

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AAMIR MUNIR,)	
Appellant,)	
)	
and)	CASE NOS. 102162,
)	102184, 102222
STATE OF IOWA (OFFICE OF THE)	
CHIEF INFORMATION OFFICER),)	
Appellee.)	

DECISION ON REVIEW

This case is before the Public Employment Relations Board (PERB or Board) on Appellant Aamir Munir’s petition and Appellee State of Iowa’s cross petition for review of a proposed decision and order issued by an administrative law judge (ALJ) following an evidentiary hearing on Aamir Munir’s consolidated Iowa Code section 8A.415 State employee disciplinary action appeals. Munir challenges the State’s issuance of a one-day suspension; a three-day suspension; and the State’s termination of his employment in the respective cases. Munir alleges just cause did not support the State’s disciplinary actions.

In her proposed decision, the ALJ concluded just cause supported the issuance of a written reprimand rather than the one-day suspension; just cause supported the issuance of a written reprimand rather than the three-day suspension; and just cause supported the State’s termination of Munir’s employment.

Prior to oral arguments on the two petitions, both parties filed briefs outlining their respective arguments. Attorney Anthea Galbraith for the State and attorney Mike Carroll for Munir telephonically presented oral arguments to the Board on January 6, 2021.

Pursuant to Iowa Code section 17A.15(3), on appeal from an ALJ's proposed decision, we possess all powers that we would have possessed had we elected, pursuant to PERB rule 621–2.1(20), to preside at the evidentiary hearing in the place of the ALJ. Pursuant to PERB rules 621–11.8(8A,20) and 621–9.5(17A,20), on this petition for review we have utilized the record as submitted to the ALJ.

Based upon our review of this record, as well as the parties' briefs and oral arguments, we adopt the ALJ's findings of fact. We also adopt the ALJ's conclusions in part with additional discussion as grounds for the basis of our decision.

We concur with many of the ALJ's underlying determinations regarding the one and three-day suspensions. However, we conclude just cause supported the State's imposition of those suspensions as well as the termination of Munir's employment

FINDINGS OF FACT

The record supports the ALJ's findings of fact, as set forth in her proposed decision and order attached as "Appendix A." The parties do not dispute these findings of fact. We adopt the ALJ's factual findings as our own.

CONCLUSIONS OF LAW

We have carefully considered the parties' arguments in our review of the ALJ's conclusions. The ALJ correctly examined the totality of circumstances to reach her conclusions. We agree with many of the ALJ's underlying determinations as set out in the Appendix A and adopt them as our own, with the following additional discussions and modification of the disciplinary actions supported by just cause:

Case No. 102162/one-day suspension.

We agree with the ALJ's determination that "it is clear that Munir did not complete documentation for 15-20 applications per week using the required template, which violated both oral and written directives." In determining the appropriate level of discipline, the ALJ also correctly considered Munir's long-term employment and performance that more often than not met expectations. However, we give greater weight to other relevant circumstances concerning the conduct and which support the imposition of a one-day suspension.

As we have previously indicated, just cause determination requires an analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action. *Gleiser & State (Dep't of Transp.)*, 2009-MA-01 (Board) at 8; *Hunsaker & State (Dep't of Emp't Servs.)*, 1990-MA-13 (Board) at 40. In the present case, relevant circumstances include how the expectation of documentation for 15-20 applications was made

and actions that occurred leading up to Munir's failure to meet the directives.

It was actually Munir who proposed completing documentation for 15 to 20 applications per week. When Lenerz confirmed this expectation in writing to Munir on October 25, Lenerz also noted that Munir should use the template for the documentations. Munir did not follow-up with a proposed alternative. On November 22, this expectation of 15 to 20 applications was used as a criteria again for Munir's performance plan. In setting this expectation, management specifically asked Munir whether the criteria was appropriate and Munir failed to propose an alternative.

