black's skill as an agent convinced his superiors to either provide him aid and assistance or go to bat for him, even to the extent of saving his job. As Satterlee testified, the DCI tried to help him and was there for him (T 124, 125), but it became clear that Black was "not getting the message". (T 127, 128, 129, Ex. 23).

When the grievance procedure reached Director Gortmaker, he affirmed the termination and wrote a letter to Black's counsel explaining his decision. (Ex. 18). In that letter, Gortmaker mentioned comments made previously in the grievance process by Black, where Black made contradictory statements on subjects deemed important by Gortmaker. Gortmaker's conclusion as expressed in Exhibit 18 that Black was lying to someone and likely to him is impossible to dispute based on Black's own actions and testimony (T 163-164).

The grievance procedure progressed through the Civil Service Commission and the Circuit Court. The DCI's actions were affirmed at both levels. This appeal followed.

STANDARD OF REVIEW

This Court has commented on the appropriate standard of review in administrative appeals in *Williams v. SD Dept. of Agriculture, 2010 SD 19, 779 NW 2nd 397*. The Court stated:

“Rather, our standard of review is controlled by SDCL §1-26-36, requiring us to give great weight to the findings of the agency and reverse only when those findings are clearly erroneous in light of the entire

record.”

When a record consists entirely of documentary evidence, or when the issues are questions of law, the review is de novo. In this case, the finder of fact was able to hear and evaluate a great majority of the witnesses who testified. Therefore, the Commission’s resolution of any facts must be reviewed under the clearly erroneous standard. See also *Weekley v. Prostrollo*, 2010 SD 13, 778 NW 2nd 823. Whether the facts established just cause for termination as a legal question is fully reviewable. *Irvine v. City of Sioux Falls*, 2006 SD 20, 711 NW 2nd 607.

In Osman v. Karlen & Assocs., 2008 SD 16, 746 NW 2nd 436, 442-443, the Supreme Court further defines the clearly erroneous standard of review:

“In applying the clearly erroneous standard, our function is not to decide factual issues de novo. The question is not whether this court would have made the same findings that the trial court did, but whether on the entire evidence we are left with a definite and firm conviction that a mistake has been committed. This Court is not free to disturb the lower court’s findings unless it is satisfied that they are contrary to a clear preponderance of the evidence. Doubts about whether the evidence supports the Court’s findings of fact are to be resolved in favor of the successful party’s version of evidence, and all inferences fairly deducible therefrom which are favorable to the Court’s action.”

The Findings of Fact are thorough and very specific in regard to Black’s actions and history, and in regard to the events and actions relied upon by the DCI in their decision to terminate his employment. Many specific findings dealt with the factual basis for termination described in the letters of termination (Ex. 3 and 5). In summary, Finding of Fact 81 confirmed that:

“The basis for termination given to Black, and the initial Notice of Intent to Terminate letter dated

February 21, 2014, and in the Supplemental Notice of Termination dated March 14, 2014, was supported by credible evidence in the record and persuasive facts.”

The Commission – charged by statute with reviewing discipline actions against state employees subject to the Civil Service Act (including those within the DCI) found there was good cause to support the decision to terminate Black’s employment. The factual findings relied on by the Commission are not contrary to any preponderance of evidence in the record, but are supported by the record in its entirety.

This Court’s Review of the Commission’s Decision

The Commission is charged by statute with resolving grievances involving the discipline of state employees. SDCL §3-6D-15. In resolving these grievances, it is the sole duty of the Commission to determine whether the employment action taken by the agency (in this case, the DCI) was made for good cause. SDCL §3-6D-16. If the Commission finds that the action was made for good cause, the agency’s decision must be upheld according SDCL §3-6D-16. That is exactly what occurred here, and this Court should affirm.

The decision of the Commission – memorialized and explained by its Memorandum Decision and Findings of Fact and Conclusions of Law – shows exactly what decision-making process was employed by the Commission in terms of determining that good cause existed for the discipline to be imposed by the DCI on Black. See also *Wendell v. SD Dept. of Transportation*, 587 NW 2nd 595, 1998 SD 130.

It is important to remember that the Civil Service Commission is, by statute, made up of at least three members who are experienced in law enforcement so that appeals

involving law enforcement officers can be heard by a Commission having expertise in that area. SDCL §3-6D-1.

Once a determination has been made that discipline was justified, the Commission cannot substitute its judgment on the form of discipline, e.g. termination vs. suspension. See *Schroeder v. Department of Social Services*, 545 NW 2nd 223, 1996 SD 34. Schroeder stands for the proposition that the employing entity should have the discretion – within bounds – to determine whether an employee is retained or dismissed, or simply disciplined in some other form, provided good cause exists for any discipline. As noted, this Court may reverse only based on the criteria established by 1-26-36 and within the parameters of the statutes and rules governing the Commission. Black acknowledges that scope of review.

ARGUMENT AND AUTHORITY

ISSUE 1: THERE WAS GOOD CAUSE BASED ON THE LAW AND THE FACTS AS PRESENTED TO THE CIVIL SERVICE COMMISSION FOR THE DCI TO TERMINATE BLACK’S EMPLOYMENT.

A. Burden of Proof

Based on the facts presented at the hearing and the applicable law, the DCI more than met its burden of proof to sustain their termination of Black. The DCI accepts Black’s contention that the DCI had the burden of proof to prove the necessary elements for termination by a preponderance of the evidence. That burden was met.

B. Grounds for Dismissal

The initial notice of intent to terminate letter (Ex. 3, App. 4) and the supplemental letter (Ex. 5, App. 5) specifically and clearly set forth the basis for Black’s termination.

The specific reasons for termination cited in each of those letters are supported by substantial evidence on the record.

Exhibit 3 cited ARSD 55:10:07:04 (26) in support of the initial decision to terminate Black's employment. That rule states:

“55:10:07:04. Causes for Disciplinary Action. Disciplinary action under this section may be taken for conduct within or outside the scope of employment. Disciplinary action may be taken for just cause as reported to the Commissioner, including the just causes listed in this section:

(26) The employee has engaged in conduct either prior to or during employment with the State that reflects unfavorably on the State, destroys confidence in the operation of State services, or adversely affects the public trust in the State.”

The letter then went on to detail facts which had only recently come to light through the course of the information obtained in the protection order materials. Specific facts referred to in Exhibit 3 include Black's admitted loss of emotional control, potentially assaultive acts against his then-wife, committing physical damage to property in the course of an out-of-control rage (which he conceded), and generally doing damage as a result of his loss of emotional control. It referred specifically to Black's own letter admitting some of these acts.

Exhibit 3 also cites DCI Policy 7.0101 as a basis for the intended action:

“7.0101. Unbecoming Conduct. Agents shall conduct themselves on and off duty in a manner that reflects favorably on the Division. Conduct unbecoming to an agent means conduct contrary to professional standards that shows and unfitness to discharge duties or conduct which adversely affects morale or efficiency of the Division, or diminish public confidence.”

Exhibit 5 was written after Black provided additional documentation and information, and after the DCI conducted an additional investigation in response to Black's submissions. Both the initial decision and the supplemental decision were made with knowledge of Black's long history of emotional outbursts and poor judgment. These had been tolerated, but not ignored. The information which came to the DCI's attention in February and March of 2014 was viewed by the DCI and must be viewed now in conjunction with his history. This was recognized by his supervisor, who wrote Exhibit 5:

“You have shown a lack of ability to deal with stressful situations and an inability to keep your emotional reactions in control. You have also continued to fail in the ability to consider consequences of your actions and communications, ensuring your decisions do not bring discredit to yourself, the Division, and the Attorney General's Office... The Division has repeatedly attempted to work with you over the years to improve your conduct...”

Black's argument is based in large part on the contention that his superiors at DCI are incapable of making a determination as to whether he or any other employee has engaged in the type of conduct described in the Administrative Rule and the DCI Policy cited above.

In fact, the DCI Director and Assistant Directors, and other supervisors, all of whom possessed substantial experience working in law enforcement and in the DCI in particular, observing and working with agents, and who are charged on a daily basis with the duty of managing the agency should be the people best suited to make a determination as to whether an agent's ability and actions have reflected unfavorably on the agency or the State, have destroyed confidence in the operation of state services, or affected the public trust in the State.

As the Circuit Court noted:

“Those members of DCI testified as laypersons with personal knowledge of what is expected of an agent with regard to public opinion, public trust, and public appearance.” Memorandum Decision (AR 412, 413)

The following are examples of incidents that clearly gave Black’s superiors great concern about actions which violated the Administrative Rule:

- Black’s letter which contained admissions of behavior of the type he could be required to investigate in others. Black now says the statements were untrue. This calls into question another point regarding Black – a willingness to say or do anything at the time if it gained him an advantage. Whether true or false, the statements made in that letter were broadcast on the internet by someone who clearly believed Black’s behavior reflected unfavorably on him as a DCI agent and on the State, and who sought to destroy confidence in Black’s ability to serve the State and the DCI effectively. Why else would someone post an incriminating letter written by a law enforcement officer on the internet?
- Similarly, someone posted an incriminating tape recording on the internet which could be viewed and utilized by litigants and defense counsel to attack Black and his ability to serve the State and the DCI.
- Black’s messages to his ex-wife telling her that when he took the stand he would admit to adultery, combined with his very direct statements to Director Gortmaker that such behavior had never occurred. This combined with other inconsistencies on the part of Black in telling people what they wanted to hear or what he wanted them to believe, were significant to the DCI’s determination.

- Black’s email to the entire DCI staff and the Attorney General which clearly reflected unfavorably on the State and on Black as a representative of the DCI, and had a tendency to destroy confidence at least among other agents and assistant Attorneys General with whom they work.

As the Circuit Court noted, the witnesses called by the DCI all had personal knowledge of the events that the DCI relied on and testified based on that personal knowledge. SDCL §19-14-2 (Rule 602). The Court commented and it is hard to argue otherwise that:

“These witnesses are the best witnesses available for determining whether conduct may destroy confidence in the Agency or adversely affect public trust in the agency. They are best able to effectively gauge the potential impact on an agent’s actions may have before actual damage to the Agency or its public image occurs.” Memorandum Decision (CR. 413)

The Circuit Court made a very important observation. That is, is actual damage to the State or the DCI required in order to impose discipline? In that case, if a “bad act” committed by an agent is unknown to the public, under Black’s theory that bad act could never be utilized as a basis for disciplinary action.

The logical inference for any reasonable person would be that Black’s actions had an unfavorable impact on the State, the DCI, and confidence in the agency, and that if he were permitted to continue in his position as an agent, they would have serious negative impact in the future. Experienced law enforcement officers such as Gortmaker, Satterlee, Even and Zeeb had a right to make that determination based on their training and experience, and their duty to operate the agency in a professional, responsible and effective manner.

No one was in a position to know more about Black and his abilities and deficiencies than the DCI management who Black now contends are unable to make the determination as to whether he violated the Administrative Rule in question. As employers and managers, they have the right, obligation and duty to determine whether conduct on the part of a DCI employee satisfies any of the Administrative Rule criteria. If that were not the case, overt behavior by a DCI employee which was never made known to the public or other law enforcement officers, and which would create a legitimate and serious concern in the mind of any reasonable person, could never be the basis for discipline. If managers of state agencies in a similar position fail to take action based on such a reasonable belief, later violations of a similar nature by the employee in question could expose the State and those managers to liability.

The DCI's concern that Black's ability to both investigate effectively and testify credibly is difficult to argue with under the circumstances. It is very likely that at some point in the future the DCI or a prosecuting attorney might have a difficult decision to make as to whether some of Black's prior behavior rose to the level of exculpatory material under *Brady v. Maryland*, 373 US 83, 83 S.Ct. 1194, 10 L Ed 2nd 215 (1963) or that which would affect his credibility under *Giglio v. United States*, 405 US 150, 92 S. CT. 763, 31 L Ed 2nd 104 (1972). This Court has recently addressed the issue in a different form, and noted the complexity of issues that can be presented in this arena. See *Milstead and State of South Dakota v. Joseph Patrick Johnson*, 2016 SD 56, and *Milstead and State of South Dakota v. Emily Lou Smith*, 2016 SD 55.

Supervisors and managers such as Gortmaker, Zeeb, Satterlee and Even are obligated to make decisions as to the operations of the DCI. They did so in this case

because they knew, based on their experience and training, that Black's history of behavior permitting his emotions to overcome his better judgment – culminating in the events which came to light as part of the protection order application – was the sort that compromised his effectiveness in exactly the way ARSD 55:10:07:04 (26) contemplated. Both the Commission and the Circuit Court agreed.

