IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

DEREK KROGMAN, ***Petitioner*,** **v.** **IOWA PUBLIC EMPLOYMENT RELATIONS BOARD,** ***Respondent.***	**Case No. CVCV061854** **RULING ON PETITION FOR JUDICIAL REVIEW**

This matter came before the Court on October 29, 2021, for hearing on judicial review. Petitioner, Derek Krogman, was represented by Attorney Charles Gribble. Respondent, Iowa Public Employment Relations Board ("PERB"), was represented by Attorney Diana Machir. Upon review of the court file and the applicable law, the Court enters the following order:

I. BACKGROUND FACTS AND PROCEDURAL POSTURE

Krogman was an employee at the Woodward Resource Center ("Woodward") as a Resident Treatment Worker ("RTW"). (Ex. 29). He had been in that position since 1995. (*Id.*). Prior to the incident for which he was terminated, Krogman had been disciplined for work absences but overall had positive performance evaluations. (Ex. 24, 30; Tr. 133:7-15).

This matter stems from an incident that occurred while Krogman was working at 108 Franklin House. The residents at 108 Franklin are intellectually challenged, with many having a high level of medical needs. (*Id.* at 17:8-13). Ruth Altman, a treatment program manager, was in 108 Franklin House making rounds. (State's Ex. F at 1). Altman heard a smacking noise come from the dining room. (*Id.*). While she was leaving the room to investigate, she heard the noise

again. (*Id.*). When Altman entered the dining room, she saw Krogman standing behind B.O., a resident of 108 Franklin House. (*Id.*). She saw Krogman's arm at shoulder level, with his hand open and fingers pointing out. (*Id.*). Altman had Krogman follow her to the office. While in the office, Krogman said to Altman, "Please don't turn me in. I won't hit her again." (*Id.*). Krogman also stated, "I can't get fired. Don't turn me in." (*Id.*).

Krogman admitted to lightly slapping B.O.'s hand one or two times. (State's Ex. H at 1). He stated he slapped her hand because B.O. was spitting in her hand and rubbing it into her hair. (*Id.*). Krogman said it was an honest mistake and he did not mean for it to happen. (*Id.*). Krogman does not know why he slapped her but said, "I don't know. I had a breakdown or something like that. I don't typically do that." (*Id.*).

Investigations were completed by the Woodward investigation team and by the Iowa Division of Inspections and Appeals (DIA). Brian Strait was assigned to investigate the incident that night by the Woodward investigation team. Strait interviewed Krogman, the staff working at the house, and two responding resident treatment supervisors. (Tr. at 51:2-8; Ex. F-M). Strait's conclusion was founded abuse based on DHS's definition of abuse. (*Id.* at 59:6-15). The DIA report issued January 25, 2019, determined the abuse was confirmed but not registered. (Ex. 8). According to the DIA report, Krogman admitted to slapping B.O. but that he made a mistake. (*Id.*). There was a preponderance of the evidence to support the allegation. (*Id.*). However, B.O. did not sustain an injury, and Krogman had no prior history of client mistreatment. (*Id.*). As a result, the DIA report concluded "this matter is considered minor, isolated, and unlikely to reoccur." (*Id.*).

Krogman was discharged from his employment at Woodward on October 26, 2018. (State Ex. A or 4). The letter stated:

> Effective today, October 26, 2018, you are being discharged from your employment at Woodward Resource Center. This action is being taken for your violation of the following work rules identified in the DHS Employee Handbook:
>
> **Section B-1. General Standards of Conduct and Work Rules**
> 5. Employees are expected to maintain appropriate control of themselves, even under provocation. The use of abusive, profane, argumentative, offensive, or threatening language or attempts to inflict bodily harm or mental anguish will not be tolerated.
> 23. Employees shall not mistreat, abuse, coerce, neglect or exploit employees, visitors or clients, verbally, physically, sexually, or financially. When physical contact is a part of an employee's duties, each contact will be performed in a professional manner.

