

Pursuant to notice, a closed evidentiary hearing on the merits of the appeal was held before me on May 14, 2019, in Des Moines, Iowa.¹ Bundy was represented by Robin White and Andrew Williams. The State was represented by Alla Mintzer Zaprudsky. Both parties submitted post-hearing briefs, which were received on July 9, 2019.

Based upon the entirety of the record, and having reviewed and considered the parties' arguments, I find DHS does not have just cause to terminate Bundy's employment.

FINDINGS OF FACT

IMHI is a locked unit facility that provides inpatient psychiatric treatment for adults, adolescents, and children who have been diagnosed with acute psychiatric disorders. More than 90 percent of the patients are involuntarily committed. The patients served tend to be violent and present risk of harm to themselves and others. The IMHI professional and nonprofessional staff are tasked with providing care for the patients and ensuring they do not harm themselves or others. All IMHI staff is trained to provide a safe and caring environment for the patients.

Bundy has been employed by IMHI since February 2006 as an LPN. Both LPN's and Registered Nurses (RN's) are licensed professional positions that have greater responsibilities in terms of patient care and treatment than the

¹ This termination appeal was filed with PERB on November 14, 2017. The parties jointly requested to delay scheduling the evidentiary hearing until Bundy arbitrated an earlier five-day suspension with a final warning she received in November 2016. The parties received the arbitrator's award in December 2018, after which they requested the termination appeal proceed with scheduling.

nonprofessional staff. They are considered leaders of the unit. The professional staff is expected to not only follow the policies and procedures, but to serve as role models to nonprofessional staff on the unit in terms of abiding by IMHI policies and work rules.

The incident underlying Bundy's termination occurred on August 24, 2017. Nursing supervisor Sherry Streif observed Bundy using her cell phone in the nurse's office when she was assigned to conduct patient safety rounds. IMHI's subsequent investigation into the incident concluded Bundy's actions violated DHS policies and work rules, as well as IMHI's nursing operations manual.

Patient safety rounds, sometimes referred to as patient roll call, are a critical way for staff to maintain continuous observation of the patients and their environment to prevent harm and injury. Each unit has an assignment sheet that informs the staff of their daily duties, including when they are responsible for conducting the patient safety rounds. The rounds are generally assigned in one hour time slots. Although staff members have assigned rounds, it is common and acceptable for staff to cover each other's rounds when the assigned staff member is occupied with other duties. The important aspect of rounding is to ensure the rounds are completed by verifying each patient's whereabouts. The staff is also expected to assess the environment by confirming all doors are secured and removing any hazards on the unit that patients can use to harm themselves or others. The assigned staff is expected to remain on the patient unit during the assigned rounds to maintain continuous observation of the patients and their

environment. The record establishes Bundy knew IMHI's expectations for properly conducting patient safety rounds.

Rounds are completed every 15 minutes at irregular intervals to prevent patients from being able to plan harm to themselves or others. When assigned rounds, the staff is to have possession of the "rounds clipboard" that contains a list of all the patients on the unit and mark the patient's status on the sheet. Different codes are used to indicate the patient's whereabouts on the rounds sheet. When a patient is present and visually observed, the staff checks the corresponding box for the patient and the 15-minute time slot for which the round is completed. If a patient is off ground, off ward, or sleeping during the round, the staff marks the appropriate code in the corresponding box.

IMHI's nursing operations manual outlines the policy and procedures for conducting patient safety rounds. The record establishes Bundy knew and had sufficient training on how to properly conduct safety rounds. The pertinent policy language states, in part:

**IMHI Nursing Operations Manual, Chapter 6
Unit Safety/Security**

POLICY

4. Nursing Observation (rounds) will be completed every 15 minutes.
5. All patients must be accounted for on each set of rounds.

PROCEDURE
Rounds

2. Staff will be assigned rounds on all shifts by the RN.
3. The staff person making rounds will locate each patient and verify the whereabouts of patients not on the unit within each 15 minute increment.

6. Rounds have not been completed until every patient has been located or accounted for.

7. The staff person on rounds will be responsible for assessing the integrity of the unit which includes: general milieu, patient behavior and locked doors (all unit doors should be locked except those that are in use/occupied by patient or staff).