Black's reliance on the decisions in *Hollander v. Douglas County, 2000 SD 159, 620 NW 2nd 181* and *Wendell v. State Dept. of Transportation, 1998 SD 130, 587 N.W. 2nd 595*, are misplaced. *Hollander* involved a county law enforcement officer and the disciplinary taken against him by the county was not governed by the Civil Service Act (previously the Career Service Act). Neither the process nor the elements of proof necessary to sustain his termination are relevant to the issues at hand. Likewise, *Wendell* involved the employer's reliance on a different Administrative Rule which in fact required proof that the employee had committed an act of brutality, cruelty, or abuse to an inmate, prisoner, resident or patient of an institution. The analysis is entirely different and does not stand as authority for the discipline of Black in this manner.

Further, Black cannot erase the numerous documented concerns regarding his emotional instability by citing the positive portions of his evaluations as he attempts to do in his brief.

The Commission specifically found as fact that Black's actions reflected unfavorably on the state, tended to destroy confidence in the operation of state services or adversely affected the public trust, particularly because several of those incidents had become known to the public through publication on the internet. (CR 281, App. 2). In addition, the Commission found that Black's actions as described in the notice of intent

to terminate letter had violated DCI Policy 7.0101 regarding agent's conduct. (AR 281, App. 2, FOF 30).

The record fully supports the Findings of Fact entered by the Commission on these points. The evidence supports the conclusions that Black's behavior compromised his ability in all the ways contemplated by the Administrative Rule, and reflected unfavorably on the State and the DCI. Agents are instructed that they are on duty 24 hours a day, 7 days a week, and their actions are the actions of their employing agency. Black's supervisors acted appropriately in reaching their conclusion that discipline was warranted under the circumstances and the Administrative Rule. Based on well-settled law, a reviewing court does not have the power to consider the nature of what that discipline should be.

DCI POLICY 7.0101

DCI Policy 7.0101 is cited in Ex. 3 as one of the reasons for the DCI's decision to terminate Black's employment provides:

“Agents shall conduct themselves on and off duty in a manner that reflects favorably on the Division. Conduct unbecoming to an agent means conduct contrary to professional standards that shows an unfitness to discharge duties or conduct which adversely affects morale or efficiency of the Division or diminished public confidence.”

Black's interpretation of this policy is erroneous and his position on how conduct unbecoming must be proven is unsupported.

Unbecoming conduct is defined as either:

1. Conduct contrary to professional standards that shows an unfitness to discharge duties, or;

2. Conduct which adversely affects morale or efficiency of the Division or diminished public confidence.

There are many instances in the record supporting the DCI's determination that Black had violated the conduct unbecoming policy. Those instances are described in the Commission's Memorandum Decision and Findings of Fact and Conclusions of Law, as well as noted above in the factual portion of this brief. Several examples are worth noting again:

- Black's email to all the employees of the DCI and others in the Attorney General's office affected the morale or efficiency of the Division. This was apparent from the immediate and strong reaction of then-Attorney General Long.

- Black's admissions in his own handwritten letter which found its way to the internet for all to view – whether they were true or not – showed and admitted to an inability to control his temper, and consistent with prior behavior noted in his record, allowed his emotion to control his better judgment.

- The DCI has established its own “professional standard” regarding honesty, contrary to Black's assertion. See DCI Policy 7.0103. Although Black is correct that 7.0103 was not specifically mentioned until Gortmaker wrote his letter as part of the appeal process (Ex. 18), it establishes a standard of honesty for DCI agents without question. Such a standard is one the public expects. 7.0103 states:

“Integrity – agents shall be truthful in all matters relating to the operation of the Division. Any conduct, act, neglect, error or omission regarding these matters may subject an agent to disciplinary action.”

- Black's history showed that he had, on occasions, been willing to tell a story or be dishonest when it suited his purpose. For example he admitted to Satterlee that

a year prior to his termination he had told his own wife that the DCI had already terminated him – presumably to obtain some advantage in the divorce proceedings (T 123, 124). This shows he was willing to lie to his wife, but it also shows that he thought the lie was plausible – i.e. that it was understandable that the DCI may terminate his employment.

- Black now claims he lied when he wrote the letter to his wife which was contained in Exhibit 4 and later posted on the internet. In any event, he now denies that he did the things he specifically admitted in that letter. He either lied to his wife in asserting that he would admit to adultery, or lied to Gortmaker when Gortmaker confronted him on that same issue. (Ex. 18)

- Black’s background and behavior and the DCI’s concerns regarding his ability to effectively and credibly act as an agent and testify in Court relate to another basic criteria of fitness for duty. Zeeb testified that considerations based on the Brady and Giglio doctrines did affect their decision to some degree. This was particularly true if Black had been required to investigate assaultive behavior or domestic violence by another law enforcement officer – exactly the type of investigation which is a common function of the DCI (T 41).

The Circuit Court recognized this in its Memorandum Decision. The Court acknowledged that Black’s letter regarding his actions towards his ex-wife prevented him from performing the duty of investigating domestic assaultive behavior in others, and affected his credibility. (Memorandum Decision AR 415). The Circuit Court noted:

“This record is full of impeachable other acts (whether those are admissible is not an issue before this court) making it dangerous for him to testify in any case on behalf of the State. His credibility has been damaged.”

Black's contention that an expert witness from outside the DCI was necessary in order to meet the DCI's burden of proof on the "conduct unbecoming" issue is erroneous.

Whether, as Black contends, the testimony of the DCI administrators and his own supervisors on this issue can and should be believed is an issue for the finder of fact. As noted by the Circuit Court, no rule prohibits potentially biased or self-serving testimony. In fact, most testimony is self-serving. It is a question of how much weight to attribute to that testimony. *Donat v. Johnson, 2015 SD 16, 862 N.W. 2nd 122*. The Commission believed the testimony of the DCI witnesses, and in fact, there was no reason not to. If this had been a conspiracy to wrongfully terminate Black or "get rid of him", the DCI and its director would not have gone to such lengths putting up with his behavior in the past and indeed saving his job twice.

SDCL §19-15-2 (Rule 702) governs the admissibility of opinions of experts:

"If scientific, technical, or other specialized knowledge will assist the Finder of Fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

SDCL §19-15-2 does not require an expert opinion in any given case. In fact, SDCL §19-15-1 (Rule 701) recognizes that witnesses not testifying as experts may still give opinions similar to those given by the DCI witnesses in this case, so long as they are rationally based on the perception of the witness and helpful to a clear understanding of his or her testimony, and the resolution of a fact in issue.

"To be helpful, of course, expert opinion must offer more than something jurors can infer for themselves." *State v. Guthrie, 2001 SD 61, 627 N.W. 2nd 401*. The Court in

Guthrie also recognized that the law does not require opinion testimony to be above all criticism.

The Circuit Court recognized this and noted that the standards of a law enforcement agent are not a matter of scientific, technical, or specialized knowledge such that an expert would be required. (Memorandum Decision, CR 415).

Black confuses standards necessary to certify or decertify a law enforcement officer with the law governing discipline for employees subject to the Civil Service Act. The provisions of SDCL §3-6D and the provisions of law enforcement certification apply to the basis for discipline and the burden of proof in this case. See *Grievance of O'Neill*, 347 N.W. 2nd 887 (SD 1984).

The Circuit Court also recognized that even if expert testimony had been required (after ruling that it was not required) Director Gortmaker and other DCI Supervisors who testified were in fact experts qualified to give such opinion (Memorandum Decision, CR 415).

In short, no expert is or should be required to support the contention that in order to be effective and credible, a law enforcement officer must be honest and exhibit a certain degree of necessary emotional control and good judgment. Conversely, as the Circuit Court noted:

“An expert is not needed to explain that a history of emotional imbalance and a hot temper may cause one to be unfit for law enforcement duties or adversely affect morale in the Division.” (Memorandum Decision, CR 415).

Finally, the periodic evaluations of Black and all other DCI agents are performed according to a format which identifies both positive characteristics which they seek to

foster in agents and negative characteristics which they seek to eliminate. The evaluations themselves – all of which were admitted into evidence – show what those characteristics are and how Black’s superiors evaluated him in those areas. To be sure, many evaluations were positive in many respects. Other evaluations were consistently troublesome and always in regard to the same negative characteristics – lack of good judgment and emotional control. These evaluations themselves established criteria for the assessment of an agent.

Black’s reliance on *Green v. City of Sioux Falls, 2000 SD 33, 607 N.W. 2nd 43* on this issue is misplaced. Black is correct when he states that there are as many definitions of “conduct unbecoming” as there are jurisdictions. However, in this case there is only one definition which controls – the definition contained in the DCI Policy Manual evidenced by Policy 7.0101. In *Green*, this court acknowledged that the term “conduct unbecoming of an officer” was not defined in the Sioux Falls city code or in any South Dakota statute. It was then necessary to create its own definition. Such an exercise is not necessary here.

The DCI clearly established that Black violated DCI Policy 7.0101 – Conduct Unbecoming.

In conclusion, there was good cause shown by the DCI in support of their decision to terminate Black’s employment, both under the applicable Administrative Rule and DCI Policy 7.0101.

Findings of Fact

Black takes issue with some Findings of Fact, mainly because he wishes the findings of the Commission had been different. They were not. In regard to those which

he claims were unduly influenced by his divorce, it should be noted that the witnesses agreed the Black would have been terminated even if the protection order had never been filed if they had known and investigated all the facts which came to light as a result. (T 78, 117, 118).

In addition, Black's own recitation of the facts regarding his wife's lawyer allegedly contacting the Attorney General or others in the DCI were not accepted by the Commission. A review of the transcript testimony cited by Black in support of those allegations (T 252-256) shows that Black was concerned about his wife's attorney having an acquaintanceship with Attorney General Jackley, but had absolutely no evidence that any such contacts were made.

Black contends that Finding of Fact 6 is clearly erroneous relating to the "spray paint incident" involving a boat that was marital property. Even assuming that the boat was in the possession and property of Black or Black and his wife, the significance of the Finding of Fact is that Black spray-painted the boat in an area of Aberdeen that was visible to everyone traveling on Melgaard Road. (See FOF 6, AR 281) and Ex. 2. Black has never disputed this act, and in fact admitted to Satterlee that when he did he "knew that it was not smart", yet he did it anyway. (See FOF 47, AR 281).

The remainder of the Findings of Fact are supported by substantial evidence on the record, and the fact that Black may have offered rebuttal or somewhat inconsistent testimony is meaningless. There is an exhibit or testimony to support all the findings entered by the Commission.

ISSUE 2: THE DIVISION OF CRIMINAL INVESTIGATION COMPLIED WITH GOVERNING LAW, RULES AND REGULATIONS WHEN IT TERMINATED BLACK'S EMPLOYMENT.

The DCI complied with the requirements of due process and South Dakota law in the procedure followed in regard to Black's termination.

The State of South Dakota has established a framework for grievances and discipline in regard to employees who are protected by the Civil Service Act. The Administrative Rule cited above has been promulgated as part of that framework, pursuant to the authority granted and required in SDCL §3-6D-14. The statutory procedure to follow grievances and the resolution of grievances is described in SDCL §3-6D-15. Black was accorded the protections of both a pre-termination hearing within the guidance of *Cleveland Bd. Of Educ. V. Loudermill*, 470 US 532, 105 S. CT. 1487, 84 L Ed 2nd 494 (1985) and a full blown due process hearing as part of his grievance process. *Schroeder v. Dept. of Social Services*, *supra*.

Black contends that the letter dated February 13, 2014 which he received from Zeeb resulted in some denial of due process. The letter in question (Ex. 1) was necessary to place Black on administrative leave without pay, due to the fact that he was prohibited from carrying a firearm, which was an essential part of his duties. Although Black contends that the letter advised him no action would be taken until the protection order matter was resolved, in reality, the letter states in pertinent part:

“You will remain on administrative leave without pay until this issue is resolved, or until further notice from me.” (Ex. 1) (Emphasis ours).

In fact, Black received further notice from Zeeb by letter dated February 21, 2014, which was a pre-termination letter. Again, Ex. 3 advised Black that he would remain

suspended with pay until a final decision had been made concerning termination. In Ex.

3, Black was advised:

“You have the right to present reasons, in person or in writing, why I should not terminate your employment. If you wish to present reasons in person, you must do so at 10 a.m. on Monday, February 24, 2014, in my office. If you wish to present reasons in writing, the reasons must be received by me on or before this time.” (Ex. 3)

In response to Ex. 3 – the written notice of intent to terminate which gave Black the right to present reasons in writing or in person – Black indeed presented reasons or arguments in writing as to why the proposed disciplinary action should not be taken. See Ex. 4 – An eleven page letter presented by Black to Zeeb in response to Ex. 3.

The DCI did exactly what the statute contemplated and what Black asked them to do – they considered Black’s response in detail. That response reaffirmed their determination that he should be terminated for a variety of reasons, all of which are clearly set forth in a letter dated March 14, 2014 from Zeeb to Black.

Black’s opportunity to be heard after receiving Ex. 3 – the pre-termination notice – was exactly that notice contemplated by US Supreme Court decision in *Loudermill and cited in Lee v. South Dakota Department of Health, 411 NW 2nd 108 (SD 1987)*:

“The pre-termination hearing need not definitively resolve the propriety of the discharge. 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...

