

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

RICHARD PALMER, Appellant,)	CASE NO. 102115
and)	PROPOSED DECISION AND ORDER
STATE OF IOWA (DEPARTMENT OF CORRECTIONS), Appellee.)	

Appellant, Richard Palmer, filed a state employee disciplinary action appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 8A.415(2)(b) and PERB rule 621—11.2. Palmer appeals the third-step response of the director of the Iowa Department of Administrative Services (DAS) denying the appeal of his termination.

Palmer worked as a correctional officer for the Iowa Department of Corrections (DOC) at the Fort Dodge Correctional Facility. Palmer alleges the State did not have just cause to terminate his employment on September 22, 2017. The State asserts Palmer's termination was supported by just cause.

A closed evidentiary hearing was held March 28, 2019. Matt Butler represented Palmer. Henry Widen and Nathan Reckman represented the State. The parties submitted post-hearing briefs on May 31, 2019. After considering the evidence and the arguments of the parties, I propose the following:

FINDINGS OF FACT

Richard Palmer began working for the State in June 2006. He most recently worked at the Fort Dodge Correctional Facility. This facility is a medium security facility that houses 1,300 offenders with sentences ranging from a

couple of years to life sentences. Generally, in Palmer's ten-year plus tenure he met expectations. In his evaluations, Palmer's supervisors noted that he responded to emergencies well, he supported offenders' case management plans, and worked well with special needs offenders. Palmer received some discipline for connecting a TV to watch a sporting event in 2012, and received written reprimands for unauthorized leave without pay in 2014 and 2015. During that period, Palmer did not meet expectations of management as noted on his evaluations. His evaluations improved in recent years.

Palmer has acknowledged receipt of DOC's 2016 policies. Palmer also acknowledged receipt of the Iowa Employee Handbook, which included the drug-free workplace policy.

On June 29, 2017, law enforcement detained Palmer for purchasing illegal substances. Special Agent, Bryant Strouse with the Iowa Division of Narcotics Enforcement was following a parcel that came into the country as a potentially controlled substance. He located the intended recipient. His investigation led him to another individual who agreed to cooperate with law enforcement and act as a confidential informant (CI). CI identified Palmer as a recipient of controlled substances, specifically testosterone and steroid drugs.

Palmer and CI arranged for Palmer's purchase of ten bottles of 10 mL of testosterone and trenbolone for approximately \$400. Strouse and another agent did surveillance and met with CI ahead of time to arrange for the controlled delivery. Strouse and the other agent heard the phone calls in which Palmer and

CI arranged for the controlled delivery of the substance to Palmer. This meeting occurred in the Walmart parking lot in Fort Dodge.

After Palmer picked up the substances, he drove to the Fort Dodge Walgreens parking lot. At the Walgreens parking lot, Strouse detained, but did not arrest Palmer, and Strouse confiscated the substances. During the detention, Palmer told Strouse he screwed up, and Strouse felt that Palmer was forthcoming and sorry for his actions. Strouse ended the detention by telling Palmer to go home and to enjoy the weekend. The detention ended around 3:30 p.m. Strouse and Palmer knew each other prior to this detention as fellow law enforcement officers. Strouse was aware that Palmer worked at the Fort Dodge Correctional Facility.

Approximately fifteen minutes after the detention, Palmer called CI. When CI and Palmer spoke, Palmer told CI about the detention and that DCI watched the whole thing. CI said he needed to get his stuff cleaned up and Palmer agreed and said he did not have anything anymore. Strouse, who listened to and recorded this phone call, viewed the phone call as Palmer warning CI.

Around 4:30, within an hour of the detention, Palmer called Captain Steve Nelson with the Fort Dodge Correctional Facility and reported his detention. Nelson told Palmer that he needed to speak to Security Director Tony Comp. Nelson sent a text message to Comp. Comp stated he would contact Warden Johnson and would call Palmer. Comp then emailed Warden Johnson and Deputy Warden Harris. Management made the decision to place Palmer on

administrative leave. Comp called Palmer around 5:00 p.m. to tell him the State would be placing him on administrative leave.