To protect the patients' safety and confidentiality, IMHI also has a policy regarding the use of cell phones and other electronic devices. Cell phones are a distraction and may prevent staff from remaining focused on their work duties. Staff is allowed to use their phones only during lunch or break times to prevent staff from neglecting their work duties. IMHI allows staff to keep their phones in the office areas, but staff is prohibited from carrying the phone with them on the patient care units. This prohibition is intended to prevent possible injury to patients who may find and take the phone, subsequently using it to cause harm to themselves or others. Prohibiting cell phones on the patient unit is also intended to protect the patients' privacy by not allowing staff to have devices that may take photos or videos of the patients served by IMHI.

IMHI's nursing operations manual outlines the policy regarding the use of electronic devices. The record establishes Bundy knew IMHI's expectations and restrictions regarding cell phone use.

**IMHI Nursing Operations Manual, Chapter 7
Electronic Device/Internet /Social Networks**

POLICY

1. Employees are not allowed to use any personal electronic devices on the patient care units.
2. Employees are not allowed to use any personal electronic devices unless they are on break (lunch or 15 minutes).

PROCEDURE

Electronic Devices (including cell phones, IPADs, E-readers, etc.)

There are many issues related to the use of personal electronic devices as work, including patient confidentiality due to their cameras and work productivity.

The use of cell phones or other personal electronic devices on work time by nursing staff is restricted to break and meal times. Electronic devices should not be carried or used on the patient care units. In addition, due to the complaints that the sounds of cell phones are disruptive in the nurse's station, please either turn off your cell phones or mute the tones if keeping them in the nurse's station.

The incident underlying Bundy's termination occurred on August 24, 2017. Based on IMHI's investigation and the record as a whole, the following facts regarding the incident are established.

Bundy worked the 7 a.m. to 3 p.m. shift on August 24. She was assigned to the unit that houses children and adolescent patients, referred to as the CAPS unit. Bundy was one of six other employees assigned to complete rounds that day. Every required 15-minute round from 7 a.m. to 3 p.m. was completed and properly documented on the rounds sheet.

On the weekly staff assignment sheet, Bundy was assigned to complete 15-minute rounds between 10 a.m. and 11 a.m. and between 12 p.m. and 1 p.m. Her scheduled half-hour lunch break was at 11:30 a.m. As is common practice for staff to cover rounds for each other as needed, Bundy covered rounds for other staff from 7 a.m. to 8:45 a.m. She completed every 15-minute round during this time frame, a total of 8 rounds, to cover for two other staff who were working

on other tasks. The record indicates the expectation is for staff to document the change in rounds coverage on the assignment sheet, but that was not done in this instance. Neither Bundy nor any other staff who obtained coverage for their assigned rounds noted the change on the assignment sheet. The patient rounds sheet, however, has a record of the staff who completed each rounds because they initial the corresponding 15-minute slot once a round is completed.

On August 24, the CAPS unit had a total of 13 patients. The day was particularly busy. The children were very unsettled when they woke up and staff was “putting out fires” before the children were escorted off to school. At 8:45 a.m., when Bundy completed that round, 12 of the 13 patients were off ward at school. She properly documented on the rounds sheet they were off the unit and marked that the only patient on unit at that time was visually observed. After completing the 8:45 a.m. round, Bundy handed the rounds board to another staff to continue rounding. That same morning, the doctors and nurses also had a meeting that resulted in the nursing staff having to do a lot of charting and noting orders in the nurse’s office on the unit.

At about 9:30 a.m., RN Becky VanLengen asked Bundy to assist her with noting orders in the nurse’s office. Bundy noted orders for about an hour. Although Bundy was assigned to do rounds from 10 a.m. to 11 a.m., resident treatment worker (RTW) Sam Rasmussen covered her rounds from 10 to 10:30. Although neither Bundy nor Rasmussen could recall the specific conversation when interviewed during the investigation, the record establishes Bundy and

Rasmussen made contact and agreed Rasmussen would cover Bundy's rounds while Bundy was noting orders.

The events that occurred next prompted IMHI's investigation and ultimately resulted in Bundy's termination. The precise timing of events is not known on this record, but based on all the witness statements obtained during the investigation, the consensus is the events were in very short proximity to each other, either moments, seconds or a couple of minutes.