The essential requirements of due process ... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement... the tenured public

employees 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.”

Black received all the due process to which he was entitled to, particularly when the pre-termination notice was combined with the full-blown evidentiary hearing from which Black now appeals.

Black also contends that DCI should have been prohibited from relying on prior disciplinary actions taken against him. It is difficult to believe that any disciplinary action could or should be taken in a vacuum, and without regard to disciplinary history. Disciplinary history was very important in Black's case. He was fully aware of that history and he knew exactly where both he and the DCI stood in regard to every incident described in his evaluations and every prior disciplinary event.

The disciplinary history which the DCI relied on showed constant and recurring problems with the exercise of judgment and common sense, and Black's inability to prevent his emotions from controlling his better judgment.

This Court recognized that it is appropriate to rely on prior conduct in determining the necessity and type of discipline to impose on any employee. In *Irvine v. City of Sioux Falls*, 711 N.W. 2nd 607 (SD 2006), a situation similar to the case at hand was discussed. This Court commented that:

“Year after year, Irvine's evaluations depicted a man who was a proficient firefighter, but an unmanageable employee. Irvine's supervisors repeatedly encouraged him to “be more cooperative, courteous and non-disruptive to the organization””.

In *Irvine*, this Court acknowledged that a review of prior evaluations and disciplinary history was very much appropriate.

Black's contention that Gortmaker added an additional ground for his termination during the grievance process is also misplaced. The Circuit Court recognized this. Gortmaker's letter of March 27, 2014 (Ex. 18) does not add any additional ground or basis for termination. It offers an additional explanation for how the facts previously made known by Black to the DCI and vice versa support Gortmaker's determination that the conduct unbecoming as expressed in Policy 7.0101 implies and how the DCI Policy requires agents to be truthful in all matters is significant.

The remainder of Black's arguments in this area represent recitations of Black's evidence, his testimony and the testimony of some of his witnesses. However, this version of facts was not accepted by the Commission, and there is no basis for an argument to the contrary. For example, the contention that Black's ex-wife and parties "on her behalf" were contacting Gortmaker and Attorney General Jackley and that there was some other, unstated reason for Black's termination was not adopted by the Commission and in fact not supported by credible evidence on the record. There is absolutely no basis for the unsupported statement made by Black that "given the status of the process, Black had no chance to prevail in any hearing before DCI Administration, nor appeal before the Commission." See P 33 of Black's brief. A review of the extensive transcript, the Findings of Fact and Conclusions of Law, and the Memorandum Opinion of the Commission and of the reviewing Circuit Court show this to be an unsupported contention.

Finally, there is no reason to believe that the Commission was not well-versed in the law governing disciplinary actions and appeals relating to State employees protected by the Civil Service Act. Allegations that the hearing officer failed to advise the

Commission of the applicable law, administrative rules and policies to be applied is likewise unsupported.

The Commission clearly understood the burden of proof. Black received pre-termination notice and an extensive and exhaustive hearing in regard to the termination proceedings. Black received all the due process he was entitled to as a result of the fair and impartial hearing held by the Commission.

CONCLUSION

During the course of his employment with the DCI, Black clearly exhibited some traits and abilities that the DCI valued. However, this is not a case that supports Black's contention that some argument supporting termination was made up after the fact. During the entirety of his employment, the same significant problem surfaced repeatedly. Despite being warned in evaluations and disciplinary proceedings over a period of 8 years or more, he consistently exhibited poor judgment and an inability to control his emotions. These characteristics can be dangerous in a law enforcement officer. Black's ability and credibility was clearly damaged as a result. Discipline was justified and it is not the role of any reviewing court to substitute its judgment on the type of judgment imposed. Black was terminated after receiving all due process rights to which he was entitled. The decision of the Circuit Court and the Civil Service Commission should be affirmed.

Dated this ____ day of August, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies a true copy of the Brief of Appellee in the above-captioned action were duly served upon Appellant by emailing a copy thereof on the ____ day of August, 2016, to attorney Tim Whalen at his email address whalawtim@cme.coop. The undersigned further certifies that the original and two copies of the Brief of Appellee in the above-captioned action were hand delivered to Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 E. Capitol Avenue, Pierre, South Dakota, 57501, on the date above written. On that same date a copy of the Appellee's Brief in Word format and Appendix in pdf format were filed electronically by e-mail attachment to SCclerkbriefs@ujs.state.sd.us .

ROBERT B. ANDERSON

CERTIFICATE OF COMPLIANCE

Robert B. Anderson, attorney for Appellee, hereby certifies that the foregoing Appellee's Brief complies with the type volume limitation imposed by the Court by Order. Proportionally spaced typeface Times New Roman has been used. Excluding the cover pages, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Brief of Appellee contains 9,232 words or 46,941 characters and does not exceed 32 pages. Microsoft Word is the word processing software that has been used.

Dated this ____ day of August, 2016.

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APPENDIX

Civil Service Commission Memorandum Decision.....A1
Findings of Fact and Conclusions of Law.....B1
Circuit Court Memorandum Decision.....C1
Intent to Terminate Letter.....D1
Second Intent to Terminate Letter.....E1

emotional guy. He testified that when he placed the message on the boat, he "knew that it was not smart", yet he did it anyway. It was this recurring loss of control that led the agency to terminate.

The Civil Service Commission cannot put itself in the position of managers or supervisors, but is obligated to determine if just cause existed for disciplinary action under these circumstances. The Commission finds that the agency had just cause to terminate the Grievant in this matter.

Counsel for the South Dakota Department of Criminal Investigation is requested to serve proposed findings of fact and conclusions of law consistent with this memorandum decision upon the hearing officer and Grievant within ten days of receipt of this decision. If Grievant wishes to submit his own proposed finding of fact and conclusions of law and any objection to those produced by the South Dakota Department of Criminal Investigation's counsel, he shall do so within 15 days from receipt of this decision. The Commission will thereafter adopt findings and conclusions and an order will be entered, with notice of entry given as provided by law.

Dated this 12th day of April, 2015.

SOUTH DAKOTA CIVIL SERVICE
COMMISSION

BY Barbara Christianson
Barbara Christianson
Acting Chair

CIVIL SERVICE COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE GRIEVANCE OF: MARK BLACK V. DIVISION OF CRIMINAL INVESTIGATION	FINDINGS OF FACT AND CONCLUSIONS OF LAW
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The hearing in this appeal was held on September 16, 2014, in room 412 of the South Dakota Capitol Building in Pierre, SD, before the Civil Service Commission of the State of South Dakota. The hearing was held before a quorum of the Civil Service Commission with Commission members Ingemunseng, Greff, Garnos, Grandepre and Mosteller in attendance and with Chairman Barbara Christianson presiding. Three of the Commission members in attendance were experienced in law enforcement as that term is utilized in SDCL § 3-6D-1. Hearing officer was Thomas Lee.

The Appellant, Mark Black appeared in person and through his attorney Timothy Whalen of Lake Andes, SD. The Division of Criminal Investigation appeared through its director Bryan Gortmaker, and through its attorney Robert B. Anderson, both of Pierre, SD.

The Civil Service Commission heard all witnesses testify and observed all witnesses in person other than the following witnesses who testified telephonically, by agreement of the parties and permission of the Commission: Dave Ackerman, Mark Milbrandt, Barry Hillstead, Dave Lunzman and Dale Elsen. The Commissioners in attendance were able to observe the witnesses who testified personally and make their judgments as to the reliability and credibility of the testimony presented by all witnesses. All of the Commissioners present heard all of the

testimony and reviewed all of the exhibits and other portions of the record. After considering the record in its entirety, the testimony of the witnesses, the evidence produced, and the argument of the parties and their counsel, and good cause appearing therefore, and the Commission having previously voted to affirm the termination of Mark Black by his employer, the Division of Criminal Investigation, and a written memorandum decision dated April 12, 2015, having previously been entered, which Memorandum Decision is attached hereto, labeled as Exhibit A and incorporated fully herein by reference, now the Civil Service Commission of the State of South Dakota does hereby make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Mark Black (Black) was hired as an agent with the Division of Criminal Investigation (DCI) in 2005. When initially hired Brian Zeeb (Zeeb) was his immediate supervisor in a region which covered northeastern South Dakota.
2. On February 13, 2014, Zeeb became aware that a protection order had been served on Black that among other things required Black to surrender his duty weapons. As a result, Black was placed on administrative leave.
3. The DCI placed Black on administrative leave because he was required to carry a firearm in the course of his employment and being unable to do so could no longer serve as an agent.
4. The Petition for Protection Order was brought against Black by his then ex-wife Patricia.
5. Black and Patricia had been involved in a lengthy, unfriendly divorce that had been finalized in August, 2013.

6. In June, 2013, it came to the attention of the DCI that Black had spray painted on a boat which was marital property and in the possession of Patricia. He spray painted on the boat in large letters "Patty Wins" at a time when the boat was parked in or near a house inhabited by Patricia.

7. Attached to the petition for protective order was a letter written by Black to Patricia which acknowledged prior violent behavior on his part and an inability to control his temper.

8. DCI was concerned that Black may have committed a crime of domestic violence based on the information they reviewed after obtaining a copy of the protection order petition.

9. Prior to February 13, 2014, the DCI had concerns about Black's behavior, his tendency to make decisions based on emotion rather than judgment, and his periodic loss of control. On at least six prior written personnel evaluations, Black had been criticized for making decisions based on emotion and not judgment.

10. At one time Black sent an email to everyone in the DCI as well as the Attorney General criticizing a prosecuting attorney with the Attorney General's office and submitted his resignation (which was not accepted). This act was the result of an emotional impulse on the part of Black.

11. Black's written personnel evaluation done in July, 2013, noted that: "Mark was placed on WIP (work improvement plan) based upon a documented history of his difficulty with stressful/emotional reactions to situations, Mark needs to keep his head down and make sound decisions at all time."

12. Black made very negative and ill considered and potentially damaging comments which were recorded on a tape recording that he had been making during the course of

investigation done in the Brown County Courthouse in Aberdeen. Portions of the tape eventually made it on to the internet through others. The tape was potentially damaging to the confidence and trust of the public and other law enforcement officials.

13. Black was in many ways a skilled agent and valuable to the DCI when he was able to control his emotions and make good judgments.

14. Despite being counseled periodically from 2006 onward Black continued to make similar mistakes and allow his emotion to control his behavior and performance.

15. The DCI views good judgment as an important characteristic of an agent because their agents must deal with complex situations involving victims, suspects, other law enforcement agencies and the public.

16. A paragraph from the hand written letter Black wrote to Patricia was obtained by someone and placed on the internet for the public to review. The letter was damaging to Black's credibility and his continuing ability to serve as an agent.

17. During the course of an investigation Zeeb conducted in response to the filing of the protection order and the information he gathered during the course of that investigation he became justifiably concerned that Black's prior behavior had affected or would affect his ability to work as an agent and testify effectively in the future.

18. Because of these concerns, Zeeb discussed Black's situation with Black's immediate supervisor Jason Even (Even) and Assistant Director, Dan Satterlee (Satterlee) as well as DCI Director Bryan Gortmaker (Gortmaker).

19. Zeeb thought discipline was necessary based on the information he had acquired and Black's disciplinary and service history with the DCI.

20. One concern related to the fact that DCI agents are often asked to investigate other law enforcement agencies or officers across the State and the fact that Black had admitted conduct that may have been criminal in nature (regardless of whether it resulted in a conviction) would affect his ability to conduct such investigations.

21. Some of these investigations relate to charges of domestic abuse against other officers and based on the information now on the internet and in other places, Zeeb and the DCI justifiably felt Black's ability to conduct such investigation was compromised.

22. The conversations Zeeb had with the other identified DCI officials caused them to be concerned about Black's ability to perform as a DCI agent.

23. It was determined that Black should be terminated and the facts required such action. Zeeb personally agreed.

24. After lengthy discussion, Gortmaker, Satterlee, Zeeb and Even all agreed that discipline was necessary and that termination should be the discipline imposed.

25. As a result of their decision, DCI through Zeeb wrote a letter dated February 21, 2014, giving Black notice of intent to terminate his employment with DCI. The letter explained the reasons in detail.

26. The basis for discipline described in the notice of intent to terminate letter included allegations contained in Patricia's application for protection order involving acts of physical violence and Black's inability to control his temper, as well as Black's own hand written letter acknowledging many of these allegations all of which the DCI was unaware of prior to February 13, 2014.

27. In addition, the letter stated that Black had committed what appears to have been the crime of simple assault (domestic violence) whether he was charged or not. The DCI was likewise unaware of this prior to February 13, 2014.

28. Black's conduct which was the basis for the notice of intent to terminate letter dated February 21, 2014, was outside the scope of his employment but administrative rules of the State of South Dakota specifically permit discipline for such acts.