The next day, June 30, 2017, Palmer went to a treatment facility for evaluation. The report concluded that no treatment was needed as Palmer was not an addict and did not meet the criteria for substance dependence. Palmer then reported to the facility for work. He met with Comp and Johnson. Palmer's wife was also present. Johnson explained the investigatory process to Palmer, and stated that management had not made any decisions regarding potential rule violations or discipline.

Palmer contends that in the meeting Johnson discussed that other employees received only two or three day suspensions after being charged with serious misdemeanors. The only information in the record regarding this meeting is the Warden's testimony and an exhibit that lists a timeline of events that was completed at an unspecified time by an unspecified person. That timeline provides that during the meeting Johnson told Palmer he would discipline him with the least amount of discipline possible and that other people that were charged with serious misdemeanors only received two or three days of suspension. Johnson does not recollect having this conversation. Johnson testified he tried to explain the process, but made no promises or guarantees about the outcome of the process.

I find Warden Johnson's testimony that he made no promises during this meeting as to the type of discipline the State would issue credible. Warden Johnson was the only one to testify as to this meeting. The document containing

the timeline of events in the record is unsubstantiated by any testimony and the record is unclear as to the author of the document or the timeframe in which the document was prepared. As such, that document does not provide credible evidence to contradict the Warden's testimony.

On June 30, 2017, the State placed Palmer on administrative leave. Warden Johnson assigned Deputy Warden Harris to investigate the matter. Harris has completed investigations in about 100 cases and has investigative training.

Harris received the incident report from Nelson and the text message from Comp and gathered information on Palmer's history of employment with the State.

Early in July, Palmer spoke to Strouse on the phone, but Strouse did not have any updates on the criminal investigation. The State also contacted Strouse. Harris told Comp to contact law enforcement as Comp had better connections with law enforcement due to his role as the security director.

In the middle of July, Comp asked Strouse for interviews, recordings, or notes. Strouse replied that he could not disseminate that information, as the case was still open. Strouse said he was waiting on lab results and did not know what the charges against Palmer might be. However, Strouse assumed Palmer would be charged with possession of a schedule III controlled substance with a possible felony charge of conspiracy to distribute a schedule III controlled substance. Strouse told Comp there was a significant chance of felony charges. Comp relayed this information to Harris. Strouse also told Comp that Palmer

had called CI on the day of the detention to warn him that DCI was monitoring the transaction. The record is unclear as to whether Comp passed on that information to Harris.

On September 1, 2017, management called Palmer in to the facility for an investigatory interview. Palmer provided the same information as he had previously provided when originally reporting the detention to Nelson and Comp. Harris and Leslie Wagers interviewed Palmer. Cassie Palmer was present as the peer representative. Management presented Palmer with the Peace Officer Bill of Rights at the interview, which he signed.

During the investigatory interview, Palmer again admitted to purposely buying and possessing steroids even though he knew it was illegal. Palmer admitted that he purposely bought ten, 10 mL bottles of steroids that he thought were testosterone and trenbolone. He stated the cost was around \$400. He stated he purchased the substances from someone he knew from the gym. Palmer stated that he has a routine for the use of steroids. He uses the steroids for sixteen weeks and then waits at least a year before using steroids again. Palmer admitted this was his second time purchasing steroids in the last two years. During the interview, Palmer stated that Strouse detained him, but did not arrest him and at that point, Palmer did not know the outcome of the criminal investigation.

Despite not having an outcome to Palmer's criminal investigation, the State decided to proceed with and close the investigation rather than waiting for law enforcement's criminal investigation to conclude. Harris felt there was a

potential work rule violation regardless of the criminal charges, so the investigation and any potential discipline would focus on the behavior at issue, rather than the criminal case.

As the investigation was wrapping up, the management at Fort Dodge conducted a just cause analysis, which was completed in written form on September 14, 2017. In the State's just cause analysis, the State determined that Palmer knew his behavior was wrong as Palmer acknowledged that he knew the rules and admitted that he "screwed up." The State found the rules were reasonable as the facility had offenders serving time in the system for similar behavior and having a staff member committing the same acts as the offenders is a larger issue. The State also noted a concern that if Palmer used any force, his steroid use could raise questions the facility would need to answer, which could be an inefficient use of the facility's time. The State determined that it conducted an objective, thorough and fair investigation as it had not issued discipline prior to the end of the investigation, Harris was a neutral investigator, and the facility gave Palmer an opportunity to respond and explain his side. Based upon the analysis conducted during the investigation, the State determined Palmer violated the work rules.