Bundy completed noting orders around 10:30 a.m. and stepped away from the computer. She sat down at the end of the table in the nurse's office for a moment. Her back was facing the office door. Other staff were present in the office with Bundy, including RN VanLengen and Resident Treatment Worker (RTW) Chris Butzlaff. Both staff were working on their own tasks. When she sat down at the table, Bundy took her purse, which she generally keeps in the office, and took out her cell phone. She pulled up a picture of a hairstyle she planned to do for her daughter's upcoming wedding and called VanLengen over to show it. Bundy did not use her phone other than to show that one photo.

Around this same time when Bundy sat at the end of the table, Rasmussen walked into the office with the rounds clipboard. He saw Bundy was done noting orders and was sitting at the end of the table with her cell phone out. Rasmussen placed the rounds board on the table next to where she was seated and told her he was going to lunch. His scheduled lunch was at 10:30 a.m.

Rasmussen left the nurse's office to go to lunch. Shortly after, nursing supervisor Streif walked into the nurse's office and observed Bundy on her cell

phone. When Streif asked whether Bundy was on break, she indicated she was not. She placed her cell phone away. Streif reminded Bundy and the other staff present in the office that cell phones are only to be used during break or meal times. At this time, Bundy stood up with the rounds board. When Streif asked Bundy whether she was on rounds, Bundy indicated she had just been given the rounds board and was getting up to do the rounds. Streif similarly reminded Bundy and other staff present that they are not to be in the office when assigned rounds and that the handoff with the rounds board should be done on the patient unit. Bundy left the nurse's office and went to the patient unit to conduct the rounds. The record reveals she completed both the 10:45 a.m. and 11 a.m. assigned rounds. From 8:45 a.m. to 11 a.m., the rounds document reveals that 12 of the 13 patients on the unit were off ward.

IMHI began an investigation into the August 24 incident for potential violations of the cell phone and rounding policy. IMHI held multiple fact-finding interviews with Rasmussen, VanLengen, and Butzlaff. All three witnesses were allowed to review the assignment and rounds sheet for August 24 prior to questioning. The information obtained from the witnesses confirms the events as described. Furthermore, Rasmussen indicated he placed the rounds board next to Bundy on the table where she was seated, instead of handing it to her directly. Other witnesses confirmed seeing Rasmussen in the office. While VanLengen indicated she recalled Rasmussen coming into the office, she did not recall the precise time or if he had the rounds board with him. Butzlaff, however, recalled he did come in with the rounds board to hand it off to Bundy.

In terms of the duration of the incident, both Butzlaff and VanLengen agreed it was very short. Butzlaff described Bundy finished noting orders and Rasmussen walked in to hand the rounds board just “moments” before Streif entered the office.

Streif’s initial documentation regarding the August 24 incident indicated it occurred around 11:30 a.m. IMHI did not review the assignment or rounds sheet until after the first round of interviews with the witnesses. Eventually, IMHI confirmed with witnesses and documentary evidence that the 11:30 a.m. time was incorrect and that the incident in question occurred around 10:30 a.m.

IMHI held three separate investigative interviews with Bundy regarding the August 24 incident. Bundy was not given an opportunity to review the assignment or rounds sheet prior to questioning at any of the three interviews. All other witnesses interviewed were given this opportunity.

The first interview was on August 28 and the second interview was on August 30. At this time, IMHI still had not retrieved or consulted the assignment or rounds sheet for August 24. As such, IMHI was still asserting the incident occurred at 11:30 a.m. Bundy responded that the time was earlier because 11:30 a.m. was her scheduled lunch break, but she was not certain of the time.

Bundy stated that right before Streif walked in, she was busy noting orders and had just sat down at the end of the table when she was done. At that point, she took her cell phone out from her purse. Bundy acknowledged she used her cell phone while not on break. Bundy indicated she believed her rounds were taken care of because she had asked other staff if they were okay covering. Bundy

could not recall from memory who covered, but indicated staff said they would cover her rounds as she was busy noting orders.

The third investigative interview was held on September 1. By this time, IMHI confirmed the time was around 10:30 a.m. through other witnesses. When questioned on the cell phone use, Bundy again acknowledged using it even though she was not on break. She admitted using poor judgment, adding that she was excited about her daughter's upcoming wedding.