29. The acts complained of by Black reflected unfavorably by the State, tended to destroy confidence in the operation of state services or adversely affected the public trust particularly since these allegations became known to the public through publication on the internet.

30. The facts described in the notice of intent to terminate letter also constitute a violation of DCI policy 7.0101 regarding how agents must conduct themselves both on and off duty. Black's conduct as described in the notice of intent to terminate letter exhibited conduct contrary to professional standards and unfitness to discharge duties as well as conduct which adversely affected morale or efficiency of the DCI and diminish public confidence.

31. Zeeb and others correctly felt that through the history of the documentation Black had not represented the DCI in a positive way and therefore violated the DCI policy noted above.

32. Given Black's behavior and the DCI's legitimate concern about his exercise of judgment it was too great of risk to maintain Black as an active agent.

33. After Black exercised his right to reply in writing to the notice of intent to terminate letter Zeeb and DCI conducted additional investigation into Black's statements to determine whether their decision to terminate was justified. This investigation included the review of documents at the Brown County Courthouse, review of audio recordings, review of

voluminous text messages and having the North Dakota Bureau of Criminal Investigation conduct a separate investigation.

34. As a result of Black's response to the notice of intent to terminate letter and the additional investigation conducted by DCI, Zeeb provided a letter dated March 14, 2014, to Black outlining in detail the factual basis for maintaining the DCI decision to discipline Black and in fact terminate him. Among other things this additional investigation resulted in the DCI stating additional factual reasons for the discipline against Black, all of which are outlined in hearing exhibit 5.

35. Black's continued behavior throughout his employment with the DCI showed a lack of ability to deal with stressful situations and an inability to keep his emotional reactions in control.

36. Black displayed frustration, anger and vindictiveness on repeated occasions that caused alarm in and outside the DCI.

37. Black over time proved that he could not or would not effectively manage his anger and emotion.

38. DCI repeatedly notified Black of their concerns over the behavior identified in the proceeding finding and attempted to work with him to improve his conduct. Those efforts are described in hearing exhibit 5.

39. Of the examples described in hearing exhibit 5 beginning on page 2 continuing through the bottom of page 3 were proven by a preponderance of evidence on the record and represent separate basis for Black's termination. Hearing exhibit 5 is attached hereto, labeled as Exhibit B and incorporated herein by reference.

40. Black's continued history of conduct and emotional behavior was a significant factor in his determination.

41. The fact that DCI had noted their concerns over Black's prior behavior on numerous occasions and attempted to assist him through evaluations and two work improvement plans was also a legitimate factor in DCI's decision to terminate Black.

42. Although Zeeb had been a personal friend of Black and had a long working relationship with him, he was justifiably convinced after the investigation and findings that Black needed to be terminated.

43. The evidence in the record shows that DCI made continuous efforts over a period of years to keep Black in the field as an agent and attempted to deal with his problems and improve his performance.

44. The tape recording which Black made in the Brown County Courthouse made its way onto the internet and did not show agent Black or the DCI in a positive light.

45. Black had difficulty during his career as a DCI agent in dealing with good and bad on an even level. His emotions often affected his judgment.

46. Black had been placed on one work improvement plan as a result of his spray painting the boat discussed above. DCI saw that as evidence of his inability to control his emotions and make bad decisions.

47. Black testified that when he spray painted the message on the boat he "knew that it was not smart". Yet, he did it anyway.

48. Black was criticized for how he handled a disagreement with a prosecuting attorney in sending negative comments to everyone in the DCI through an email. DCI

administration correctly determined that such criticism should be handled in a different way and in a more limited fashion.

49. Black received a one day suspension without pay for commenting on a Keloland Blog and identifying himself as a DCI agent in a manner that the DCI was concerned would be interpreted as an official comment on their behalf.

50. On June 28, 2013, Black had been placed on a 60 day work improvement plan by his immediate supervisor Even.

51. At that time that work improvement plan was imposed on Black, the DCI specifically relied on the tape recording that he had made and which found its way to the internet, the spray painting of the boat discussed above, and 15 other notations in his personnel file that addressed his communications ability with others and his emotional reactions in regard to relationships with others and the impact of that on his decision making.

52. One purpose of the work improvement plan in June, 2013, was to get the message across to Black that they didn't want any more of these type of events involving emotional reactions or poor judgment to occur. Shortly after the work improvement program was completed, Black was again disciplined for the blog comment identifying himself as a DCI agent.

53. During the course of events concerning Black which became public, various law enforcement officers and agencies contacted Even and asked him what was going on, why did this happen and the like.

54. There were articles concerning Black in the Aberdeen Newspaper and on the internet. They were affecting public knowledge and confidence.

55. Black explained the incident where he spray painted the boat as representing an impulsive reaction to his frustration with his divorce proceedings.

56. Black's response to the Keloland blog identifying himself as a DCI agent was noticed by the Attorney General's Office and brought to the attention of the DCI by that office.

57. The letter written by Black to Patricia during the course of their divorce which was ultimately placed on the internet by unidentified parties admitted to acts of violence in breaking and destroying personal property and physical contact between Black and Patricia.

58. By statute, the DCI is the law enforcement agency charged with the duty and obligation to assist other agencies including both local and state agencies, municipal police departments, county sheriffs and others engaged in law enforcement.

59. The role of the DCI is unique and law enforcement in South Dakota. As explained by assistant director Satterlee they "police the police".

60. When Black sent an email to all DCI employees state wide criticizing and blaming an assistant attorney general for the manner in which they prosecuted a case, Gortmaker intervened with then Attorney General Larry Long to save Black's job. Gortmaker correctly viewed it as an example of Black's emotions overcoming his reason and judgment.

61. The tape recording which ultimately made it to the internet and which involved Agent Black among others was in the eyes of Director Gortmaker very inappropriate and harmful to the DCI and its image.

62. Gortmaker was justifiably concerned about the incident where Black spray painted the boat because it also showed a continuation of Black's emotions overcoming his judgment.

63. Gortmaker was justifiably concerned about Black's response on the Keloland news blog criticizing a mother who had posted remarks about a swat team exercise, and identifying himself therein as a DCI agent. He viewed that as a continuation of poor judgment on the part of Black.

64. Gortmaker and the DCI determined that Black's behavior over a period of time reflecting poor judgment and a tendency to react emotionally affected him, his credibility and his ability to carry out his duties as a DCI agent.

65. After the initial of intent to terminate letter dated February 21, 2014, and Black's response, the DCI conducted additional investigation which among other things revealed 540 pages of text messages many of which were sent by Black. Director Gortmaker reviewed all of those and he had never seen them prior to that time.

66. Gortmaker's review of the text messages confirmed his decision that Black should be terminated.

67. Among other things Black admitted to his wife in a text message that he would take the stand and admit to adultery when he had previously specifically denied such actions to Director Gortmaker in response to a specific and direct question.

68. Gortmaker made the determination that if Black would lie to his wife, Black would lie to him in the course of his duties and responsibilities. That has always been Gortmaker's rule in dealing with other employees of the DCI.

69. Throughout the course of his employment with DCI, Black had been furnished written personnel evaluations commenting on his need to improve his control of emotion, he was offered counseling, he was placed on two work improvement plans in an effort to improve his performance and save him as an agent.

70. Black's inability to control his emotional response to stressful events as set forth above negatively affected the confidence of others in him as an agent and in the DCI as well as their respective relationships with other law enforcement agencies and individuals.

71. Black's repeated behavior in permitting his emotions to overcome his better judgment and reasoning reflected unfavorably on the State and the DCI and destroyed confidence in the operation of the DCI as well as adversely affecting the public trust in the State and the DCI.

72. Black's behavior and in particular his tendency to react emotionally to stressful situations and not use his better judgment became known to other law enforcement agencies and individuals and to the public in general.

73. Black's emotional responses to stressful situations and his tendency to allow emotion to overcome better judgment and reason caused his supervisors at the DCI to lose trust and confidence in his ability to effectively act as an agent and a representative of the DCI.

74. Black violated rule 7.0101 of the DCI personnel policy manual in that he failed to conduct himself on and off duty in a manner that reflected favorably on the DCI.

75. Black violated rule 7.0101 of the DCI personnel policy manual in that his conduct both on and off duty adversely affected the morale and efficiency of the DCI and diminished public confidence.

76. Black's conduct and violation of the DCI policy set forth in the preceding two findings of fact negatively impacted the trust of others in the DCI and those in other law enforcement agencies in regard to Black's ability to perform the duties of his position and reflected poorly on the DCI.

77. The evidence presented at the hearing is sufficient to establish good cause for Black's termination by DCI.

78. Black's actions as set forth in these findings of fact disrupted the efficiency or morale of the DCI.

79. Black violated standard work rules and DCI policies established for the safe, efficient or effective operation of the DCI.

80. Black violated the provisions of ARSD 55:10:07:04(26).

81. The basis for termination given to Black in the initial notice of intent to terminate letter dated February 21, 2014, and in the supplemental notice of termination dated March 14, 2014, was supported by credible evidence in the record and persuasive facts.

82. Good cause and factual support exist to support the discipline which was imposed on Black as a result of the facts and circumstances described in these findings of fact.

83. Good cause existed for the termination of Black by the DCI.

CONCLUSIONS OF LAW

1. The Civil Service Commission of the State of South Dakota has jurisdiction over both the subject matter of this proceeding and the parties.

2. All of the evidence and testimony was heard by a quorum of the Civil Service Commission for the State of South Dakota. Of those members present, three were experienced in law enforcement as that term is utilized in SDCL 3-6D-1.

3. The DCI met its burden of going forward, its burden of proof, and its burden of persuasion to establish there was good cause for discipline to be imposed on Black.

4. The DCI met its burden of going forward, its burden of proof, and its burden of persuasion to establish there was good cause for Black's termination.

5. Given the facts and circumstances which existed and which are described in these findings of fact and conclusions of law, there was good cause for the DCI to terminate Black's employment.

6. These conclusions of law are based on the facts and other evidence presented at the hearing held on September 16, 2014 and on the Commission's assessment of the credibility of the various witnesses as well as on the memorandum decision dated April 12, 2015, which is attached hereto, labeled as Exhibit A and incorporated herein by reference.

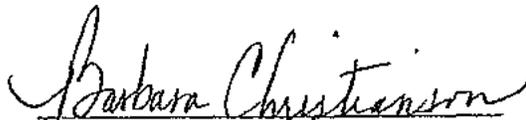
7. Black's appeal is dismissed and the decision of the DCI in regard to the termination of Black's employment is upheld.

8. The memorandum decision entered by the Civil Service Commission dated April 12, 2015, is hereby incorporated fully by reference.

9. An order consistent with these findings of fact and conclusions of law shall be issued by the Civil Service Commission.

Dated this 18th day of May, 2015.

SOUTH DAKOTA CIVIL SERVICE COMMISSION



BY:
It's Chairman



CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

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February 1, 2016

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Re: Hughes County Civ. No. 15-125: Mark Black v. Division of Criminal
Investigation

MEMORANDUM DECISION

This is an appeal from the Civil Service Commission regarding Mark Black's termination of employment. The Division of Criminal Investigation terminated Mark Black for cause. Mark Black eventually appealed that decision to the Commission, which affirmed termination. Mark Black now appeals to this Circuit Court. This Court affirms the Commission.

BACKGROUND

Mark Black ("Black") began employment as an agent with the Division of Criminal Investigation ("DCI") on August 5, 2005. AR. at 110. He was terminated on February 24, 2014. AR. at 88. Before being terminated, Black was considered

one of DCI's top five agents. HT. at 110 (Even); HT. at 139 (Satterlee). Black was awarded the Distinguished Service Award in 2009. AR. at 254. Everyone agreed that Black was recognized as a good agent who performed his work exceptionally.

However, the record shows a long history of temper, emotional imbalance, and poor judgment when under stress. These have been continuous concerns of DCI since Black's first year of employment. Within his first year, he received high marks and praise on his evaluation of September 7, 2006, but was told that he needed "to continue to remind himself to maintain his composure and not allow his emotions to take over." AR. at 112. For the first part of 2007, his evaluation read, "Mark needs to remind himself to maintain a positive attitude when things are difficult or do not turn out the way he hoped." AR. at 115. Another evaluation six months later in February of 2008 revealed the same problem: "Mark needs to maintain his composure during stressful times when dealing with others in" law enforcement. AR. at 118. Later that year, his evaluation advised that "Mark on occasion makes poor decisions with regards to his relationship with others. Mark had at times a very difficult 6 month period and became frustrated and disappointed. This became an issue when he sent a resignation email to all agents in the DCI and to the Attorney General." It continued on to recommend improvement by seeking "out avenues to relieve his stress and not allow his emotions to get the best of him. Mark understands what is expected of him, but has in the recent past made poor choices in how he expresses himself." AR. at 121. The email resulted in 2-day work suspension and 60-day work improvement plan, and Black saw a counselor. He received an additional five similar evaluations outlined in Zeeb's second letter. AR. at 105; 122-36. Black was put on a work improvement plan "based upon a documented history of his difficulty with stressful/emotional reactions to situations. Mark needs to keep his head down and make sound decisions at all times." AR. at 140; 226.