The State reviewed and discussed its treatment of employees in similar circumstances. The State determined that Palmer's situation was different and more severe than employees with a record of OWIs as those situations did not involve the illegal purchase of a substance and a person could operate while intoxicated without having the intention to do so. The State also determined

Palmer's circumstances were more severe than two other employees the State had disciplined for drug-related rule violations. In one of those circumstances, an employee smoked marijuana at a party, but self-reported the use of this illegal substance. The State initially issued a ten-day suspension, which the employee grieved. In the grievance resolution improvement process (GRIP) settlement, the suspension was reduced to a three-day suspension, and would be further reduced if there were no further incidents of a like nature over the course of the successive two years.

In the other circumstance, an employee was in a narcotic state and brought a prescribed narcotic into the facility. That employee received a ten-day suspension.

The State determined Palmer's violation of the rule was more serious than these two other employees' violations as Palmer used an illegal substance while employed as a correctional officer in Fort Dodge and he purchased an illegal substance. Further, he only reported the violation to the facility after being detained in a public parking lot by law enforcement for purchasing the illegal substance. In conducting the just cause analysis, the State correctly noted that Palmer was not charged with anything, but the written work rule violation worksheet stated there was a significant chance of felony charges. The State also considered Palmer's evaluations and history of discipline. The State determined that Palmer's work performance and disciplinary history did not negate the egregiousness of the work rule violation.

At the completion of an investigation, Warden Johnson receives the report and shares it with some office staff, and they discuss the matter. That staff generally includes the deputy director, DAS staff, and the local personnel officer. The Fort Dodge staff also consulted with DOC's central office as to the appropriate discipline in this case. Management did look at comparable incidents. Warden Johnson found the largest difference between Palmer's conduct and past employees' conduct to be intent. Johnson determined that Palmer intended to act illegally. He had to contact someone to arrange to receive the steroids illegally. Ultimately, Warden Johnson, Dan Craig, the deputy director, Susie Pritchard, and Lori Gregory determined that termination was the appropriate discipline in Palmer's case. Johnson reiterated in testimony that he still believes that termination was appropriate for Palmer's violation of the work rules.

On September 22, 2017, the State called Palmer in around noon for a *Loudermill* interview between Warden Johnson and Palmer. After the interview, the State terminated Palmer's employment. In the letter, the State asserted that Palmer violated C.2, E.2, E.4 and H.8 of the State of Iowa Department of Corrections Policy and Procedures, Policy Number AD-PR-11, section IV. Those rules state:

IV. Procedures

The following rules were established in 1998 and are being incorporated into this policy:

C. Code of Conduct

2. Employees are charged with the responsibility of complying with IDOC's, Institution, and Judicial District Department's work rules, orders, policies and procedures, along with municipal, county,

state and federal laws, and the applicable rules of regulatory agencies that apply to them.

E. Personal Ethics

Employees Shall:

2. Avoid any action that might adversely affect the public confidence in the state criminal justice system.
4. Obey all applicable federal, state, and local laws and the policies of the IDOC, institutions, or judicial districts.

H. Professional Demeanor

Employees Shall:

8. Not sell, use, possess, purchase, manufacture, distribute, or transfer any illegal drug or alcoholic beverage while engaged in state business or operating a state vehicle. Law and policy prohibit complicity in the use, possession, sale, or exchange of illegal drugs or narcotics.

The letter provided the violation of the rules occurred due to an incident in which Palmer was detained in Fort Dodge for buying steroids in a parking lot. The letter further detailed that Palmer admitted to buying and using illegal drugs twice in the last two years and admitted that he knew using and buying the substance was illegal. In the letter, the State went on to provide that being detained in a public parking lot adversely affects the public's confidence in the criminal justice system.