In regard to the rounding assignment, Bundy stated she was noting orders right before and was not paying attention to the time because she believed her rounds were taken care of by other staff. She did not recall Rasmussen coming into the office and handing the rounds board to her. Bundy indicated nobody handed the rounds board to her. However, Bundy indicated she saw the rounds board on the table, at which point she picked it up and went to do the rounds, around the same time Streif had walked into the office. IMHI told Bundy during the interview that a "serious discrepancy" exists among her assertions and the other witnesses because she is "saying exactly the opposite of what other people told [them]" regarding the rounds board. Based upon review of the witness statements obtained, Bundy's assertions regarding the rounds board hand-off is consistent with information provided by other witnesses. Rasmussen confirmed he did not directly hand the board to Bundy, but placed it on the table.

Bundy was placed on administrative leave on September 6, 2017. IMHI considered the information obtained during the investigation. They concluded Bundy violated the cell phone policy, the rounding policy, and neglected her job

duties because she was using a personal cell phone while on work time and when she was supposed to be out on the patient unit doing rounds.

IMHI also concluded that Bundy was insubordinate because similar concerns had been discussed with her and she continued to go against the policies instituted by management. Prior to the August 24 incident, Bundy had been coached on the rounding policy. In September 2016, Bundy was observed sitting in the dayroom with her feet up while assigned rounds on two occasions and being in the office when she should be on rounds. Staff had also reported concerns that she was late for rounds or other assignments. At that time, management had a coaching session with Bundy regarding the issues.

In February 2017, Bundy received her annual performance evaluation with an overall rating of “does not meet” expectations. This rating period was from December 2015 to December 2016, which includes the concerns for which she was coached in September 2016. Although she received an overall unsatisfactory rating, the supervisor comments included in the evaluation reveal that Bundy satisfactorily completed the basic requirements of her job without error. The unsatisfactory rating primarily pertained to perceived shortcomings with professionalism in the workplace and lack of initiative to utilize her LPN skills. The only specific comment relevant to the appeal here stated, “While on rounds be alert to all areas and continually moving to assist in the safety of the units. Be prompt to complete assignments such as handing off rollcall, observing assigned areas and escorting patients.” A developmental plan was given to “Follow State of Iowa policy on Patient Confidentiality.”

IMHI also concluded following its investigation that Bundy was not forthcoming during the investigation with the information and gave conflicting information. The State has not presented specific factual basis for this assertion. Instead, the State argues that Bundy was “argumentative, defensive, evasive, and sarcastic” during the interview and that her uncooperative behavior during the investigation “rose to the level of being misleading.”

Prior to the termination at issue here, Bundy had been disciplined before. IMHI has at least four separate disciplinary tracks – attendance, call-in, refusal of mandated overtime (OT), and the misconduct or rule violation track, which is the track on which she was terminated. The tracks are separate from each other when IMHI is considering discipline. As such, although Bundy had been disciplined on the other tracks for attendance and OT refusal, those disciplines are not relevant to the rule violation track from which she was terminated.

The only discipline on Bundy’s rule violation track is a one-day suspension that she received in April 2015. The discipline was not related to rounds or cell phone use. At the time of her termination in September 2017, Bundy had also been disciplined with a five-day suspension with a final warning. The discipline was grieved to an arbitrator through a collective bargaining agreement grievance procedure in effect at the time. The arbitrator sustained the grievance and ordered IMHI to expunge Bundy’s record of the five-day suspension. As such, the only discipline on Bundy’s record that can be considered in this appeal is the one-day suspension she received in April 2015.

IMHI held a *Loudermill* meeting with Bundy on September 19 prior to giving her the notice of termination. Bundy was informed DHS had made a decision to terminate her employment and that this was her opportunity to provide any other information for management to consider that “might change our opinion about this decision.” Bundy told them she had already provided them with the information, “there’s nothing I can add, I have nothing to share.” Following this meeting, DHS determined the decision to terminate would stand.

Bundy was terminated on September 19, 2017. Her termination notice stated, in part:

As a result of a fair and thorough investigation, your employment with Independence Mental Health Institute has been terminated, effective September 19.

The following has occurred in the past twelve months:

On September 7, 2016, you were coached and counseled regarding not doing safety rounds properly.