Before the directive was put into place and throughout the period leading up to the one-day suspension, the State provided extensive resources to assist Munir in successfully performing his duties. In October, the team lead, Justin Carlson, provided guidance to Munir in weekly meetings that evolved into daily meetings. After Kinney became the division administrator in later November, he and Lenerz met with Munir monthly to review the performance plan criterion. Kinney, Lenerz, and Carlson met with Munir weekly and sometimes daily to go over assignments and provide feedback. When determining the level of appropriate discipline, as far as Kinney was concerned, "I can speak from November 27th going forward and my experiences with him were nothing that would even remotely meet expectations."

Munir's involvement in setting the expected applications and the State's extensive efforts in assisting Munir to meet the expectation are "relevant circumstances concerning the conduct which precipitated the disciplinary action." Although we have given due consideration to Munir's prior employment record, it is outweighed by his failure to meet performance expectations that he identified for himself and was given ongoing resources to successfully meet. Munir's years of service with the state also demonstrate he is more than capable of meeting the reasonable expectations placed on him by management.

For these reasons, we conclude the State established just cause supported its imposition of a one-day suspension for Munir's failure to complete documentation for 15-20 applications contrary to oral and written directives.

Case No. 102184/three-day suspension.

We agree with the ALJ's determination that the State established sufficient proof that Munir negligently handled confidential or sensitive information in violation of OCIO's handbook, number 19.1. "It is uncontested that Munir included confidential or sensitive information in a screenshot." Nonetheless, we view the reasons for disciplinary action outlined by the ALJ as serious and egregious enough to warrant the imposition of a three-day suspension.

As the ALJ stated, it is clear Munir's actions were negligent and preventable. Munir did not accept responsibility and minimized the error.

The OCIO employee handbook treats violations of the confidentiality section as a serious offense. For all the reasons outlined in the proposed decision, the State established just cause supported its imposition of a three-day suspension for Munir's actions in violation of the OCIO employee handbook.

Case No. 102222/termination.

We concur with the ALJ that the State established just cause supported its termination of Munir's employment. The ALJ correctly concluded that there is sufficient proof of four of the five original allegations that: (1) Munir intentionally sent emails containing protected health information (PHI) of a deceased veteran from his work email to his personal email account; (2) Munir violated the directive in his individual performance plan that required him to notify his supervisor of unscheduled absences from his desk; (3) Munir violated the November 27, 2017, work directive by not being at his desk when required; and (4) Munir violated the January 19, 2018, directive and did not consistently focus on assigned tasks and work when at his desk.

The last three allegations relate to Munir's productivity or lack thereof and directives resulting from his prior performance failures. On April 24, the one day Kinney monitored Munir's activity, Kinney noted Munir focused on work-related tasks for approximately 90 minutes. The ALJ correctly examined the evidence of record and noted examples of Munir's non-billable time included in the remote access printout.

Additionally, as the ALJ determined, Munir talked in the lobby for one hour that same day and never made a notation on his calendar or in any way notified his supervisor of his time away from his desk. We agree there is sufficient proof that Munir violated directives as alleged by failing to notify his supervisor of his time away from his desk; by not being at his desk when required; and by failing to consistently focusing on assigned tasks and work.

Turning to the first allegation, we also agree with the ALJ's conclusion that there is sufficient proof Munir violated the OCIO employee handbook numbers 19.1, 19.3 and 19.4 by sending a screenshot of the deceased veteran's PHI to Munir's own personal email account. The provisions provide:

Employees are prohibited from the unauthorized use, disclosure, retention, or negligent handling of confidential or sensitive information.

Employees may only use, disclose, retain, or otherwise handle confidential or sensitive information as necessary to do so to complete their assigned duties.

Employees must diligently comply with the physical, electronic, and administrative safeguards implemented by OCIO to prevent unauthorized access to, disclosure of, or handling of confidential or sensitive information.

The ALJ further concluded Munir's actions not only violated these policies, but "created a HIPAA violation which resulted in a security incident."