After the termination, Palmer pled guilty to two counts of possession of a controlled substance. Both counts were serious misdemeanors.

On September 25, 2017, Palmer filed a grievance. DAS issued the third step answer on October 25, 2017, denying the appeal and upholding Palmer's termination.

Although Palmer admits to his conduct, he argues the State has not terminated other employees with similar infractions. Palmer provided a list of

other employees who committed potentially criminal actions who did not have their employment terminated. For most individuals, there is not enough information on the list to ascertain the veracity of the claims, nor is there enough information to compare the incidents to Palmer's situation. The list Palmer provided contains only names and alleged criminal activity. The document contained no record of the discipline level received, the date of the incident, or the job classification of the employees. The list also fails to provide any discussion of aggravating or mitigating factors the State may have considered when determining the appropriate discipline for these individuals. In testimony, Deputy Harris confirmed some of the incidents on the list, but could not confirm all the alleged incidents and could not provide specific information on the investigation of the employees or the discipline rendered. The evidence in the record is insufficient to show the majority of the people on the list actually engaged in criminal conduct that led to discipline.

The record contains enough additional evidence about only two of the listed employees to determine whether the individuals were similarly situated to Palmer. One of those cases involved the current Warden's commission of multiple OWIs. The other case concerned a correctional officer that self-reported the use of an illegal substance while off-duty at a party.¹ Testimony from State witnesses and other evidence in the record provided enough information to be able to compare Palmer's circumstances to that of these two individuals.

¹ The State also cited this correctional officer's case as one of the situations it used to evaluate the appropriate discipline in Palmer's case.

The Appellant argues that his discipline was too severe, especially considering the State's failure to terminate other employees even when those employees committed crimes or committed drug-related rule violations. The State argues it evaluated the circumstances of other employees cited for similar rule violations, but determined that Palmer's violation of the rules was distinguishable as he intentionally violated the law and only admitted to his purchase and use of steroids after being detained by law enforcement.

Palmer filed the present appeal on October 31, 2017.

CONCLUSIONS OF LAW

Palmer filed this appeal pursuant to Iowa Code section 8A.415(2), which states:

2. Discipline Resolution

a. A merit system employee . . . who is discharged, suspended, demoted, or otherwise receives a reduction in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.

b. If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board . . . If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

DAS rules provide specific discipline measures and procedures for disciplining employees.

11—60.2(8A) Disciplinary actions. Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when the action is based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal of a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee’s job performance of the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

. . . .

60.2(4) Discharge. An appointing authority may discharge an employee. Prior to the employee’s being discharged, the appointing authority shall inform the employee during a face-to-face meeting of the impending discharge and the reasons for the discharge, and at that time the employee shall have the opportunity to respond. A written statement of the reasons for the discharge shall be sent to the employee within 24 hours after the effective date of the discharge, and a copy shall be sent to the director by the appointing authority at the same time.

The State bears the burden of establishing that just cause supports the discipline imposed. *Phillips and State of Iowa (Dep’t of Human Res.)*, 12-MA-05 at App. 11. The term “just cause” as used in section 8A.415(2) and in administrative rule is undefined. *Stockbridge and State of Iowa (Dep’t of Corr.)*, 06-MA-06 at 21 (internal citations omitted). Determination of whether management has just cause to discipline an employee requires a case-by-case analysis. *Id.* at 20.

When determining the existence of just cause, PERB examines the totality of the circumstances. *Cooper and State of Iowa (Dep’t of Human Rights)*, 97-MA-12 at 29. The Board has stated the just cause determination “requires an

analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical, inflexible application of fixed ‘elements’ which may or may not have any real applicability to the case under consideration.” *Hunsaker and State of Iowa (Dep’t of Emp’t Servs.)*, 90-MA-13 at 40. Although just cause requires examination on a case-by-case basis to determine just cause, the Board has declared that the following factors may be relevant to the just cause determination:

While there is no fixed test to be applied, examples of some of the types of factors which may be relevant to a just cause determination, depending on the circumstances, include, but are not limited to: whether the employee has been given forewarning or has knowledge of the employer’s rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether sufficient evidence or proof of the employee’s guilt of the offense is established; whether progressive discipline was followed, or not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee’s employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.