On November 15, 2016, you were given a 5 Day/Final Warning Suspension for violation of the DHS Handbook Section A-2, Code of Conduct, Section D-1 Subsection 19 regarding cooperating with investigations, D-7, Confidentiality and the Independence Mental Health Institute Nursing Operation policies for Confidentiality and Electronic Device/Internet/Social Networks. You directly violated the policy on cell phone use. You were not forthcoming with information and gave conflicting information during the investigation regarding this incident.

On February 26, 2017, you were given an overall Does Not Meets rating on your Performance Evaluation.

On August 24, 2017, you were noted to be sitting in the nursing office by a nursing supervisor while assigned safety rounds. You were not out on the unit doing patient safety rounds and you had your personal cell phone out showing another employee pictures

from your phone while on duty. You again failed to follow the safety rounds policy by engaging in personal business while on duty instead of performing your assigned 15 minute safety rounds. You again violated the Electronic Device policy by having your personal cell phone out showing pictures on it while on duty. You admitted that you were not on break at that time. You again violated the DHS Handbook work rule D-1, Subsection 19 by not being forthcoming about the information in an investigation and giving conflicting information throughout three investigations.²

You have had multiple violations of work rules and nursing policies, some of which create safety hazards for your patients and other staff. These violations culminated in your 5 Day/Final Warning in November, 2016 and your Does Not Meet overall performance evaluation on February 26, 2017. You have been given multiple opportunities to show improvement in your work performance which you have failed to do.

This action has been taken due to the seriousness of the violations that you continue to exhibit and your failure to respond to directives to improve.

In the termination letter, DHS asserted that Bundy's actions on August 24, 2017, violated the nursing operations manual provisions previously outlined pertaining to use of electronic device and conducting patient safety rounds. In addition, the termination letter also asserted Bundy's conduct on August 24, as well as her statements during the investigation, violated DHS employee handbook provisions regarding insubordination, poor work performance and neglecting job duties, and making false or misleading statements or otherwise failing to

² Although the letter states between the three "investigations," the record as a whole indicates that IMHI disciplined Bundy for allegedly providing conflicting information between the three interviews during the investigation into the August 24 incident. Furthermore, the reference to work rule D-1, subsection 19, is an erroneous reference to a prior November 2014 version of the DHS employee handbook. The handbook was revised in September 2017. The prior D-1, subsection 19, contained the identical language requiring cooperation and assistance during an investigation that is found in the 2017 version work rule B-1, subsection 20, language which is recited in Bundy's termination letter.

cooperate during the investigation. The DHS employee handbook work rules contained in the termination letter are the following:

Part B: Employee Responsibilities and Work Rules

Section B-1. General Standards of Conduct and Work Rules

1. An employee's job is important, and employees are expected to cooperate and follow the instructions of supervisors or other designated members of management. Insubordination (intentional refusal to follow an authorized supervisor's reasonable orders or instructions) is prohibited unless such instructions are contrary to the Code of Iowa.
2. Poor work is not acceptable. Employees are expected to perform their work properly and efficiently and to meet performance standards. Employees are expected to seek, accept and accurately complete assignments within deadlines and not neglect job duties and responsibilities.
3. Employees are expected to be attentive to their responsibilities and shall not loaf, loiter, sleep or engage in personal business while on duty.

10. Employees shall not make false, misleading or malicious statements concerning themselves ... or falsify forms or work documents, or ... intentionally give false or misleading information, or omit information significant to the Department.

20. Employees shall cooperate and provide assistance with any type of investigation regarding alleged civil, criminal or administrative misconduct; including cooperating in interviews, producing requested documents or other requests as appropriate.

Bundy appealed her termination to the Department of Administrative Services (DAS) on September 28, 2017. The DAS director's designee denied the grievance on October 26, 2017. In denying the grievance, DAS found that IMHI established a violation of the cell phone and rounding policy. DAS further concluded that termination was supported by just cause because IMHI issued the

next step of progressive discipline since Bundy had a five-day suspension with a final warning on her disciplinary record at the time IMHI terminated her employment.