Outside of work, Black commented on the KELOland blog about a SWAT training event. Because he indicated he was a DCI agent on his Facebook page, his comment was linked, and it appeared that the comment was made on behalf of the DCI. He wrote: "This story is an excellent example of a waste of time by the media. This 'mother' would rather whine to get her face on camera than be a parent and explain to her child, it is the people that protect us practicing to keep us safe from bad guys." AR. at 105; 229. Black was disciplined with a 1-day suspension.

Black had a pending divorce occurring around 2013 that was very hostile. Black was very frustrated and spray-painted the phrase "Patty wins" on his boat

that was parked on the street in front of his home. On February 13, 2014, his ex-wife filed a petition for a protection order. That same day, Black's supervisor, Brian Zeeb, wrote to Black advising him that because he had to relinquish his service weapon, he had to be "on administrative leave with pay until this issue [of the protection order] is resolved or until further notice from me." AR. at 35. The Protection Order alleged many things, of which none were the basis of termination for cause. Instead, the only basis in the protection order was found in an attached document, one handwritten letter by Black himself to his then-wife. That letter dated October 23, 2013 included these passages:

"As for my temper, rage, and razor tongue, I finally figured out how bad I hurt everyone around me. Especially you. I said numerous hateful things . . .

"I know you feel like a victim . . .

"Yes babe I know I punched walls and doors, broke dishes, pictures.

"I pushed and shoved you as well for that I am sorry too. A[n] honest reflection is that we both mistreated each other. . ."

AR at 59-60. Because of the admission in the letter of physical contact that may arise to domestic simple assault and a clear showing of Black's continued lack of emotional control and poor judgment, DCI (through Zeeb) sent a letter dated February 21, 2014, stating that it intended to terminate Black's employment. AR. at 88-91.

The notice of termination letter cited ARSD 55:10:07:04(26) and DCI Policy 7.0101 as a basis for finding just cause to terminate. AR at 88-89. In response, Black was given the opportunity to be heard and wrote a lengthy letter explaining his side of the story. AR. at 92-102. This response letter caused Supervisor Zeeb to reconsider. Zeeb reviewed numerous documents and information and outlined his findings in another letter. He stood by his decision and advised Black on the appeal process afforded to him. AR. at 103-106. Black appealed to Director Gortmaker who reinvestigated and reconsidered. In doing so, he instead found more support for termination and affirmed Zeeb's decision. AR. at 170-71. Specifically, Black texted his ex-wife on May 17, 2013, the following, "Not after I take the stand and admit to adultery. I told you I'll give you what u want. Btw [by the way] I broke up w/Lynda." AR. at 170. Gortmaker had asked Black if he committed adultery, to which Black said no. In light of this text, Gortmaker considered Black was lying to him or lying to his wife, in either case being a violation of DCI Policy 7.0103

“Integrity” and “unbecoming conduct” of an agent under 7.0101. Gortmaker stood by Zeeb’s decision.

Then, Black appealed to the Attorney General, Marty Jackley, who also affirmed Zeeb’s decision and denied the appeal. AR. at 197.

Next, Black appealed to the Civil Service Commission. At the hearing, DCI presented witnesses who testified about Black’s long history of emotional imbalance and poor judgment. Black presented numerous commendation exhibits and witnesses who testified about his character and being a great agent. The Commission considered all of the above acts and found that just cause existed to terminate the employment of Black. AR. at 279-80. Findings and Conclusions were entered. AR. at 315-28.

Black now appeals to this Circuit Court. This Court heard oral arguments by counsel on January 6, 2016. This Court now affirms the decision of the DCI administrators and the Commission.

STANDARD OF REVIEW

Agency decisions concerning questions of law are fully reviewable.¹ “Whether the facts establish just cause for termination is a legal question reviewed *de novo*.” *Irvine v. City of Sioux Falls*, 2006 S.D. 20, ¶ 4. “In reference to the civil service board’s factual findings, we have said that ‘we do not judge witness credibility, a matter left to those presiding first hand.’” *Id.* Otherwise, this court’s review of a decision from an administrative agency is governed by SDCL 1-26-36. “The court shall give great weight to the findings made and inferences drawn by [the Commission] on questions of fact” and reverse only when those findings are “clearly erroneous in light of the entire evidence in the record.”² Documentary evidence is reviewed *de novo*.³

ANALYSIS

I. Whether the facts relied on by DCI establish just cause to terminate Black’s employment?

¹ *Hayes v. Rosenbaum Signs & Outdoor Adver., Inc.*, 2014 S.D. 64, ¶ 7, 853 N.W.2d 878, 881.

² *Williams v. S.D. Dep’t of Agr.*, 2010 S.D. 19, ¶ 5, 779 N.W.2d 397, 400; SDCL 1-26-36.

³ *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 14, 857 N.W.2d 413, 417.

DCI cited one regulation and one policy that were violated by Black continuously throughout his employment as support for just cause to terminate Black's employment. The Commission cited the same two authorities for finding just cause existed to terminate.

The first regulation, ARSD 55:10:07:04, is entitled, "Causes for disciplinary action." It reads in relevant part,

Disciplinary action under this section may be taken for conduct within or outside the scope of employment. Disciplinary action may be taken for just cause as reported to the commissioner, including the just causes listed in this section: . . . (26) The employee has engaged in conduct, either prior to or during employment with the state that reflects unfavorably on the state, destroys confidence in the operation of state services, or adversely affects the public trust in the state.

ARSD 55:10:07:04(26).

Black's main argument is that DCI did not present the right witnesses to prove that Black "engaged in conduct that reflects unfavorably on the state, destroys confidence in the operation of state services, or adversely affects the public trust in the state." Black would require DCI to present witnesses from the general public, outside of the agency, to testify whether Black's conduct spoiled their personal view of, confidence in, and trust of the state and DCI. To take this proposal to its logical extreme, Black would require a parade of individuals to the court and having them polled without suggesting what level of personal knowledge each person would have, where these people need to reside, or how many members of the public are needed for DCI to meet its burden of proof. Black would have some amount of random individuals testify about their opinion that would somehow be a reflection of the general public's opinion. Additionally, this proposal has judicial economy concerns.

Instead, to meet its burden, DCI presented the directors and assistant directors of the DCI who had substantial experience working in DCI, observing and working with the agents and the public, and who are charged with the duty of managing DCI. One way it manages the DCI is handling and improving the public's opinion of the DCI. "A witness may testify to a matter only if evidence is

introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." SDCL 19-19-602. Those members of DCI testified as laypersons with personal knowledge of what is expected of an agent with regard to public opinion, public trust, and public appearance. These witnesses also had personal knowledge of the events that occurred surrounding Black. These witnesses are the best witnesses available for determining whether conduct may destroy confidence in the agency or adversely affect public trust in the agency. They are best able to effectively gauge the potential impact an agent's actions may have before actual damage to the agency or its public image occurs.

Further, Black presents no authority for his proposal that "the test is to show that parties independent of the DCI administration were adversely affected as provided by this administrative rule." *Black's Brief* at 14. While the failure to cite authority is fatal for an issue at the Supreme Court level,⁴ it is illustrative to this circuit court that the witnesses who testified, being charged with managing and supervising the agency, were competent and provided appropriate opinions that Black's conduct fit within the just cause described in section 26 of this Rule.

DCI also found Black's conduct was unbecoming of an agent, in violation of DCI Policy 7.0101, which provides that

agents shall conduct themselves on and off duty in a manner that reflects favorably on the division. Conduct unbecoming to an agent means conduct contrary to professional standards that shows an unfitness to discharge duties or conduct which adversely affects morale or efficiency of the division or diminished public confidence.

Black argues that an expert witness is necessary to explain to the court the professional standards required of an agent to discharge his duties, before determining whether Black was unfit. Black argues that that expert must come from outside of the agency because the administrators are biased, and their testimony would be self-serving.

First, there is no rule of evidence prohibiting bias or self-serving testimony to be admitted. That only goes to the weight of the evidence that the court will give it. *See Donat v. Johnson*, 2015 S.D. 16, ¶ 17, 862 N.W.2d 122, 128 (citing *State v.*

⁴ "As has been stated many times by this Court, [Appellant's] failure to cite authority is fatal." *Steele v. Bonner*, 2010 S.D. 37, ¶ 35, 782 N.W.2d 379, 386 (citing SDCL 15-26A-60(6)).

Bergeron, 452 N.W.2d 918, 926 (Minn. 1990) (“explaining that the objection that testimony is ‘self-serving’ appears to be a variation on the objection that a defendant is incompetent to testify because of an ‘interest’ or ‘bias’ in the case, an objection that is no longer valid under the modern rules of evidence.”).

Second, expert testimony is necessary when the “expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.” SDCL 19-19-702. “To be helpful, of course, expert opinion must offer more than something jurors can infer for themselves.” *State v. Guthrie*, 2001 S.D. 61, ¶ 32, 627 N.W.2d 401, 415. The professional standards of an agent are not a matter of scientific, technical, or specialized knowledge. This court, sitting as the trier of fact, does not need testimony to help it understand any of the evidence presented. The court can infer for itself the professional standards of a law enforcement agent, and how those standards were violated in this circumstance. An expert is not needed to establish that emotional control is a professional standard for a law enforcement officer. An expert is not needed to explain that a history of emotional imbalance and a hot temper may cause one to be unfit for law enforcement duties or adversely affect morale in the division.

Even if an expert was required to help the court understand what conduct is “professional” for an agent, Director Gortmaker and other supervisors who testified are such experts qualified to give such opinions.

DCI also presented Black’s evaluations as exhibits. The evaluations show the expectations and standards required of an agent and how each is assessed. In this case, those evaluations show a history of conduct that Black was unable to keep a cool head and deal with his stress and anger in a very stressful job.

Additionally, one of his job duties is to investigate other law enforcement agents, sometimes those accused of domestic violence. The admission in the letter that he “pushed and shoved” his ex-wife prevents him from performing that duty because he has lost all credibility specific to that issue. But further, his course of conduct and the way he handles stressful situations gives one pause as to how well Black will testify at trial. Testifying is a very stressful but very important duty of an officer. This record is full of impeachable other acts (whether those are admissible is not an issue before this court) making it dangerous for him to testify in any case on behalf of the State. His credibility has been damaged.

DCI also met its burden of proof that Black's actions adversely affected the morale or efficiency of DCI or diminished public confidence. There were examples of conduct including exposure of embarrassing communications or documents on the internet, and public displays of frustration and anger, and an agency-wide email criticizing an assistant attorney general's work performance. Zeeb even received calls about people concerned over Black's actions. HT. at 92.

Combining the long, continuous course of conduct and the episodes of public outbursts, Black's actions were contrary to professional standards, which show he is unfit to discharge the duties of an agent. DCI met its burden of proof that Black did not conduct himself on and off duty in a manner that reflects favorably on DCI, contrary to DCI Policy 7.0101.

Findings of Fact

Black points to several factual findings that he argues were erroneous and require reversal. No finding was wholly unsupported by the record or so egregiously erroneous to warrant reversal of the Commission's decision.

First, FOF 6 said the boat was in "Patty's" possession when in fact it was in front of Black's home. The significance of this finding is to describe that Black spray-painted his boat with angry words, "Patty Wins," in frustration of the divorce. Also, it was still marital property, so both parties had property rights to it. This finding does not require reversal.

Black contends that FOF 7 and 8 indicate that Black admitted to allegations in his handwritten letter. The words "admit" or "admission" are not in those findings. Instead, FOF 7 summarizes the content of that letter where Black acknowledged that he "pushed and shoved" his wife. FOF 8 explains DCI's concerns about this letter. Neither is erroneous.

Black alleges that Gortmaker and Jackley "made it clear to the DCI administration that they were simply tired of hearing Black's name." Appellant's Br. at 21. Black fails to cite the record for this alleged motivation. Instead, Exhibits 3, 5, 18, and 20 are letters from Zeeb, Gortmaker, and Jackley. Those letters are absent of any "clear" intention to fire Black because of gossip or annoyance. Those exhibits lead to the reasonable inference that DCI had dealt with Black's constant and repeated unacceptable and inappropriate behavior, which is well documented in the record.

The rest of Black's complaints with the Findings are consistent with the record and have already been addressed elsewhere in this opinion. The court cannot say the Commission's factual findings were clearly erroneous in light of the entire evidence in the record. *See* SDCL 1-26-36.

Lastly, Black spends a considerable amount of time proving he was a good agent. That is undisputed and irrelevant. Black was not terminated for inadequate work performance or poor case management. He was terminated because his emotions and anger cause him to act without thinking in a manner contrary to professional standards and unbecoming of a state employee and a law enforcement officer. Under this Court's *de novo* standard of review, the facts establish that just cause existed for DCI to terminate Black's employment. The Court affirms the Commission's and DCI's decision to discipline Black in the form they chose, termination.