Hoffmann and State of Iowa (Dep’t of Transp.), 93-MA-21 at 23. The Board has also considered how other similarly situated employees have been treated. *Kuhn and State of Iowa (Comm’n of Veterans Affairs)*, 04-MA-04 at 42.

PERB has determined the presence or absence of just cause rests on the reasons stated in the disciplinary letter. *Eaves and State of Iowa (Dep’t of Corr.)*, 03-MA-04 at 14. Iowa Code section 8A.413(19)(b) and DAS rule IAC 60—2.4 require the State to provide the employee being disciplined with a written statement of the reasons for the discipline. See *Hunsaker*, 90-MA-13 at 46, n.27.

In order to establish just cause, the State must demonstrate the employee is guilty of violating the work rule, policy, or agreement cited in the termination letter. *Gleiser and State of Iowa (Dep't of Transp.)*, 09-MA-01 at 17–18, 21.

Palmer violated the DOC's rules as cited in the termination letter. Palmer admitted to purchasing illegal substances at least twice and Palmer admitted to the use of those substances. Palmer admitted that he was detained by law enforcement in a public parking lot for his purchase of illegal substances. Palmer purchased and used illegal drugs and failed to comply with state laws as shown by his purchase of the illegal substances.² His actions in purchasing illegal substances led to a public detention by law enforcement. The State has demonstrated Palmer violated the rules about abiding by DOC policies and state and federal laws.

The State also demonstrated that Palmer's actions could adversely affect the public confidence in the state criminal justice system. Palmer argues no one complained or called in to the Fort Dodge facility with concerns about his actions; therefore, the State has not shown a violation of this rule.

Palmer correctly states the record does not show that any member of the public made complaints. Nonetheless, I still find Palmer's actions in purchasing illegal drugs, which led to his detention by law enforcement, could jeopardize the

² I question whether Palmer violated H8 of the DOC policy as the phrasing of that particular rule seems to suggest an employee's use or purchase of illegal drugs is only a violation of the rule if the employee was engaged in state business or operating a state vehicle. However, as the State has proven Palmer's violation of other rules for the purchase and use of illegal substances, I find that I do not need to reach the question of whether Palmer violated this particular rule. Assuming without deciding that Palmer did not violate this particular rule, I still would reach the same decision regarding the conclusions of law and the discipline in this case.

public's confidence in the state criminal justice system as his actions could affect the public's viewpoint of correctional officers, if known. The DOC policy does not require that Palmer's actions definitively caused a lack of confidence in the criminal justice system, just the possibility of such an outcome. Even if that alone is not a violation of the rule, the State did establish that members of the public knew about Palmer's actions and those individuals could have a negative reaction toward the criminal justice system due to Palmer's conduct. The special agents involved in Palmer's detention could have their confidence in the state criminal justice system, especially in the Fort Dodge Correctional Facility, adversely affected because of their detention of Palmer. At least one of the agents knew that Palmer worked at the Fort Dodge facility, and was concerned about Palmer's conduct after the detention. There is sufficient proof that Palmer violated the cited DOC rules.

The State adequately communicated the reasons for the discipline through the termination letter. The State provided Palmer with a termination letter that listed the rule violations for which Palmer's employment was terminated. In the letter, the State asserted that Palmer violated these rules when he was detained in Fort Dodge for buying steroids in a parking lot and for his admitted purchase and use of an illegal substance.

Palmer was also aware of the DOC rules and the expected conduct. Palmer received the DOC's policies and the State of Iowa Employee Handbook, both of which included provisions related to illegal substances. Palmer admitted to knowing that his actions were wrong and that he "screwed up."

The Appellant also does not dispute the sufficiency or fairness of the investigation. The State interviewed Palmer and he had a chance to provide his accounting of the events and defend the allegations. During the investigation, the State employed the just cause factors to determine the appropriate discipline.