Krogman appealed the decision pursuant to Iowa Code section 8A.415(2). An evidentiary hearing was held, and a Proposed Decision and Order was issued by an administrative law judge ("ALJ") on March 4, 2020. The ALJ found the State did have just cause for terminating Krogman and the progressive discipline process was not appropriate in this case. This decision was appealed to PERB. Oral arguments were presented to PERB on November 17, 2020, and on April 29, 2021, PERB affirmed the ALJ's decision. PERB adopted the ALJ's findings of fact in addition to adopting the ALJ's conclusions. (PERB Decision at 2).

On May 14, 2021, Krogman filed this action for Judicial Review. A hearing was held on October 29, 2021.

II. STANDARD OF REVIEW

Final decisions rendered by PERB are reviewed by the district court under Iowa Code Chapter 17A, the Iowa Administrative Procedures Act. Iowa Code § 17A.19 (2019). The district court acts as the appellate court and may only overturn the agency's decision "if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer v. IBP, Inc.,* 710 N.W.2d 213, 219 (Iowa 2006). The standard of review depends on the type of error alleged by the Petitioner. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d

192, 196 (Iowa 2010). When an agency has been "clearly vested" with a fact-finding function, the "standard of review depends on the aspect of the agency's decision that forms the basis of judicial review." *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Systems, Inc. v. Iowa Utilities Board*, 805 N.W.2d 758, 762 (Iowa 2011)). The standard of review depends on if the alleged error involves an issue of (1) findings of fact, (2) interpretation of law, or (3) an application of the law to facts. *Id.*

If the alleged error is one of fact, the standard of review is whether the findings are supported by substantial evidence. *Harris*, 778 N.W.2d at 196; *Schutjer v. Algona Manor Care Ctr.,* 780 N.W.2d 549, 557 (Iowa 2010). "[A] reviewing court can only disturb those factual findings if they are 'not supported by substantial evidence in the record before the court when that record is reviewed as a whole.'" *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f)). The Court "is limited to the findings that were actually made by the agency and not other findings the agency could have made." *Id.* "In reviewing an agency's findings of fact for substantial evidence, courts must engage in a 'fairly intensive review of the record to ensure the fact finding is itself reasonable.'" *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012) (quoting *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003)).

"Evidence is substantial if a reasonable person would find the evidence adequate to reach the same conclusion." *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002) (citing *Ehteshamfar v. UTA Engineered Sys. Div.,* 555 N.W.2d 450, 452 (Iowa 1996)). The district court is "not to determine whether the evidence supports a different finding; rather our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made." *Cedar Rapids Community School District v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (internal citations and quotations omitted).

When the alleged error is in the Commissioner's interpretation of law, the standard of review is whether the Commissioner's interpretation was erroneous. *See Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 604 (Iowa 2005). When the district court is evaluating the agency's interpretation of law, the standard of review depends on if the agency was "clearly vested" with the authority to interpret the statute by the Iowa Legislature. *Meyer*, 710 N.W.2d at 256-57.

> If the agency *has not* been clearly vested with the authority to interpret a provision of law, such as a statute, then the reviewing court must reverse the agency's interpretation if it is erroneous. If the agency *has* been clearly vested with the authority to interpret a statute, then a court may only disturb the interpretation if it is "irrational, illogical, or wholly unjustifiable.

Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 256 (Iowa 2012) (internal citations omitted) (emphasis in original). If the legislature does not expressly grant that right to the agency, then the Court must review "'the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved' to determine whether the interpretation of a statute has been clearly vested in the discretion of the agency." *The Sherwin-Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 423 (Iowa 2010) (internal citations omitted). "[E]ach case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes." *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 13 (Iowa 2010).

If the claimed error is in the ultimate conclusion reached, "then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." *Meyer*, 710 N.W.2d at 219; Iowa Code § 17A.19(10)(i), (j).