II. Was Black provided his full due process rights?

Black complains that he was not afforded due process during his termination proceedings. First, Black argues that he did not have notice that prior disciplinary actions would be a basis for termination.

He had notice on February 21, 2014 that he may be terminated due to specific acts alleged in the protection order and Black's statements in his handwritten letter. The decision became final when Zeeb gave notice on March 14, 2014 outlining several examples of how Black had destroyed his own reputation but also the public's and DCI's confidence in Black to maintain professional standards. This served as notice that all those prior acts showed a course of conduct that Black was unable to control his emotions in stressful situations and to consider the consequences of his actions. He has been afforded every opportunity to be heard at every level of this appeal process.

Second, Black cites no authority that prohibits prior conduct already subject to discipline, from being used in consideration of just cause for a future termination. Prior conduct *can* be the basis for just cause when an employee has a history of bad conduct and continues to act adversely to their employer. *See Irvine v. City of Sioux Falls*, 2006 S.D. 20, ¶ 15, 711 N.W.2d 607, 612 (finding a long and continuous history of attitude problems recorded in employee's evaluations).

Finally, Black argues that after he was terminated, additional reasons and grounds were added. While Gortmaker *did* add another fact of just cause after

termination, there was no added "ground" or policy violation. Gortmaker merely cited the Integrity expectation at 7.0103. Lying, or violating this "golden rule," is a violation of Policy 7.0101, unbecoming conduct of an agent. Even if there were some violation of due process for adding another cause or a new ground, without the alleged fact of lying about adultery, the record still supports the agency's decision that just cause existed for disciplinary action by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons, the Commission's decision is AFFIRMED.

Dated this 1st day of February, 2016.



Honorable John Brown
Presiding Sixth Circuit Court Judge



STATE OF SOUTH DAKOTA
DIVISION OF CRIMINAL INVESTIGATION
OFFICE OF ATTORNEY GENERAL
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Law Enforcement Training
State Forensic Laboratory

MARTY J. JACKLEY
ATTORNEY GENERAL

February 21, 2014

Special Agent Mark Black
PO Box 117
Aberdeen, SD 57402-0117

Dear Special Agent Black:

In accordance with Administrative Rules of South Dakota (ARSD) 55:10:07:03, this letter is notice of intended disciplinary action. On February 24, 2014, at 5:00 PM, I intend to terminate your employment as a Special Agent with the Division of Criminal Investigation. Additionally, you will continue to be suspended with pay until a final decision is made concerning whether to proceed with your termination.

The basis for this intended action is ARSD 55:10:07:04, which states:

55:10:07:04. Causes for disciplinary action. Disciplinary action under this section may be taken for conduct within or outside the scope of employment. Disciplinary action may be taken for just cause as reported to the commissioner, including the just causes listed in this section:

(26) The employee has engaged in conduct, either prior to or during employment with the state that reflects unfavorably on the state, destroys confidence in the operation of state services, or adversely affects the public trust in the state.

This action is based on the following summary of facts:

On February 13, 2014, Patricia Ann Black, your former wife, filed a Petition and Affidavit for a Protection Order (Domestic Abuse) and a Petitioner's Affidavit in Support of Petition for a Protection Order at the Brown County Courthouse in Aberdeen, South Dakota. In the Petitioner's affidavit, Patricia cites several incidents that allege domestic abuse:

- 1) Specifically, in the summer of 2008, you broke half of Patricia's china, ripped her shirt while holding her on the kitchen floor, and punched holes in a door and walls of your daughter's room.

D1

28



- 2) In the spring of 2009, you physically picked up Patricia, tearing her pants zipper, and carried her outside your home and locked her out of the house.
- 3) In Billings, Montana, you pushed Patricia up against a wall in a cabin you were staying in.

In the Petitioner's affidavit, Patricia included a copy of a handwritten letter that you wrote to her on October 23, 2013. In the letter on page 3, you stated, "I know you feel like a victim and that wounds me as well. Yes babe I know I punched walls and doors, broke dishes, pictures. I pushed and shoved you as well for that I am sorry too. A [sic] honest reflection is that we both mistreated each other."

This handwritten letter has now become a public document, which was brought to my attention when the Brown County Sheriff served the Order for Protection on you on February 13, 2014. DCI administration was not aware of this conduct prior to February 13, 2014. You have admitted to what appears to be a simple assault (domestic violence) in violation of SDCL 22-18-1.

SDCL 22-18-1. Simple assault--Misdemeanor--Felony for subsequent offenses. Any person who:

- (1) Attempts to cause bodily injury to another and has the actual ability to cause the injury;*
- (2) Recklessly causes bodily injury to another;*
- (3) Negligently causes bodily injury to another with a dangerous weapon;*
- (4) Attempts by physical menace or credible threat to put another in fear of imminent bodily harm, with or without the actual ability to harm the other person; or*
- (5) Intentionally causes bodily injury to another which does not result in serious bodily injury;*

is guilty of simple assault. Simple assault is a Class 1 misdemeanor. However, if the defendant has been convicted of, or entered a plea of guilty to, two or more violations of § 22-18-1, 22-18-1.1, 22-18-26, or 22-18-29 within ten years of committing the current offense, the defendant is guilty of a Class 6 felony for any third or subsequent offense.

This also violates DCI Policy 7.0101.

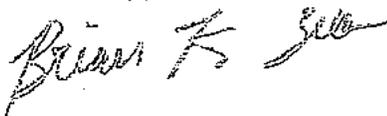
Special Agent Mark Black
February 21, 2014
Page 3

7.0101 Unbecoming Conduct

Agents shall conduct themselves on and off duty in a manner that reflects favorably on the Division. Conduct unbecoming to an agent means conduct contrary to professional standards that shows an unfitness to discharge duties or conduct which adversely affects morale or efficiency of the Division or diminished public confidence.

As a result of your actions, it is my intent to terminate your employment as a Special Agent. You have the right to present reasons, in person or in writing, why I should not terminate your employment. If you wish to present reasons in person, you must do so at 10:00 AM on Monday, February 24, 2014, in my office. If you wish to present reasons in writing, the reasons must be received by me on or before this time.

Sincerely,



Brian K. Zeeb
Assistant Director
SD Division of Criminal Investigation

cc: Personnel File
Director Bryan Gortmaker
SSA Jason Even

55:10:08:02. Appeal from dismissals, demotion, suspension, reduction in pay, or termination. A status employee may appeal a disciplinary action taken in accordance with § 55:10:07:04 or a termination pursuant to § 55:10:09:02 within 14 days after notification of the disciplinary action or termination. The appeal shall be made pursuant to the departmental grievance procedure found in § 55:10:08:16 if the department does not have an approved procedure.

Source: 39 SDR 99, effective December 3, 2012.

General Authority: SDCL 3-6D-14.

Law Implemented: SDCL 3-6D-14.

55:10:08:16. Appeal procedure. Appeals made pursuant to § 55:10:08:01, 55:10:08:02, 55:10:08:03, 55:10:08:04, or 55:10:08:05 shall follow the appeal procedure in this section unless the employee's department has an approved departmental appeal procedure. The appeal procedure shall be as follows:

(1) Appeal to the DCI Director. The employee or applicant shall submit a written statement of the grievance and remedy sought to the DCI Director within 14 days after the event causing the grievance. The DCI Director shall respond to the grievant in writing within 14 days and after receipt of the written grievance. If not satisfied with the response, the employee may, within 14 days from the date of the notice, proceed to step 2;

(2) Appeal to the Attorney General. The grievant shall submit in writing the grievance and the remedy sought to the Attorney General for the appointing authority. The Attorney General shall reply in writing within 30 days after receipt of the written grievance. If not satisfied with the response, the employee may, within 14 days from the date of the notice, proceed to step 3;

(3) Appeal to commission. The grievant, who wishes to appeal to the commission, shall submit in writing the grievance and the remedy sought to the commission. Any appeal shall be addressed to: The Civil Service Commission, c/o The Bureau of Human Resources. The employee shall also send a copy of the appeal to the agency head; and

(4) Appeal to court. The decision of the commission may be appealed to circuit court pursuant to the provisions of SDCL Chapter 1-26.

Any written grievance or appeal submitted by an employee may be delivered personally or mailed by first-class mail. If mailed, the notice is effective on the date the notice is postmarked.

Source: 39 SDR 99, effective December 3, 2012.

General Authority: SDCL 3-6D-14.



STATE OF SOUTH DAKOTA
DIVISION OF CRIMINAL INVESTIGATION
OFFICE OF ATTORNEY GENERAL
GEORGE S. MICKELSON CRIMINAL JUSTICE CENTER
PIERRE, SOUTH DAKOTA 57501-8505
PHONE (605) 773-3331
FAX (605) 773-4629

MARTY J. JACKLEY
ATTORNEY GENERAL

Law Enforcement Training
State Forensic Laboratory

March 14, 2014

Mark Black
38396 132nd St.
Aberdeen, SD 57401

CERTIFIED – RETURN RECEIPT REQUESTED

Dear Mr. Black:

I am in receipt of your February 23, 2014, letter in which you indicated that you would like me to reconsider proceeding with your termination. I have had the opportunity to review and consider your correspondence dated February 23, 2014, and also additional information to include the following items:

- Brown County Protection Order documents, Petition and Affidavit for Protection Order (Domestic Abuse), dated 2-13-14, 5 pages;
- Brown County Protection Order documents, Notice of Hearing, dated 2-13-14, 2 pages;
- Brown County Protection Order documents, Order for Protection, dated 2-13-14, 3 pages;
- Brown County Protection Order documents, Petitioner's Affidavit in Support of Petition for Protection Order, dated 2-13-14, 40 pages;
- Brown County Protection Order documents, Brown County Sheriff's Office Receipt of Service, dated 2-14-14, 2 pages;
- North Dakota Bureau of Criminal Investigation (ND BCI) Investigative Report of Domestic Violence Allegations, 8 pages;
- Brown County Sheriff's Office Report dated 12-9-13 Investigative Report of Theft, 8 pages;
- Aberdeen Police Department Report dated 1-27-14 Investigative Report of Identity Theft, 7 pages;
- Correspondence among yourself, Patty Black, and Patty Black's attorney, 19 pages;
- Audio recording of your interview with ND BCI, dated 2-19-14, 1 hour 7 minutes;
- Audio recording of Morgan Black's interview with ND BCI, dated 2-19-14, 24 minutes;
- Audio recording of conversation between you and Patty Black, 5 minutes;
- Copy of text messages between you and Patty Black, dated 12-19-12 to 12-8-13, 540 pages.

Your continued conduct has had an irreversible effect on your ability to continue to perform your duties as a Special Agent. Your conduct has not only damaged your reputation as an agent, but it has also

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destroyed the public and Division's confidence in your ability to maintain professional standards at all times while on and off duty. You have shown a lack of ability to deal with stressful situations and an inability to keep your emotional reactions in control. You have also continued to fail in the ability to consider consequences of your actions and communications insuring your decisions do not bring discredit to yourself, the Division, and the Attorney General's Office.

The Division has repeatedly attempted to work with you over the years to help improve your conduct. This has occurred in many ways including supervisors addressing areas of weakness and needs improvement in your evaluations, coaching you in your day-to-day development and relationships; holding you accountable by disciplinary action, implementing a Work Improvement Plan, and offering a relocation of your duty station. These progressive discipline attempts have obviously failed to change your behavior. Building and maintaining relationships are core functions of the Division. It is made abundantly clear to each and every current and future employee of the Division that relationships are of the utmost importance.