Since the five-day suspension has been expunged from her record, the State argues termination is supported by just cause due to the seriousness of the rule violation and the fact that Bundy has been previously coached on the applicable policies. The State offered two disciplines of other employees to demonstrate IMHI had skipped progression when the rounding policy had been violated.

In September 2017, an RTW was disciplined for an incident that involved a patient falling, failing to notify the RN of the fall, moving the patient prior to notifying the RN, and being contradictory in the employee's interviews. The employee was also investigated for proper documentation when rounding. Testimony received at hearing indicates this RTW failed to follow the rounds policy by leaving the rounds board in the nurse's station, making rounds without the board and came back off the unit to mark the rounds he completed when he should have been on the unit. IMHI disciplined him with a one-day suspension, forgoing a written reprimand, due to the seriousness of the rounds policy violation.

In February 2018, an RTW was given a five-day suspension for leaving his assigned unit while he was assigned to do the rounds. The employee left the assignment of patient safety rounds without permission and without notifying the RN. He went to a different unit to complete a task, leaving his assigned unit and

rounds for approximately 30 minutes. He did not arrange for another staff to cover his rounds during this time. The employee was also untruthful about his location when he was paged by the RN. He did not have any other discipline on the rule violation track at the time, but IMHI skipped progression and imposed a five-day suspension due to the serious nature of the violation.

CONCLUSIONS OF LAW

Bundy filed the instant state employee disciplinary action 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.

The following DAS rules set forth 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 or 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. *E.g., Phillips and State of Iowa (Dep't of Human Res.)*, 12-MA-05 at App. 11. The term "just cause" as employed in subsection 8A.415(2) and administrative rule 11—60.2 is not defined by statute or rule. *Stockbridge and State of Iowa (Dep't of Corr.)*, 06-MA-06 at 21 (internal citations omitted). Whether an employer has just cause to discipline an employee is made on a case-by-case basis. *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. As previously stated by the Board,

... a [§ 8A.415(2)] 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. The Board has further instructed that an analysis of the following factors may be relevant:

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. PERB also considers how other similarly situated employees have been treated. *E.g. Kuhn and State of Iowa (Comm'n of Veterans Affairs)*, 04-MA-04 at 42.

The presence or absence of just cause rests on the reasons stated in the disciplinary letter provided to the employee. *Eaves and State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14. To establish just cause, the State must demonstrate the employee is guilty of violating the work rule, policy, or agreement cited in the disciplinary letter. *Gleiser and State of Iowa (Dep't of Transp.)*, 09-MA-01 at 17-18, 21.

Bundy's notice of termination indicates she was terminated for multiple policy violations pertaining to cell phone use, patient safety rounds,

insubordination, and not being forthcoming and honest during the subsequent investigation into the August 24 incident.

The State has presented sufficient proof that Bundy violated the IMHI nursing manual provisions on cell phone use when she used her personal cell phone in the nurse's office to show a photo to a co-worker. Bundy acknowledged during the investigation that she used her cell phone even though she was not on break at the time, and admitted she exercised poor judgment. Bundy's conduct on August 24 is in violation of the nursing manual provision which directs that the use of personal cell phones is restricted to an employee's break and meal time.

The State has also demonstrated that Bundy's presence in the nurse's office after she had been handed the rounds board is in violation of IMHI policy and expectations when conducting safety rounds. One aspect of rounding is to verify the whereabouts of each patient on the unit. The nursing operations language at issue directs that patient rounds are to be "completed every 15 minutes" and a round is deemed complete when the whereabouts of every patient on the unit has been verified. As the record demonstrates, Bundy timely and accurately completed both her 10:45 a.m. and 11 a.m. assigned rounds by verifying the whereabouts of each of the 13 patients and properly documenting it on the rounds sheet. As such, Bundy completed her 15-minute rounds as required by the nursing operations manual.

The other aspect of rounding as established by the record is the requirement and expectation that staff be present on the patient unit for the

duration of the assigned 15-minute increments. Bundy was aware of this expectation. As the nursing operations manual dictates, a staff member assigned rounds is also responsible for assessing the unit, including “general milieu, patient behavior and locked doors.” The staff person must be physically present on the unit to accomplish these other purposes of rounding. After RTW Rasmussen gave the rounds board back to Bundy around 10:30 a.m., IMHI policy and expectations required Bundy to immediately walk to the patient unit, which she admittedly did not do. Thus, the State has established Bundy violated the policy due to her failure to be present on the patient unit for the duration of the time she was assigned to do rounds.