However, Palmer does assert the State relied on faulty assumptions when determining the discipline. At the time of Palmer's termination, the investigator believed it was likely that Palmer would be charged with a felony. The investigator even noted, "there is significant chance of felony charges" in Palmer's criminal case. After his termination, Palmer pled guilty to two serious misdemeanors. Although the investigation revealed there was a significant chance of felony charges according to the special agent assigned to Palmer's criminal case, Palmer was never charged with a felony. Nonetheless, the facility chose to act before the criminal charges were filed.

Even if the State assumed Palmer would be charged with a felony, I find the State did not use the potential charges as a factor in determining the discipline. When the State filled out a form regarding the just cause analysis, the State noted there was a significant chance at felony charges, but also noted that no charges had been filed. At the end of the document, in listing the facts relevant to whether just cause existed for discipline and the severity of the discipline, the facility omitted any reference to the potential charges. Both the investigator and the Warden testified about the underlying factors in determining the level of discipline for Palmer, and they did not list potential felony charges as one of the underlying factors in that determination. Instead, they both noted Palmer's

employment was terminated due to his intentional purchase and use of an illegal substance, and his failure to report his behavior until after his detention. Based on the facts in the record, I find the facility proceeded with the termination based on Palmer's actions alone and the potential criminal charges and the level of those charges had no effect on the State's determination of the appropriate discipline.

The parties' main area of contention in this case is whether Palmer's conduct warranted the severity of the discipline imposed. The State did not follow progressive discipline in this case, and instead proceeded to termination, the most severe form of discipline. Palmer also argues that other employees did not receive as severe of discipline as he did, thus the State did not treat him the same as similarly situated individuals.

Progressive discipline is a system where measures of increasing severity are applied to repeated offenses until the behavior is corrected or it becomes clear that it cannot be corrected. *Nimry and State of Iowa (Dep't of Nat. Res.)*, 08-MA-09, 08-MA-18, at App. 30. Progressive discipline is used to encourage employees to take corrective responsibility to follow work rules and employment obligations. *Stockbridge and State of Iowa (Dep't of Corrections)*, 06-MA-06 at 28. The purpose is to correct the unacceptable behavior of an employee and to convey the seriousness of the behavior while affording the employee an opportunity to improve. *Phillips and State of Iowa (Dep't of Human Servs.)*, 12-MA-05 at App. 16 (citing Norman Brand, *Discipline and Discharge in Arbitration* at 57 (BNA Books 1998)). When determining the appropriate discipline and the

use or absence of progressive discipline, PERB considers the circumstances of the case. *Hoffmann and State of Iowa (Dep't of Transp.)*, 93-MA-21, at 26.

Progressive discipline may be inapplicable when the conduct underlying the discipline was a serious offense. See *Phillips and State of Iowa (Dep't of Human Servs.)*, 12-MA-05 at App. 1, 13, 16-18. When determining the appropriate type of discipline given the circumstances, PERB examines the severity and extent of violations, the position of responsibility held by the employee, the employee's prior work record, and whether the employer has developed a lack of trust and confidence in the employee to allow the employee to continue in that position, taking into account the conduct at the basis of the disciplinary action. *Phillips and State of Iowa (Dep't of Corr.)*, 98 H.O. 09 at 15; *Estate of Salier and State of Iowa (Dep't of Corr.)*, 95-HO-05 at 17.

The State argues that Palmer's conduct was so egregious that progressive discipline was inapplicable in this situation. I agree with the State's conclusion in forgoing progressive discipline.

Palmer bought and used illegal drugs on more than one occasion. This is a serious violation of the facility's rules. A correctional officer is generally held to a higher standard of respect for and adherence to the law given that offenders the correctional officer works with may be in the facility for similar legal violations. See Frank Elkouri and Edna Asper Elkouri, Resolving Drug Issues 221-22 (1993) (stating a key determination in finding a nexus between off-duty behavior and discipline for drug-related rule violations is the fundamental incompatibility of an employee's job responsibilities and drug activity).

Palmer worked for the DOC for over ten years, mostly at the Fort Dodge facility. Palmer had generally positive evaluations with only minor disciplines and management praised him for working well with special needs offenders.