The following are several examples of attempts made by the Division to address these issues and to correct your conduct:

9-7-06 Evaluation – Needs Improvement section – Notation to remind yourself to maintain your composure and not allow your emotions to take over;

8-1-07 Evaluation – Needs Improvement section – Notation to remind yourself to maintain a positive attitude when things are difficult or do not turn out the way you hoped;

2-13-08 Evaluation – Relations with Others/Public – Notation regarding a traffic stop in your personal vehicle by the South Dakota Highway Patrol when you became frustrated and vocal toward a trooper. Needs Improvement section – Notation regarding maintaining your composure during stressful times when dealing with others in law enforcement;

5-18-08 – Email resigning your position as a DCI Agent due to frustration over the Attorney General's Office's handling of the Nick Berbos case and harassment by Berbos;

6-4-08 – Memo regarding your email to all DCI Agents and Attorney General Long and your perception of Assistant Attorney General Mayer's incompetent manner in dealing with the case. This unbecoming conduct was cause for a two-day suspension without pay and required meetings with Dr. Magnavito on a monthly basis;

8-12-08 Evaluation – Relations with Others/Public – Notation regarding disagreements with other investigators in Aberdeen and taking the high road. Needs Improvement section – Notation regarding the need to seek out avenues to relieve your stress and not allow your emotions to get the best of you;

9-3-08 – Memo to all agents from you regarding your frustration with the Berbos case and your apology to Assistant Attorney General Mayer and to all agents. You explain your regret for acting hastily;

Mark Black

March 14, 2014

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3-13-09 Evaluation – Relationships with Superiors/Peers – Notation regarding the need to remain in control of your emotions and not let others affect how you do your job. Needs Improvement section – Notation regarding the need to continue to work on your relationships with others in this assigned area, which at times can be a challenge;

8-30-11 Evaluation – Relationships with Others/Public – Notation regarding ironing out differences that you may have with people and not to let things fester. Needs Improvement section – Notation regarding the need to deal with work issues when they arise so it does not affect parties involved for a prolonged time period;

3-20-12 Evaluation – Relationships with Superiors/Peers – Notation regarding involvement in an office conflict and encouraging to learn from this situation and apply to future relationships. Needs Improvement section – Notation regarding the need to do a better job of dealing with things on the front side so they do not turn into bigger issues down the road;

9-6-12 Evaluation – Needs Improvement section – Notation regarding the need to make sure that your passion does not become the focal point of your investigations and dealing with things on the front side and moving on;

2-7-13 Evaluation – Relations with Others/Public – Notation regarding the need to make sure to take things in stride and work toward remedies. Written and Oral Communications – Notation regarding a recording that made its way to the internet. Needs Improvement section – Notation regarding dealing with issues that are positive or negative on an even level;

6-3-13 – Meeting regarding spray painting your boat with “Patty Wins” due to frustrations with Patty Black over the divorce process;

6-28-13 Work Improvement Plan – Notice regarding your continued conduct and the adverse effect on the ability of both the DCI and Attorney General’s Office to conduct business effectively with other officers and the public;

7-30-13 Evaluation – Needs Improvement section – Notation regarding being placed on a Work Improvement Plan regarding your history with stressful and emotional reactions to situations and making sound decisions at all times;

10-8-13 – Notice with intent to discipline regarding a one-day suspension without pay due to a 9-18-13 response to a KELOLAND.com story about a SWAT training event and response as a South Dakota DCI Agent stating the story was a waste of time by the media and the mother would rather whine to get her face on camera than explain to her child the need for law enforcement training;

1-29-14 Evaluation – Written and Oral Communication section – Notation regarding a one-day suspension without pay for a written comment on KELOLAND.com where you identified yourself as a DCI Agent. Needs Improvement section – Notation regarding the need to understand that others in the

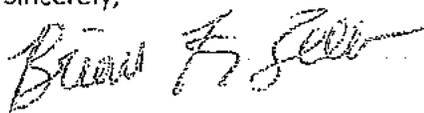
Mark Black
March 14, 2014
Page 4

agency can recognize when you are not happy and isolating yourself from others is not a positive way to deal with issues.

I have fully considered all the information you have provided to me. After consideration, I stand by my decision to terminate your employment with the South Dakota Division of Criminal Investigation as I referenced in my February 21, 2014, letter to you. The reasons given in this letter in support of my decision to terminate your employment with the DCI are based on additional review of documents and are intended to supplement and further explain my initial decision. Effective at 5:00 PM on March 14, 2014, you are terminated.

Pursuant to the Administrative Rules of South Dakota (ARSD) 55:10:08:16, you have the right to appeal this decision. You have 14 days from the date at the top of this letter (March 14, 2014) to go to the next step in the appeal procedure. If you want to appeal this decision, this letter will allow you to proceed to Step 2 of the appeal procedure. Step 2 is an appeal to Director Gortmaker. Your failure to meet any of the time limits in the appeal process will be considered a withdrawal of your appeal in accordance with ARSD 55:10:08:14.

Sincerely,



Brian K. Zeeb
Assistant Director
SD Division of Criminal Investigation

cc: Director Gortmaker
Attorney General Jackley
Personnel File

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPELLANT'S REPLY BRIEF

MARK BLACK
Plaintiff and Appellant,

vs.

DIVISION OF CRIMINAL INVESTIGATION
Defendant and Appellee.

DOCKET #27784

APPEAL FROM THE SOUTH DAKOTA CIVIL SERVICE COMMISSION
AND THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

HONORABLE JOHN L. BROWN
Presiding Circuit Judge

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NOTICE OF APPEAL FILED MARCH 1, 2016

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PRELIMINARY STATEMENT

The Jurisdictional Statement, Statement of Legal Issues, Statement of the Case, and Statement of the Facts will not be restated herein, as the Appellant will rely upon his initial brief for these matters. As in the Appellant's Brief, the Appellant shall hereinafter be referred to as "Black". The Appellee shall hereinafter be referred to as "DCI". References to the Commission hearing will be by "CH" followed by the page number and line number if necessary. References to Commission exhibits shall be by "Exh." followed by the exhibit number or, if used, the exhibit letter. This Reply Brief is intended only to be responsive to the arguments contained in the Appellee's Brief. Consequently, Black is not abandoning the arguments made in the Appellant's Brief by not restating same herein.

ARGUMENT

ISSUE 1: Whether there was good cause under the governing law, rules and regulations and the facts as presented to the civil service commission to terminate Black's employment with the South Dakota Division of Criminal Investigation.

At the onset it is important to note that the entire case presented against Black by DCI centers around very few and isolated incidents, to the exclusion of the vast majority of Black's performance record during his entire career with DCI. The incidents relied upon by DCI to establish just cause for terminating Black's employment were, largely, matters which had already been addressed and/or resolved by prior disciplinary actions or simple discussions with Black, or were incidents that involved his personal life and did not affect the performance of his work duties. Furthermore, the testimony and evidence

presented by the DCI at the hearing before the Civil Service Commission of South Dakota (Commission) were from within the administrative framework of DCI and did not include front line agents from DCI, other South Dakota Department of Public Safety staff, other law enforcement officers or staff, other agencies, or sources outside of the State of South Dakota governmental offices. Critical to the inquiry herein is the fact that DCI was an advocate in this matter and was asserting its position to uphold the termination of Black's employment throughout these proceedings. There never was a neutral moment in the investigative process nor the appellate procedure where DCI attempted to view the evidence objectively. This position is made abundantly clear to Black from the onset and has been maintained throughout the proceedings against Black. Moreover, it is readily apparent that DCI engages in cherry picking of certain facts, comments and other evidence to support its decision to terminate Black's employment. There are several problems with this maneuver by DCI, but the most prominent one is that DCI's cherry picking disregards the context of the facts, comments and evidence presented to the Commission and the plethora of evidence supporting Black's position. Consequently, the DCI's arguments as set forth in the Appellee's Brief are wholly unsupported by the law, facts and evidence in this case.

A. Grounds for Dismissal.

DCI asserts that Black relies in large part on the argument that the DCI administrative staff were not capable of making a decision that Black violated the Administrative Rules of South Dakota (ARSD) and the DCI policies so as to terminate Black's employment with DCI. This is a misapprehension of Black's argument.

Black's argument in this regard is that the DCI administrative staff made the initial decision to terminate Black's employment. This decision involved Attorney General Marty Jackley (Jackley), DCI Director Bryon Gortmaker (Gortmaker), DCI Assistant Director Brian Zeeb (Zeeb), DCI Supervising Agent Dan Satterlee (Satterlee), and DCI Supervising Agent Jason Even (Even). Again, it is critical to remember that these individuals were adversaries of Black and advocated against Black throughout the entire disciplinary proceedings. The initial decision was based upon the DCI administrative staff's determination that Black engaged in conduct which violated the ARSD and DCI policies. Black disagreed with the decision by DCI and exhausted his administrative appeals. The administrative appeals were heard and considered by Black's adversaries who were the very same people who determined that his employment should be terminated. These very same people are also the same witnesses who advocated against Black, testified for DCI, and were offered by DCI to the Commission as the professional and expert witnesses who are able to establish the professional standard to which Black is required to adhere and the grounds for terminating Black's employment. In short, it is the position of DCI that it is the investigative body, the charging agency and officer, the trier of facts necessary to convict, and the entity that governs the evidence to be considered on appeal. The problem with this format is apparent. If the Commission had required DCI to produce independent witnesses to prove its claim, then the outcome of this case would have been substantially different because of a gross lack of evidence against Black by independent sources.

Moreover, given the testimony from Black's witnesses, there most likely would

not have been any individual who would have been able to testify that DCI had just cause to terminate Black's employment or that DCI complied with the standard established by the ARSD and the policies. Clearly, the above scenario begs for an independent expert to establish the professional standard and to set the stage of compliance for Black. In addition, the ARSD and the DCI policies seem to clearly require that independent witnesses provide evidence of just cause for the firing and proof of the violations of the ARSD and the DCI policies. This is also apparent given the adversarial position the DCI and its administrative staff have relative to Black. Moreover, this process is only fair under the system of employment rights created by the State by the enactment of the governing ARSD and the DCI policies. The independent expert is consistent with evidentiary standards set by this Court in order to prove a certain standard of conduct. See, Luther v. City of Winner, 2004 S.D. 1, ¶9, 674 N.W.2d 339. The above scenario also demands a fair hearing where the witnesses produced by DCI not only be its administrative staff, but also consist of professionals from outside of the agency and the public. Not only did DCI not call an expert to establish the appropriate professional standard in this case, but they did not call any witnesses who could testify or provide any evidence that Black's conduct reflected unfavorably on the state, destroyed confidence in the operation of the services provided by the state, or adversely affected the public trust in the state. Black's superiors accused him of the above offenses, but, again, they are not the test. The test is to show that parties independent of the DCI administration were adversely affected, as provided by this administrative rule.

Black, on the other hand, produced four sitting sheriffs from his northeastern

South Dakota work area and his partner, Dave Lunzman (Lunzman), who was still employed by the DCI to show that his actions had not effected his ability to perform his work. Moreover, Black's witnesses testified and produced evidence that Black's relationship with other law enforcement agencies was solid and nothing that he did either on duty or off duty reflected unfavorably on the state or destroyed confidence in the operation of the state services or adversely affected the public trust in the state. Black's witnesses testified to Black's effectiveness as a DCI Special Agent and that his relationship with them was not harmed in any respect from the antics of Patty Black (Patty) nor by Black's conduct and actions in any respect. CH., pp. 192-220. Also, the sheriffs and Lunzman clearly indicated that no "black eye" had been given to DCI as a result of Black's conduct, nor had the DCI lost any respect or credibility with other law enforcement agencies or the public because of Black's actions. Id. DCI, however, wholly failed to interview or communicate with the sheriffs or Lunzman prior to terminating Black's employment and failed in all respects to call any witness that could show the public or other law enforcement agencies had any issue with Black or his actions or conduct in any regard.

The DCI relies upon the conclusion of the Circuit Court and cites to its opinion regarding the testimony of the DCI administrative staff. *Appellee's Brief, p. 19.* This point, again, misses the mark. In essence, all of the DCI administrative staff vouched for each other and determined that they all had made the right decision. This process is devoid of any requirement that the DCI produce uninterested witnesses to say that the DCI administrative staff was either right or wrong in the manner in which they exercised

their authority under the ARSD and the governing policies in Black's case. The plain fact of the matter appears to be that DCI was not able to produce independent witnesses and could not find anyone who would produce the evidence needed to establish any violation of ARSD or the DCI policies as alleged against Black outside of the DCI administrative staff.

DCI also makes an issue of the claim that it would be required to disclose Black's conduct as exculpatory material or impeachment material in any criminal case that Black would have worked on after the disciplinary matter. This contention was asserted by the Circuit Court as well. This position is untenable in both circumstances, as it is nothing more than mere speculation. The basis for both the DCI and the Circuit Court's position is that the evidence associated with Black's disciplinary matters might be subject to disclosure under either the United States Supreme Court cases of Brady v. Maryland or Giglio v. United States. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2nd 215 (1963); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2nd 104 (1972). Neither DCI nor the Circuit Court would wade into the certainty of this issue, but merely suggested and speculated that the disciplinary action against Black might require disclosure. DCI cites the recent South Dakota Supreme Court decisions relative to the disclosure of an officer's personnel and discipline record in a criminal assault case pursuant to a subpoena duces tecum in support of this speculation. See, State v. Smith, 2016 S.D. 55, — N.W.2d — ; State v. Johnson, 2016 S.D. 56, — N.W.2d —. Neither Smith nor Johnson are persuasive in Black's case. This Court, in both the Smith and Johnson cases, denied the requested disclosure of the officers' personnel and discipline

records and neither case reached the Brady or Giglio issue. Smith, 2016 S.D. at 55, fn. 1; Johnson, 2016 S.D. at 56, fn.1. Since the Court did not address the Brady and Giglio issues in Smith and Johnson, it is speculation to conclude that the allegations against Black would be subject to such a disclosure. Moreover, if the Brady and Giglio disclosures were truly concerning for DCI, surely there would have been some disciplinary action against Black before the instance action given the importance DCI attached to Black's prior disciplinary record.