Bundy’s contention that she believed her assigned rounds were taken care of do not negate the policy violation. The record establishes that Rasmussen covered her rounds from 10 a.m. to 10:30 a.m. while Bundy assisted with noting orders in the office. However, around 10:30 a.m., Rasmussen came into the office, observed Bundy was no longer noting orders, and placed the rounds board by her, stating he was going to lunch. At this time, Bundy’s back was facing the office door and she was on her cell phone trying to find a photo. Thus, while Bundy’s contention that she did not hear or see Rasmussen give her the rounds board is plausible, the pertinent fact established by the record is that she was given the board around 10:30 a.m. Other witnesses in the office confirmed Rasmussen came in and at least one witness recalled him handing the rounds board to Bundy, although she could not recall if he placed it on the table or gave it directly to Bundy. Thus, on this record, there is no question that Rasmussen

handed the responsibility for rounding back to Bundy around 10:30 a.m., at which time Bundy was required to leave the nurse's office and be physically present on the patient unit.

The State has shown that Bundy's use of her personal cell phone on work time and not being on the patient unit when assigned is poor work performance and neglect of assigned job duties. Although Rasmussen had come in to hand the rounds board to Bundy, it appears she did not realize it because she was distracted by her personal cell phone. This is precisely the distraction the cell phone policy seeks to eliminate by limiting its use to employee meal and break times. Bundy's decision to take her phone out while on work duty caused her to be inattentive to her work and fail to immediately realize the rounds board was handed off to her. Such conduct is in violation of DHS employee handbook work rules B-1, subsection 2 and 3.

The State has not demonstrated that Bundy's conduct on August 24 amounts to insubordination. The State's position that she was insubordinate is solely based on Bundy's prior coaching on being present on the unit during rounding and unsatisfactory work performance evaluation in February 2017. IMHI argues Bundy's conduct on August 24 was against the prior notice she had been given to follow these policies. Under the record present, the State's position is unsustainable. As the cited section B-1, subsection 1, of the employee handbook states, insubordination is an intentional refusal to follow a supervisor's reasonable orders or instruction. Bundy made no such intentional refusal. In fact, Bundy put her phone away and went to do rounds without prompting from

Streif. Bundy further answered Streif's questions that she was not on break when Streif observed her with her phone and that she was on her way to do the rounds when she stood up to leave the office. The State's interpretation of what amounts to insubordination, if accepted, would result in every single policy and work rule violation also being insubordination because the employee had been previously advised of the policies and work rules. I cannot accept such broad interpretation for an act that is, by policy definition, intended to apply to intentional refusals to follow a supervisor's directive or instruction.

The State also has not presented evidence that Bundy failed to be forthcoming or honest during the investigation into the August 24 incident. The termination letter claims she gave conflicting information between her three interviews but does not provide a factual basis for the claimed inconsistency. The State argues in its brief that Bundy's "argumentative, defensive, evasive, and sarcastic" tone and uncooperative behavior during the investigation amounts to being misleading. I find no factual support for such conclusions. Bundy answered the questions posed during the three interviews. Her substantive answers about the August 24 incident are not inconsistent with the statements obtained from other witnesses. As such, the State has not established Bundy violated DHS employee handbook B-1, subsection 10 or 20.

The parties' main area of contention on the discipline imposed is whether just cause requires the State to follow progressive discipline. At the time Bundy was disciplined, the termination was progressive. IMHI relied on Bundy's five-day suspension with a final warning to conclude termination was appropriate.

However, the five-day suspension has subsequently been expunged from Bundy's disciplinary record. She now has only a 2016 one-day suspension as the most serious discipline on this disciplinary track. However, the State still contends skipping progression and imposing termination, the most severe penalty, is warranted due to the seriousness of the violations, as well as IMHI's prior coaching of Bundy regarding rounding and being inattentive to her duties. The State further argues IMHI skipped progression when disciplining other employees for similar violations, and thus is treating Bundy as it has treated other similarly situated employees.