Munir argues that he did not commit a Health Insurance Portability and Accountability Act (HIPAA) violation because Munir transferred the information within the same Google domain. Munir explains that had his

personal email account been a non-Google domain, such as Hotmail or AOL, his actions would have been a HIPAA violation. *Assuming arguendo* Munir did not commit a HIPAA violation, we view Munir's actions as egregious regardless. The ALJ noted Munir's work assignments did not require him to have access or view the documentation. He had no reason to possess the document nor did he inadvertently discover it. Rather, Munir actively searched out a document, which contained sensitive information so that he could use it to assert disparate treatment. By his actions, Munir once again violated OCIO policies pertaining to the use and handling of confidential and sensitive information.

We concur with the ALJ's analysis of the totality of circumstances given sufficient proof that Munir's actions violated policies and directives as alleged in four accounts. For all these reasons, the State established just cause supported its termination of Munir's employment.

Accordingly, we enter the following:

ORDER

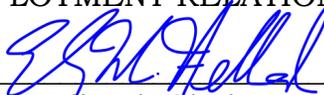
For Case Nos. 102162, 102184, and 102222, Aamir Munir's Iowa Code section 8A.415(2) State disciplinary action appeals are DISMISSED.

The cost of reporting and of the agency-requested transcript in the amount of \$2866.25 are assessed against Aamir Munir pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. Bills of costs will be issued to Aamir Munir in accordance with PERB subrule 11.9(3).

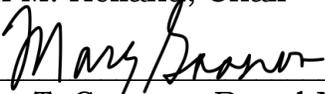
This decision constitutes final agency action.

DATED at Des Moines, Iowa, this 27th day of September, 2021.

PUBLIC EMPLOYMENT RELATIONS BOARD



Erik M. Helland, Chair



Mary T. Gannon, Board Member

Original filed EDMS.

FINDINGS OF FACT

Aamir Munir was an Information Technology Specialist (ITS5) with the Office of the Chief Information Officer (OCIO). He began state employment in 2007 as an ITS4 with the Iowa Department of Revenue (IDR). On November 23, 2012, IDR promoted Munir to an ITS5. At IDR, Munir worked with sensitive personal data and received training regarding the management of that kind of information. Munir took his responsibilities for protecting private, sensitive data seriously. He saw IDR employees terminated for mishandling sensitive information or looking up personal information on their computers.

In 2014, his position was moved to Information Technology Enterprise (ITE), and in late June, 2016, Munir's position became part of OCIO where he was assigned to the Application Development work unit in the Application Development Division of OCIO.¹ Sometime in September or October, management assigned him to work on Iowa Veterans Home (IVH) projects as a lead. His primary duties were to troubleshoot IVH's existing applications that were not working properly, as well as coordinate the assignment of help desk tickets in the work queue to the IVH support team for resolution.

Between 2016 and the summer of 2017, Munir applied for various promotional opportunities, but was not awarded any of these positions. He believed there were substantial irregularities as to how positions were awarded.

¹ The Application Development Division is made up of three work units (teams): the application development team, the mainframe application team, and the database administration team.

In April, 2017, Michelle Lenerz was appointed as Application Development Manager for OCIO, a position for which Munir had applied. As Manager, she was Munir's direct supervisor.

During Munir's tenure with the State, including his tenure at OCIO, he has primarily received "meet expectations" ratings on his annual performance evaluations. Lenerz evaluated Munir's work performance for the review period of June 26, 2016 to June 26, 2017. On June 29, 2017, Lenerz met with Munir to review his performance evaluation. Overall, Munir met expectations and Lenerz commented that:

Aamir's drive and dedication is evident. He has jumped into supporting the Veterans' Home (IVH) and understanding the inner-workings of one of our larger customer portfolios. Aamir's ability to grasp the details of existing applications in the absence of any documentation has been crucial to our support of IVH. He takes his leadership assignment seriously and works diligently to ensure our business partners receive quality service and support.²

Prior to July 2017, Munir plus two contract employees were dedicated to supporting IVH. In July, 2017, Lenerz decided to decrease the number of staff supporting IVH to one staff member, Munir. Munir disagreed with this decision and voiced his concerns regarding the reduction of the IVH Application Development team separately to both Lenerz and Kirsten Bosch, the Application Development Division Administrator, who was Lenerz's supervisor. He believed that reducing the size of the IVH Application Development team would negatively impact the ability to get work done.