DCI argues that Black inappropriately relies upon the positive aspects of his evaluations during his career with DCI in support of his contentions. This position is absurd. It is wholly illogical to ignore Black's outstanding evaluations which were rendered by DCI supervising staff in this matter. DCI, however, emphasizes the paltry poor evidence on Black's evaluations and rely thereon for support of its position. This reliance is misplaced and wholly inappropriate given the picture painted of Black's outstanding work performance by an examination of the entire evaluation evidence. Black's few misgivings certainly did not outweigh his positive attributes nor did they justify the termination of his employment.

In addition, there can be no question that Black's termination was solely based upon the meritless Protection Order (PO) proceeding instituted by Patty against Black. While the DCI elects to argue otherwise, the uncontroverted evidence shows that the sole basis for the termination was the PO proceedings. Specifically, Exhibits #3 and #5 refer only to the PO pleadings, investigations conducted pursuant to the PO pleadings or allegations contained therein, items referred to in said pleadings, or documents and other

evidence used as exhibits in the PO hearing. Exhs. #3 and #5. The “additional grounds” for terminating Black’s employment set forth by Gortmaker was Black’s alleged untruthfulness or, as Gortmaker put it - violating Gortmaker’s golden rule. CH, pp. 165, 261. It is critical to note that Gortmaker’s personal rules are not policy, administrative rules, nor law. They are just as explained by Gortmaker and Black at the Commission hearing - nothing more than Gortmaker’s personal belief and certainly not legal grounds for terminating Black’s employment. Furthermore, the DCI relied heavily, if not exclusively, on Black’s letter that was attached as an exhibit to the PO pleadings filed by Patty. This allegedly incriminating letter was in Patty’s possession from the time it was delivered in October of 2013, until she filed the PO in February of 2014. Exh. #2. During this four month time period Patty harassed and harangued Black with false reports to law enforcement, complaints to Black’s attorney, and through a variety of other media, but failed in all respects to bring to the attention of any law enforcement agency the allegedly “incriminating” nature of Black’s letter and his purported conduct. The simple truth of the matter is that Patty knew the letter was not truthful and did not contain “evidence of abuse” by Black, but in order for the letter to do the maximum damage to Black’s employment, it had to be disclosed at precisely the right time and in precisely the right way. Hence the disclosure of the four month old letter in the PO proceedings. The final nail in the DCI coffin relative to the PO grounds is that Judge Eugene Dobberpuhl made detailed findings on the PO proceedings when he dismissed same and specifically held that

... 38. The Court finds that any unwanted physical contact between the parties does not rise to the level of physical abuse and is too far removed to warrant a protection order.

39. As with any marriage, the parties had disagreements throughout the marriage, however, this Court does not find that the disagreements rose to the level of assault or domestic violence that would warrant a protection order.

40. The Court does not find that the actions of Mark rise to the level of warranting a permanent protection order.

Exh. I. It is also critical to note here that the burden of proof at the PO hearing was by a preponderance of the evidence, which is a light standard compared to the criminal standard. Patty could not carry this light standard of proof at the PO hearing even with the allegedly damning letter from Black. Moreover, the investigation by the North Dakota Bureau of Criminal Investigation revealed no domestic violence nor any criminal activity by Black, did not result in Black being prosecuted for anything, and did not paint Black in a bad light with regard to his work. CH., pp. 37-38; Exh. #4. Clearly, DCI's reliance on Black's letter was misplaced and wholly inappropriate and did not warrant the termination of his employment.

DCI alleges that Black violated DCI policy 7.0101 and takes issue with the manner in which Black dissects this policy. DCI policy number 7.0101 defines conduct unbecoming as follows:

Unbecoming Conduct - Agents shall conduct themselves on and off duty in a manner that reflects favorably on the Division. Conduct unbecoming to an agent means ...[1]... conduct contrary to professional standards ...[2]... that shows an unfitness to discharge duties or ... [3]... conduct which adversely affects morale or efficiency of the Division or diminished public confidence.

Clearly, there are three elements to the charge of conduct unbecoming. There is no

question that before the DCI can get to elements numbered 2 and 3, it must first show sufficient facts and evidence to establish element number 1. If DCI cannot establish element number 1, then the conduct unbecoming charge fails on its face. Consequently, DCI must have shown that Black engaged in conduct which was contrary to professional standards. DCI failed to produce such an expert witness and, therefore, it cannot establish the first element of the conduct unbecoming charge. See, *Supra*.

Assuming, for the sake of argument, that the DCI did establish the first element of the conduct unbecoming charge, then, in order to meet its burden, DCI must produce evidence to establish that such unprofessional conduct was directly related to and showed an unfitness to discharge duties or was conduct which adversely affected the morale or efficiency of the Division or diminished public confidence. The burden of proof imposed upon DCI required that it produce witnesses to establish elements 2 and/or 3. If DCI alleges that Black engage in conduct that showed he was unfit to discharge his duties, then they would need to produce witnesses to this effect or show by his performance evaluations that he was unfit to perform his duties. No witnesses were called in this respect and Black's performance evaluations were virtually impeccable. If the morale or efficiency of the Division is affected, then other officers and staff from the DCI must be produced to establish this fact. DCI failed to produce such witnesses. Black, on the other hand, produced the four sitting sheriffs and his DCI partner who was still employed with DCI at the time to testify favorably on his behalf. If DCI elected to prove that Black's actions diminished the public confidence in DCI, then some witness, other than the DCI administration, must have been called to testify as to the problems

created by Black; however, no such witnesses were called and Black produced the four sitting sheriffs and his DCI partner to testify on his behalf. In short, absent an expert witness and the appropriate lay witnesses or other law enforcement witnesses, DCI cannot prove the conduct unbecoming charge against Black.

The final DCI policy alleged to have been violated by Black is DCI policy 7.0103 which provides as follows:

Integrity - Agents shall be truthful in all matters relating to the operation of the Division. Any conduct act, neglect, error or omission regarding these matters may subject an agent to disciplinary action.

The grounds for termination of Black's employment based upon the above policy were an after thought by Gortmaker. No allegation based upon the above policy was made by anyone prior to Gortmaker receiving Black's case on appeal. Moreover, this new allegation was not work related and did not have anything to do with the operation of the division as contemplated by the above policy. Furthermore, the basis for the allegation is purely Gortmaker's personal belief, feelings or opinions.

DCI appears to argue that the Commission had the duty to make the final determination in this case and was the check in the system to avoid an unfair result. This position is not correct in this case. The Commission was the final fact finding tribunal in this matter, but it committed reversible error because its findings are clearly erroneous given the fact that DCI failed to produce the essential witnesses to meet its burden to justify the termination of Black's employment as argued *supra*. The Commission relied upon the testimony of the DCI administrative staff and no independent and corroborating proof of their testimony. The findings entered by the Commission verify this position.

The lack of independent or corroborating evidence may not be an issue in every case, but it is in this one since Black produced four sitting sheriffs and his current DCI partner to contradict the assertions of the DCI administrative staff. Given this contradiction in evidence, it was incumbent upon the Commission from a burden of proof standpoint to require that DCI produce independent and corroborating evidence of its position. After all, the Commission is not a rubber stamp for the DCI and its administration, but has an affirmative duty to sort out the facts and verify and confirm same when credible and contradictory evidence is produced as in this case.

In light of the above, it is Black's position that the DCI failed to establish just cause for his termination, the disciplinary action against him was inappropriate in all respects, and said action was clearly motivated by some intentions other than the alleged violation of either the ARSD or the DCI policies.

B. Erroneous Findings of Fact.

The general argument advanced by the DCI on this issue is that Black disagrees with the Findings of Fact rendered by the Commission because he lost the appeal. Black most certainly does disagree with the Commission's findings and their decision because it was patently wrong given the evidence before it. Moreover, the findings are clearly erroneous given the fact that DCI failed to produce the essential witnesses to meet its burden to justify the termination of Black's employment as argued *supra*. DCI relies heavily on the argument that the Commission made the findings that it did and, therefore, no further evidence is required for DCI to prevail in this matter. Therein lies the problem with this case. The Commission relied upon the testimony of the DCI

administrative staff and no independent and corroborating proof of their testimony. The findings entered by the Commission verify this position. The lack of independent or corroborating evidence may not be an issue in every case, but it is in this one since Black produced four sitting sheriffs and his current DCI partner to contradict the assertions of the DCI administrative staff. This was clearly erroneous given the facts and evidence before the Commission. The failure by the Commission to require independent and corroborating evidence of the DCI administrative staff is, in and of itself, clearly erroneous. Black fully understands the governing law regarding this Court's review of findings of fact on appeal. See, Certiability of Jarman, 2015 S.D. 8, 860 N.W.2d 1. This standard of review, however, is not insurmountable and a reversal due to erroneous findings of fact is permitted where this Court finds that , "... after reviewing the entire record, ... [the court is] ... left with the definite and firm conviction that a mistake has been made...". Estate of Schnell, 2004 S.D. 80, ¶8, 683 N.W.2d 415. Black asserts herein that based upon a review of the entire record, and not just the facts cherry picked by DCI, the Court will be convinced that a mistake has been made by the Commission and the Circuit Court.

ISSUE 2: Whether the South Dakota Division of Criminal Investigation complied with the governing law, rules and regulations when it terminated Black's employment.

Black has made two arguments in regard to this issue.

First, he was not properly notified of the reasons for the termination of his employment. Black was initially notified of the disciplinary action against him by a letter dated February 13, 2014. Exh. #1. This letter specifically states in the first

paragraph as follows:

This letter is to inform you, effective immediately, you are on administrative leave with pay, **due to the temporary protection order** served today in Brown County. ... (Emphasis added).

Exh. #1. There are no other grounds, reason or basis for the administrative leave stated in this letter. The next letter to Black was dated February 21, 2014, and cited as the sole reason for the intended disciplinary action the protection order affidavit and its contents.

Exh. #3. Black appealed the intended disciplinary action. Exh. #4. DCI denied Black's appeal of the termination of his employment by virtue of a letter dated March 14, 2014, with the primary basis for the denial of the appeal resting on the protection order matter. Exh. #5. DCI also referenced the past disciplinary actions against Black in the March 14, 2014, letter, but, as argued previously, most of those disciplinary matters were addressed and dealt with by DCI administrative staff prior to the action to terminate Black's employment. Furthermore, the protection order matter was litigated and dismissed by Judge Dobberpuhl on March 21, 2014. The past disciplinary matters from 2013 forward were primarily in relation to Black's highly contentious divorce proceeding. The appeal to Gortmaker was the first instance when Black learned that he would be disciplined for an integrity issue. Exh. #18. Clearly, Gortmaker added a new charge to the disciplinary action after Black had proceeded through most of the administrative appeals process. Based upon the above process it seems abundantly clear that the grounds for terminating Black's employment snowballed with each letter he received from the DCI administration. First, the grounds for termination of Black's employment was the protection order matter. Second, after an appeal, the grounds grew from just the

protection order matter to include the past disciplinary actions which had been, largely, resolved. Third, the integrity issue is created by Gortmaker. Due process does not permit a snowball attack against an employee in disciplinary actions, but demands that the employee received notice and an opportunity to be heard on the charges against him in a “... meaningful time and in a meaningful manner ...” before his employment is terminated, not while the process is unfolding against him. Hollander v. Douglas County, 2000 S.D. 80, ¶17, 683 N.W.2d. 181.

Secondly, the DCI administration acted as advocates for their position and their actions were not supported by independent experts nor witnesses. This argument is set forth above and in Black’s initial brief and will not be repeated herein.

CONCLUSION

Black prays that the Commission and Circuit Court decisions be reversed and he be awarded all benefits he lost as a result of the termination of his employment.

REQUEST FOR ORAL ARGUMENT

Black hereby requests oral argument.

Dated this 22nd day of August, 2016.

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CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellant hereby certifies that the 15-26A-66(b)(4). The Appellant's Reply Brief contains 22,080 characters and 4,258 words. Further, the undersigned relied upon the word count of the word processing system used to prepare the Appellant's Reply Brief.

Dated this 22nd day of August, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the Appellant's Reply Brief on the attorney for the Appellee at his address as follows:
Robert B. Anderson, May, Adam, Gerdes & Thompson, P.O. Box 160, Pierre, SD 57501, rba@magt.com by e-mail and by depositing same in the United States first class mail, postage prepaid, on the 22nd day of August, 2016, at Lake Andes, South Dakota.

Further, the undersigned hereby certifies that the original and two copies of the above and foregoing Appellant's Reply Brief were mailed to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070 by depositing same in the United States first class mail, postage prepaid, on

the 22nd day of August, 2016. Further, one copy of the Appellant's Reply Brief was e-mailed to the aforesaid Clerk of the Supreme Court on the 22nd day of August, 2016, at her e-mail address as follows: SCClerkBriefs@ujs.state.sd.us.

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