Upon review of the totality of the record presented by this appeal, I disagree with the State's assertion that Bundy's conduct on August 24 and disciplinary history renders progressive discipline inapplicable. 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. 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)). Progressive discipline may be inapplicable when the conduct underlying the discipline was a serious offense. *See id.* at App. 1, 13, 16-18.

The State has not shown that Bundy's conduct was so egregious that progressive discipline is inapplicable in this situation. Under the record presented, it is undisputed that Bundy had been coached in September 2016 about being attentive to her duties, being prompt to her assigned rounds and being present on the patient unit when assigned rounds. She was also informed during her performance evaluation that she needs to be alert while on rounds and be continually moving. The performance evaluation was for the period that includes the September 2016 coaching. The notices were essentially regarding the same conduct and neither was disciplinary in nature. Following the coaching and evaluation, Bundy abided by the rounding policy without incident for almost a year. Thus, Bundy has shown that she can and did improve her performance regarding rounding. While the August 24 incident violated the rounding policy, the State has not shown that Bundy's conduct cannot be corrected by imposing discipline that will remind her and reinforce that a violation of the rounding policy is serious while giving her an opportunity to improve.

The discipline of other employees further demonstrates Bundy's discipline is not in line with how other employees have been treated. The circumstances underlying the other disciplines are more serious and extensive than Bundy's established violation on August 24. In one of the similar disciplines presented (September 2017), the RTW conducted the round without the rounds board and was also not on the patient unit when assigned because he went into the office to mark on the rounds board. This is a more serious violation of the rounding policy than Bundy's. IMHI skipped a written reprimand and imposed a one-day

suspension, but the employee was still given an opportunity to improve because he kept his job. Furthermore, the February 2018 discipline of an RTW that left his unit unattended for 30 minutes when assigned rounds is far more egregious than Bundy's established violation. However, the employee was still allowed to keep his job and given an opportunity to improve. Yet, the State asserts Bundy's inattentiveness for a minute or two on August 24 warrants termination, the most severe penalty, because she had been coached a year earlier to be attentive to her work duties and alert when rounding. The position is untenable and not supported by the record presented.

Upon review of the evidence received, the State has established Bundy used her cell phone while she was supposed to be on rounds and she failed to be present on the patient unit immediately after being given the rounds board. The State has not, however, provided sufficient proof or evidence that Bundy was insubordinate, that she misled or gave false information during the investigation, or that she otherwise failed to assist the investigation. For the established violations and based on the totality of the circumstances presented, progressive discipline is applicable.

Having considered the entirety of the record and the arguments raised by the parties, I conclude Bundy's violations of the policies and procedures on rounding and the use of electronic devices warrants discipline. However, termination of employment in this instance is disproportionate to the rule violations shown. The seriousness of her violations does not justify skipping from a one-day suspension to termination. Under the circumstances presented and

the established violation, just cause requires utilizing progressive discipline and imposing a three-day suspension, the next step of discipline based on Bundy's disciplinary record.

Consequently, I propose the following:

ORDER

The State of Iowa, Department of Human Services, shall reinstate Shannon Bundy to her former position as a Licensed Practical Nurse at the Independence Mental Health Institute (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings and any other deductions associated with a three-day suspension; restore her benefit accounts to reflect accumulations she would have received but for the discharge and less any adjustments for the three-day suspension; make appropriate adjustments to her personnel records and take all other actions necessary to restore her to the position she would have been in had she instead been issued a three-day suspension on September 19, 2017.

The cost of reporting and of the agency-requested transcript in the amount of \$625 are assessed against the State of Iowa, Department of Human Services, pursuant to Iowa Code subsection 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the State of Iowa in accordance with PERB subrule 621—11.9(3).

This proposed decision and order will become PERB's final agency action on the merits of Bundy's appeal pursuant to PERB subrule 621—11.7(2) 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 motion.

The ALJ retains jurisdiction of this matter in order to address any remedy-related matters which might arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, a hearing to receive evidence and arguments on the precise terms of the remedy, should the parties fail to reach agreement, will be scheduled and held within 45 days of the date this proposed decision becomes PERB's final action on the merits of Bundy's appeal.

DATED at Des Moines, Iowa this 4th day of September, 2020.

/s/ Jasmina Sarajlija
Administrative Law Judge

Electronically filed.
Parties served via eFlex.