² Appellant's Exhibit 1 at 136.

On July 17, 2017, in an IVH 10-month review meeting with Lenerz, Bosch and Jeff Franklin, the Chief Information Security Officer, Munir once again raised his concerns as Franklin was meeting with the IVH commandant and OCIO leadership regarding this plan. At the end of the July 17 meeting Lenerz met with Munir, and informed him that he should not go directly to OCIO leadership with his concerns. Munir memorialized his version of the Lenerz meeting in a July 18 email sent to both Lenerz and his personal email account. According to Munir:

I heard you saying that “what ever happened in the morning meeting, it should not happen again. Do you understand? You will not go directly to OCIO leadership (Jeff Franklin). You are no longer IVH Team Lead. You will not go to IVH for any EPS design presentation.” You were uncontrollable....³

At the end of the email, Munir commented:

I just want to have a productive work environment. At work, it’s normal to have disagreements and conflicts. Avoiding conflicts does not serve anything but chaos and breeds resentment. I chose to confront this disagreement and openly talk to you. I understand your concern but you should understand my concerns as well and listen to the team members and stakeholders involved. If you had communicated to me before the morning meeting and taken me into your confidence, we could have both avoided this embarrassing situation. A good conversation will help both of us to develop a better trustworthy relationship with each other. Once we are able to build that relationship, believe me we will see amazing results.

Please let me know when you are ready to talk.⁴

There is no evidence in the record that a conversation resulted after this email correspondence. Munir was counseled on July 26 to cease conversations with

³ Appellant’s Exhibit 3 at 217.

⁴ Appellant’s Exhibit 3 at 217.

others about resourcing concerns, and that these concerns should be brought to Lenerz.

Both IVH and upper OCIO management agreed with the plan to decrease the number of staff supporting IVH. On August 4, 2017, OCIO laid off the two contract employees leaving Munir as the sole employee responsible for supporting IVH, with Tim Daniels as a backup resource along with a scrum manager.

During August, the number of user requests for IT support (tickets) in the work queue began to pile up. Under OCIO protocol, when a ticket is received, it is logged into the system along with notations which include the steps taken to resolve the issue as well as customer contacts. The ticket system is OCIO's means to communicate with the customers as well as OCIO team members and management.

During the week of August 21, 2017, Munir had a conversation with Karen Connell, IVH Operations Manager regarding his concerns about staffing issues at IVH. There is a disagreement as to the content of the conversation. The State contends that Munir voiced concerns about OCIO's decision to decrease the number of employees supporting IVH. Munir contends that Connell contacted him on another matter, but when she inquired as to why the help tickets were "piling up," he told her that he was the only one working on the issues, he had requested one more developer, and he was trying to approach his supervisors to provide more resources. Regardless of the substantive nature of the conversation, Connell contacted someone at OCIO who notified Lenerz

that she needed to speak with Munir concerning the inappropriateness of that conversation.

On August 27, 2017, Lenerz and Jeri Rietz, Interim Application Development Division Administrator, issued a work directive to Munir.⁵ The directive set forth eleven work directives which were effective until further notice. This work directive provided in relevant part:

It is critical that you follow the instructions provided to you on acknowledging, documenting, and working tickets. It is critical that you also are consistently at your desk to perform these functions. Completing these job functions accurately and in a timely manner is imperative as it relates to your job performance.

....

- You are to be at your desk except when on break or participating in regularly scheduled IVH Support meetings.
- You are expected to collaborate with your team and all project members.
- It is expected that you follow all directions from your supervisor and lead workers on all processes and procedures.