However, Palmer's conduct leading to the instant discipline led to the State's lack of trust and confidence in him. Not only did Palmer knowingly violate one of the DOC's rules and the law in purchasing and using illegal substances, but he also had purchased and used illegal substances in the past without reporting the incident. In June 2017, Palmer immediately reported his detention by law enforcement to the Fort Dodge facility and he cooperated throughout the investigation, but management believed he reported the incident only because of his detention by law enforcement. Palmer's actions and his failure to report his behavior until after his detention led the facility to lose confidence in him. Under these circumstances, progressive discipline is inapplicable.

Palmer also argues that he was not treated the same as similarly situated employees. Palmer accurately notes the State has not always terminated other DOC employees for drug offenses or for violations of the same work rules as cited in his termination letter. Based on the evidence in the record, the State DOC has not demonstrated it has a zero-tolerance policy concerning drug-related rule violations or illegal activity. However, the State argues the circumstances surrounding Palmer's rule violation is more egregious than other employees' circumstances and warranted termination.

I agree that Palmer's conduct was more serious than other employees' violations of similar work rules. Palmer presented evidence regarding the Warden

multiple OWIs. The State presented evidence about two employees who committed drug-related rule violations to demonstrate that Palmer's actions warranted a more severe discipline.³ The State has demonstrated that Palmer's actions warrant a more severe discipline.

Palmer's conduct in buying and using illegal substances is not similar to an employee with one or multiple OWIs. An individual may unintentionally operate a vehicle while intoxicated from alcohol. This is not the case with Palmer. Palmer intentionally committed an illegal act. Palmer admitted to buying and using illegal substances knowing that his actions were illegal. Further, to buy an illegal substance, Palmer had to engage in a transaction with another individual who is also likely acting illegally.

Palmer's conduct is also more egregious than the other two cases involving employee violations of drug-related rules and policies. In one of those cases, the employee reported to work in a narcotic state, but was under the influence of a prescribed substance. The State issued a ten-day suspension. That employee is not similarly situated to Palmer, as the facts provided in the record do not demonstrate the employee committed an illegal act. Rather, the employee violated the rule by using and possessing a legal substance, but during work time. Nonetheless, Palmer's conduct is more egregious due to his intentional and knowing violation of the law when he bought and used an illegal substance.

³ Palmer's document of similarly situated employees also cites one of the two incidents cited by the State.

Further, Palmer engaged in illegal activity with another individual when he purchased the illegal substance.

In the other case presented by both the State and Palmer, a correctional officer self-reported use of marijuana at a party when the employee was off-duty. The State issued a ten-day suspension. At the GRIP settlement stage, this employee's suspension was reduced to a three-day suspension and would be reduced further for additional years without further incident.

Palmer's conduct was more egregious than that employee's conduct. The other employee self-reported a one-time use of an illegal substance despite no law enforcement intervention. Palmer, on the other hand, only reported after he was detained by law enforcement. Palmer not only used an illegal substance, but he also purchased an illegal substance. Finally, Palmer admitted to past use and purchase of that illegal substance.

Palmer did not accidentally purchase and use an illegal substance. Palmer did not mistakenly engage in the one-time use of an illegal substance. Palmer sought to purchase an illegal substance and then engaged in a regimented use of that illegal substance.

Palmer's actions are far more egregious than that of the other employees cited by both Palmer and the State, and warrant a more severe discipline. While Palmer has been a solid employee for the facility for over ten years, his employment record is not enough to outweigh the gravity his actions in the instant case.

The State has demonstrated just cause exists to terminate Palmer's employment.

Consequently, I propose the following:

ORDER

Palmer's state employee merit appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of \$605.35 are assessed against the Appellant, Richard Palmer, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellant in accordance with PERB subrule 621—11.9(3).

The proposed decision and order will become PERB's final agency action on the merits of Palmer's appeal pursuant to PERB rule 621—9.1 unless, within 20 days of the date below, a party files a petition for review with the Public Employment Relations Board or the Board determines to review the proposed decision on its own merits.

DATED at Des Moines, Iowa this 22nd day of October, 2019.

/s/ Amber DeSmet

Administrative Law Judge

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