III. CONCLUSIONS OF LAW

Krogman asserts he should be afforded relief under 17A.19(10)(f), (g), (h), (m), and (n). (Pet. Brief at 9). Krogman further states, "substantial evidence does not support the findings and decisions of the Agency and the Agency's actions were arbitrary and capricious." (*Id.* at 10). Krogman does not dispute the facts asserted by the Agency but does dispute the ultimate conclusion of termination. (*Id.* at 11 (stating "the quantity of evidence reviewed was not at issue as the parties agree on the facts; instead, it is the quality of the evidence relied upon.")). If Krogman was disputing the factual findings of the case, then 17A.19(10)(f) would apply. The Agency's decision "is 'arbitrary' or 'capricious' when it is taken without regard to the law or facts of the case." *Soo Line R.R. v. Iowa Dep't of Trans.*, 521 N.W.2d 685, 688-89 (Iowa 1994). Ultimately, Krogman is arguing the Agency decision should be reversed based on the application of law to the facts, not because the Agency's decision was taken without regard to the law or facts.

A. Whether PERB's finding was irrational, illogical, or wholly unjustifiable application of law to the facts regarding whether there was just cause for Krogman's termination.

The threshold determination is if PERB was vested with the authority to interpret the statute. There is no language in Iowa Code section 17A.19 clearly vesting PERB with interpretive authority. "If the legislature has not expressly granted interpretive authority to an agency, [the court] must examine the phrases or statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations to determine whether the legislature intended to give interpretive authority to an agency." *Abbas v. Iowa Ins. Div.*, 893 N.W.2d 879, 886 (Iowa 2017). "We are more likely to conclude the legislature clearly vested interpretive power in an agency when the agency necessarily must interpret the statutory language at issue in carrying out its duties and no relevant statutory definition applies." *Ramirez-Trujillo v. Quality Egg, L.L.C.*,

878 N.W.2d 759, 769 (Iowa 2016). The Court finds no precedent to determine if PERB has interpretive authority. However, the Iowa Court of Appeals has found: "The Board's application of the just cause standard to the facts was clearly vested in the discretion of the agency." *Kuhn v. Pub. Employment Relations Bd.*, No. 07-0096, 2007 WL 4191987, at *1 (Iowa Ct. App. Nov. 29, 2007). Therefore, it is necessary for this Court to determine if PERB's decision was "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency." *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007).

> A decision is "irrational" when it is "not governed by or according to reason." *Webster's Third New International Dictionary* 1195. A decision is "illogical" when it is "contrary to or devoid of logic." *Id.* at 1127. A decision is "unjustifiable" when it has no foundation in fact or reason. *See id.* at 2502 (defining "unjustifiable" as "lacking in ... justice"); *id.* at 1228 (defining "justice" as "the quality or characteristic of being just, impartial or fair"); *id.* (defining "just" as "conforming to fact and reason").

Sherwin-Williams Co. v. Iowa Dep't of Revenue, 789 N.W.2d 417, 432 (Iowa 2010).

Courts generally hold that "just cause" is a case-by-case analysis. *See Briggs v. Bd. of Directors of Hinton Cmty. Sch. Dist.,* 282 N.W.2d 740, 743 (Iowa 1979) ("Probably no inflexible 'just cause' definition we could devise would be adequate to measure the myriad of situations which may surface in future litigation."). PERB has previously used a variety of factors to determine if "just cause" existed, such as: if there was a fair investigation, if the employee had knowledge of the rules and expected conduct, if the reasons for the action were adequately communicated to the employee, whether there was sufficient evidence of guilt, if the progressive discipline system was followed, if the punishment was proportionate to the offense, the employee's performance and discipline record, and if they were given due consideration, and any other

mitigating circumstances. *See Rode and State (Dep't of Corr.),* No. 100041, 2015 WL 10437949, at *5 (IA PERB 2015).