It is our expectation that you should come to us if you have any questions or require clarification regarding anything in this work directive. Any additional directives may be given both verbal and in writing from me or your lead workers and should carry the same weight as the above directive and memo from me and shall be followed. This letter is not a disciplinary action; however, a copy will be placed in your personnel file. Failure to comply with any of these directives may result in disciplinary action, up to and including discharge. These directives shall remain in effect until rescinded in writing.⁶

Lenerz can only remember one instance when Munir informed her that he would be away from his desk.

On August 30, Munir acknowledged that he received the work directive

⁵ Reitz had replaced Bosch and was interim administrator.

⁶ 1 State's Exhibit 5 at 1-2.

and noted he would get back to either Lenerz or Rietz. Munir did not follow-up with Lenerz or Rietz about this matter.

On September 5, Munir emailed Lenerz and Rietz expressing his concerns about the number of IVH Application Development issues/tickets piling up. He requested that OCIO add one more resource to its IVH application development team so that issues be handled timely. Management did not grant this request. At some point in time, all levels of OCIO management, including Chief Information Officer Robert von Wolffradt told Munir the decision had been made, IVH had agreed, additional personnel were not going to be added, and he needed to accept the decision.

On September 14, 2017, the State issued Munir a written reprimand as a result of his violation of previous verbal and written directions which instructed him to cease conversations about his resourcing concerns. The written reprimand noted that he had previously been counseled twice (July 17 and July 26, 2017), and that his conversation during the week of August 21 with Connell “was inappropriate and in direct violation of previous direction.”⁷ Munir did not challenge this reprimand through the State’s grievance procedures specified in Iowa Code section 8A.415(1).

On October 4, 2017, Munir filed a civil rights complaint with the Iowa Civil Rights Commission (ICRC). OCIO received notice of the filing on October 5. This complaint was subsequently administratively closed.

⁷ 1 State’s Exhibit 3.

Case No. 102162: One-day Suspension:

Sometime after the State issued Munir the written reprimand on September 14, OCIO removed Munir from direct customer contact. His primary assignment was to provide documentation for IVH software supported by OCIO. Documentation describes what the software does, contains general support history and provides technical information used by technicians to identify root causes of a problem so it can be solved quickly. According to Lenerz, the reason OCIO assigned Munir to this project was that he had the most in-depth institutional knowledge about the software. This is a task that an ITS5 could accomplish.

OCIO held meetings, followed up by written communications, with Munir to discuss what documentation should include as well as its purpose. Additionally, OCIO management told Munir that if he needed anything or had questions, he could speak with Lenerz or a team lead.

Sometime in October, Justin Carlson, ITS5 and team lead, was assigned to assist Munir with the ticket queue and to provide guidance with regards to documentation. Carlson provided feedback in weekly in-person meetings and electronic feedback. At some point, the weekly meetings progressed into daily meetings. Before Munir, Carlson had never provided this type of feedback to an ITS5.

During the week of October 22, 2017, Munir met with Lenerz and Franklin to reaffirm the IVH documentation assignment. Munir proposed completing documentation for 15 to 20 applications per week. On October 25, Lenerz sent

an email to Munir confirming his agreement that he would provide complete documentation for 15-20 applications a week, noting that Munir should use the template created by Carlson and that if he had any questions, he should let her know. Munir did not follow-up with Lenerz regarding this communication.

On November 2, Lenerz notified Munir about her intention to have a mid-year performance evaluation for the period of June 26, 2017 through November 21, 2017. On November 15, Munir sent von Wolfradt an email expressing his concern about the evaluation as Lenerz had never discussed a shortened review period and requesting advice on “how to proceed with this discriminatory behavior.” He further requested that if he needed to be evaluated, it be by a different supervisor. While Munir’s request was denied, von Wolfradt noted that OCIO would assign an additional supervisor to sit in on all disciplinary and performance reviews with the caveat that they were not his supervisor and would not play a role in evaluating his performance.