In this case, PERB held Krogman violated DHS standards of conduct and work rules and progressive discipline was inapplicable. (PERB Decision at 3-4; ALJ Decision at 14, 19). Specifically, Krogman violated Section B-1 of the DHS Employee Handbook because "hitting or slapping an individual could never be considered a redirection or block because it is in violation of DHS rules. The facility's training, that Krogman received, explicitly stated that hitting a client is physical abuse. (ALJ Decision at 15). Further, PERB held the State established there was just cause supporting termination based on the totality of circumstances. (PERB Decision at 3; ALJ Decision at 22). Despite his lengthy employment, there was just cause supporting termination due to the "severity of the incident at issue coupled with the nature of Krogman's relationship with the individual." (PERB Decision at 3; ALJ Decision at 20). Also, PERB found the cases cited by Krogman where progressive discipline was applicable were distinguishable from his case. (PERB Decision at 4; ALJ Decision at 22).

Krogman argues that progressive discipline was applicable and the State failed to meet their burden to prove there was just cause for his termination. Krogman outlines the following circumstances to support his argument: (1) admittance of wrongdoing; (2) prior work history and evaluation received; (3) finding by Iowa Department of Inspections and Appeals; and (4) disproportionality of penalty imposed. Krogman argues as a mitigating circumstance he should be given credit for his truthfulness because he admitted he was wrong and accepted responsibility. Krogman also contends this was an isolated incident and he has worked for the State for 23 years, with positive work evaluations. Also, the DIA investigation found "the client sustained no injury and RTW Derek has no prior history of client mistreatment. Therefore, this matter is considered

minor, isolated, and unlikely to occur." (Ex. 8 at 1). Krogman argues there is disproportionality of the penalty imposed, given the investigation conducted by Woodward "failed to review the evidence in its totality; therefore, exculpatory evidence favoring Mr. Krogman was not taken into consideration." (Pet. Brief at 18).

Based upon its review of the record, contrary to Krogman's arguments, the Court cannot conclude PERB failed to acknowledge or review the evidence in its totality. PERB acknowledged all of the circumstances described by Krogman in its decision. PERB acknowledged that he admitted to and took responsibility for slapping B.O. on the wrist or hand once or twice. (ALJ Decision at 15). PERB also considered the length of Krogman's work history and overall positive reviews in its decision. PERB stated:

> Based on the record prior to the incident, Krogman was a long-term, model employee who treated persons within his care with respect and patience, and maintained a calm demeanor in difficult decisions.

(*Id.* at 19-20). PERB also reviewed the investigation by the DIA and, despite the finding, still found the act egregious enough to warrant skipping lesser disciplinary penalties. (*Id.* at 19). Ultimately, PERB concluded:

> "The State has shown just cause exists for foregoing progressive discipline and terminating Krogman's employment. Although Krogman's lengthy history of employment may suggest his behavior was an isolated incident and unlikely to occur again; nonetheless, the severity of the incident at issue coupled with the nature of Krogman's relationship with the individual justifies the State's refusal to exercise progressive discipline in this instance."

(ALJ Decision at 20).

Krogman has failed to show how PERB did not consider the totality of the circumstances when determining there was just cause for his termination. Again, his argument instead seems to be a disagreement with the weight or determination given to the facts and evidence by PERB. The Court is aware of Krogman's 23-year work history, and overall he had positive reviews with no

other abuse allegations or incidents. The Court has considered the finding by the DIA that "the client sustained no injury and RTW Derek has no prior history of client mistreatment. Therefore, this matter is considered minor, isolated, and unlikely to occur." Additionally, the Court acknowledges the difficulties imposed on treatment workers, such as Krogman, when working with individuals with higher needs. However, the focus of the judicial inquiry is whether the evidence is sufficient to support the decision made, not whether it is sufficient to support the decision not made. *Coghlan v. Quinn Wire & Iron Works*, 164 N.W.2d 848, 852 (Iowa 1969). PERB correctly applied the law to the facts by weighing the totality of the circumstances when deciding whether the State proved just cause for termination and whether progressive discipline should apply. There is precedent for the progressive discipline standard not to be applied in similar situations. Therefore, the Court cannot find it was irrational, illogical, or wholly unjustifiable for PERB to find the State established just cause to support termination of Krogman's employment and that progressive discipline was inapplicable in this case.