On November 22, 2017, Lenerz met with Munir to review his work performance for the shortened review period. With respect to the first goal of providing application support to IVH, Lenerz found that Munir did not meet expectations. Deficiencies included that he had been resistant to the change OCIO had made to support IVH, and based upon Lenerz’s observations and feedback from multiple supervisors and team members, he was frequently away from his desk. With respect to the deficiencies referenced above, Lenerz noted:

While our organizational approach to supporting IVH changed mid-way this period, Aamir has been vocally resistant to this change despite being told by multiple members of the OCIO management team, in addition to his supervisor, that this

management decision has been made. I had hoped that Aamir would, in time, jump onboard with these changes and think creatively about ways to improve service delivery; however, he has been resistant to accept this change and despite invitations to contribute, has struggled with this change.

....

I have observed and received feedback from multiple supervisors and team members that Aamir is frequently away from his desk. I expect that, with the exception of breaks and scheduled meetings, Aamir is at his desk performing work.⁸

Overall, Lenerz found that Munir did not meet expectations. Munir signed the evaluation on November 22, 2017, and noted he believed the evaluation was due to the Civil Rights grievance that he had previously filed. Munir did not grieve this evaluation.

Based upon this evaluation, OCIO instituted a three-month individual performance plan for the review period November 21, 2017 through February 21, 2018. Added to the previously established action step to “[p]repare and maintain accurate technical documentation of systems” was the performance criterion that Munir complete 15-20 application maintenance guides weekly. OCIO management asked Munir whether this criterion was appropriate. Because he did not propose a revised criterion, this was the performance criterion contained in the performance plan which was to be used to evaluate his performance. Further, under a new goal of “[m]anages own time, priorities, and resources to achieve goals,” and the corresponding action step of “[a]ttentive to job duties and is actively engaged in daily work,” the criterion of “[w]ith the

⁸ 1 State’s Exhibit 10 at 3.

exception of scheduled breaks and meetings, send email to supervisor when not at desk” was established.⁹

On November 27, 2017, Stephen Kinney became the Application Development Division Administrator replacing Rietz, the interim administrator. In the first two meetings between Kinney and Munir, Munir focused on his concern that OCIO needed to hire more resources to support IVH. After reviewing the situation with others, Kinney informed Munir that the decision had been made, but that the work queue would be monitored so that if the work queue starts to get out of hand, and does not improve as expected, then the issue could be readdressed. According to Kinney, Munir was not satisfied with the explanation.

Kinney and Lenerz met monthly with Munir to review the performance plan criterion. Kinney, Lenerz, and Carlson met weekly and sometimes daily with Munir to go over assignments and provide feedback. Additionally, Lenerz provided electronic feedback. In December, OCIO verbally decreased their expectation of completed documentations to 5. At no time was the criterion of completed documentations contained in the performance plan modified. On January 8, 2018, Lenerz noted the amount of feedback required was not sustainable and thus would provide weekly feedback.

Because Lenerz and Kinney did not see any change in the quantity or quality of Munir’s work, the State commenced an investigation. The investigation consisted of interviews with Carlson on January 11, 2018, and

⁹ 1 State’s Exhibit 10 at 9 and 10.

Munir on January 12. Additionally, various documents were reviewed, including Munir's individual performance plan, the emails that had been sent to provide direction, and Munir's documentation. Kinney and Lenerz determined the level of discipline. In making their determination, Munir's prior performance and tenure were not considered. Instead, Kinney looked at Munir's performance for the past seven weeks. As far as Kinney was concerned, "I can speak from November 27th going forward and my experiences with him were nothing that would even remotely meet expectations."¹⁰

Based upon their investigation, and in consultation with DAS Human Resources Enterprise (HRE) and OCIO management, OCIO management determined significant deficiencies existed in both the quality and quantity of Munir's work. In determining the level of discipline, Munir's past disciplinary history, coaching and counseling sessions, work directive and written reprimand, were taken into consideration. OCIO management also considered the fact that Munir had not made progress in completing documentation for IVH applications even though he had received additional coaching and counseling and additional resources had been made available to him.

As a result, the State issued Munir a one-day paper suspension on January 19, 2018, because his "conduct violated previous verbal and written direction" that he "complete documentation for 15-20 applications each week using the template provided."¹¹

¹⁰ Transcript at 211-2.

¹¹ 1 State's Exhibit 2.

Additionally, OCIO issued a second work directive which provided in part that Munir was “[w]ith the exceptions of breaks, regularly scheduled staff meetings and meetings with your supervisor, you are to have no idle (non-billable) time.”¹²

Munir appealed the one-day paper suspension on January 25, 2018, and DAS issued the third-step response on February 24, 2018, denying Munir’s grievance. Munir timely appealed the third-step response to PERB on March 26, 2018.

Case No. 102184: Three-day suspension:

After the issuance of the one-day paper suspension, Lenerz, Kinney and Carlson continued to meet with Munir in both one-on-one meetings and group meetings to discuss documentation. Additionally, Lenerz continued to provide electronic feedback.

In preparing documentation, Munir handled sensitive and confidential information. OCIO’s employee handbook contained a provision concerning confidential information. This provision provides in relevant part:

19. Confidential Information. OCIO Employees may have access to confidential or sensitive information processed, stored, transmitted or managed by or on OCIO systems. Confidential information includes all information protected by state or federal law including but not limited to Personal Health Information (“**PHI**”), Personally Identifiable Information (“**PII**”), (Federal Tax Information (“**FTI**”), Criminal Justice Information (“**CJI**”), Trade Secrets, or information identified in Iowa Code section 22.7. Sensitive information includes but is not limited to information not protected by law, but the disclosure of which could result in negative impact to OCIO or other governmental entities. In order

¹² 1 State’s Exhibit 5 at 3.

to protect confidential or sensitive information both during and after employment:

- 19.1. Employees are prohibited from the unauthorized use, disclosure, retention, or negligent handling of confidential or sensitive information;
- 19.2. Employees are prohibited from discussing confidential or sensitive information processed, stored, transmitted, or managed by OCIO with anyone not authorized to have the information;
- 19.3. Employees may only use, disclose, retain, or otherwise handle confidential or sensitive information as is necessary to do so to complete their assigned duties;
- 19.4. Employees must diligently comply with the physical, electronic, and administrative safeguards implemented by OCIO to prevent unauthorized access to, disclosure of, or handling of confidential or sensitive information;

....

A violation of this section or a separately executed non-disclosure/confidentiality agreement shall be treated as a serious offense and may result in discharge.¹³

Munir received annual training on handling sensitive information and received the OCIO handbook as evidenced by his signature on the acknowledgement receipt.

On January 31, 2018, when creating the documentation for the IVH Facesheet application, Munir placed a screenshot in the application which contained personal identifiable information (PII) (*i.e.* name, home address, birthdate, place of birth, father's name, mother's maiden name, social security number "SSN", and Medicare number) in a folder on the Google drive. Those

¹³ 2 State's Exhibit 13 at 7-8.

having access to this document included OCIO staff responsible for supporting IVH applications, Yarborough, an OCIO contractor, and potentially IVH employees.

At 6:53 a.m. on February 1, Lenerz notified Munir that the IVH Facesheet contained a screenshot of SSNs and “we should never have SSNs in our documentation.” Less than 30 minutes later, Munir responded that he had removed the screenshot from the document. At 8:53 a.m., Kinney responded by saying:

Just because of the sensitive nature of information in that screenshot, lets be overly cautious with the clean up. Please copy the revised content without the screenshot into a fresh new document and then delete the previous document. I’d like to make sure people don’t stumble across that data in the revision history.¹⁴

Approximately 30 minutes later, Munir responded to Kinney and Lenerz that he had followed Kinney’s instructions and listed 18 individuals who would have had access to this documentation. Additionally, he noted that “most of these users already have access to IVH resources mentioned in the document.”