B. **Whether PERB failed to follow their own rules and precedent in determining the State proved just cause for Krogman's termination.**

Krogman argues Iowa Code sections 17A.19(10)(g) and (h) also provide avenues for relief. Under Iowa Code section 17A.19(10)(g), the Court shall grant appropriate relief if action other than a rule is inconsistent with a rule of the agency. Under Iowa Code section 17A.19(10)(h), the Court shall grant appropriate relief if action other than a rule is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency. Krogman does not cite to any specific rules to demonstrate the action by PERB was inconsistent with a rule of the agency. Krogman cites to three cases to support his argument that PERB was inconsistent with prior practice or precedent.

The Court agrees with PERB that two out of three cases cited by Krogman are not similarly situated cases that show PERB was inconsistent with a rule of the agency or prior practice or precedents. (ALJ Decision at 21). Both of these cases are distinguishable on the facts and cannot be compared to show PERB was inconsistent with prior practice precedent. The two cases not similarly situated are *Frost and State of Iowa (Dep't of Admin. Services)*, 07-MA-01/07-MA-02 (PERB June 23, 2010) and *Bundy and State of Iowa (Dep't of Human Services)*, 20 PERB 102124 (Sept. 9, 2020).

The case similarly situated to this case is *Cole and State of Iowa (Dep't of Human Services)*, 20 PERB 102113, 2020 WL 4748176 (March 3, 2020). In *Cole*, a resident treatment worker at Glenwood Resource Center made contact with a resident after attempting to block the movement of the resident by raising his foot. *Id.* at *1. The resident was an adult dependent resident. *Id.* at *1. Cole's blocking maneuver was inconsistent with the Mandt techniques and training he received. *Id.* at *2. PERB found the State did not establish just cause existed to support its termination of Cole. *Id.* at *4.

However, like the finding by PERB, the Court finds *Cole* is distinguishable from this case, and PERB has justified any inconsistency with credible reasons. *See* Iowa Code § 17A.19(10)(h); *Cole*, 2020 WL 4748176. The credible reasons given by PERB to justify any inconsistency are: (1) Cole did not have adequate notice that failing to use the least restrictive intervention would constitute physical abuse and (2) Cole did not intend to come into physical contact with the resident and the contact was not strong enough to cause the resident to stumble or fall. (ALJ Decision at 21-22; *Cole*, 2020 WL 4748176, at *2). Here, Krogman had adequate notice slapping would be considered physical abuse under Woodward's Incident Management Policy and that any abuse would not be tolerated. (State's Ex. D-2 at 5; State's Exhibit D-3 at 1). Also, Krogman intentionally

slapped B.O. on the wrist or hand twice, with the slaps being enough force that it produced a sound that someone in another room heard. (ALJ Decision at 19). As stated, the Court finds PERB gave credible reasons sufficient to indicate a fair and rational basis for any inconsistency between *Cole* and Krogman's case. *See* Iowa Code § 17A.19(10)(h). Therefore, PERB did not fail to follow its own rules and precedent in determining the State proved just cause for Krogman's termination and progressive discipline was inapplicable.

IV. CONCLUSION

IT IS HEREBY ORDERED that the Petition for Judicial Review is **DENIED.** Costs are assessed to Krogman.

State of Iowa Courts

Case Number	**Case Title**
CVCV061854	DEREK KROGMAN VS IOWA PUBLIC EMPLOYMENT RELATIONS
Type:	OTHER ORDER

So Ordered

Samantha Gronewald, District Court Judge
Fifth Judicial District of Iowa

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