No one believes that Munir intentionally placed the screenshot containing PII in the documentation. However, management did believe Munir placed the screenshot in the document due to his lack of attention to detail. He had been told repeatedly that snapshots needed to be specific and should not include the whole page. It is OCIO’s position that if he had cropped the screenshot as directed, the mistake would not have occurred. OCIO considered the lack of attention to detail as part of Munir’s ongoing performance issues,

¹⁴ Appellant’s Exhibit 11 at 2.

and believed the issuance of the one-day suspension had failed to correct Munir's performance issues as the quantity and quality of Munir's work continued to be a concern.

After speaking to HR, Lenerz and Kinney launched an investigation. The purpose of the investigation was to determine (1) whether Munir understood the purpose of the documents and why a complete screenshot was inappropriate, (2) if he understood how to handle sensitive information, (3) if he was properly trained, and (4) if he had any questions he had not asked.

Kinney and Lenerz conducted two short interviews with Tim Daniels, an OCIO contractor and Carlson on February 23, 2018. The purpose of those interviews was to determine whether employees understood the intent of documentation, and whether employees received training and understood how to handle sensitive documents. After these two interviews were completed, OCIO also interviewed Munir on February 23. During his investigatory interview Munir acknowledged that he had received training and understood how to handle sensitive information. He explained that it was an accident and that he "was focused on the rules that you set for me this week and last week." After this conversation, there was an extended conversation about the documentation issue.

According to Kinney, based upon their investigation and in consultation with DAS HRE and OCIO management, it was determined that Munir mishandled confidential information, he continued to show a pattern of inattentiveness to his work, and despite ongoing coaching and counseling

Munir's behavior was not changing. In determining the level of discipline, OCIO considered Munir's past disciplinary history, that despite ongoing coaching and counseling there was not a change in behavior, and that there was a pattern of inattentiveness which was exemplified when he included the PII into the screenshot, an event which Kinney deemed to be "pretty egregious." On March 8, 2018, the state issued Munir a three-day paper suspension. The letter stated in part:

This letter is to advise you that the investigation into the Iowa Veterans Home application documentation and handling of sensitive information has concluded. The investigation concluded that your conduct violated previous verbal and written direction that stated:

- Employees are prohibited from the unauthorized use, disclosure, retention, or negligent handling of confidential or sensitive information;
- Employees are prohibited from discussing confidential or sensitive information processed, stored, transmitted, or managed by OCIO with anyone not authorized to have the information;
- Employees may only use, disclose, retain, or otherwise handle confidential or sensitive information as is necessary to do so to complete their assigned duties;
- Employees must diligently comply with the physical, electronic, and administrative safeguards implemented by OCIO to prevent unauthorized access to, disclosure of, or handling of confidential or sensitive information;¹⁵

The four bullet points listed in the disciplinary letter are contained in OCIO's employee handbook, numbers 19.1 through 19.4, which relate to protecting

¹⁵ 2 State's Exhibit 2, at 1.

confidential or sensitive information.

Munir appealed the three-day paper suspension on March 15, 2018, and DAS issued the third step response on April 13, 2018, denying Munir's grievance. Munir timely appealed the third step response to PERB on May 14, 2018.

Throughout the grievance process, Munir did not accept responsibility, but instead deflected his responsibility by noting that it occurred due to the "pressure to do the job and satisfy my supervisor's expectations."¹⁶ Further at hearing, he testified that it was because he was too "detailed-oriented."

Case No. 102222: Termination:

After the issuance of the three-day paper suspension, OCIO continued to meet with Munir in both one-on-one meetings and group meetings. Additionally, Lenerz continued to provide electronic feedback. In the group meetings, Lenerz, Carlson and Kinney would list what they liked, what needed to be changed and why. Additionally, expectations and reasons for the expectations were discussed. Munir did not view these meetings as helpful. Instead, he was frustrated, depressed and believed that he was being "pushed too hard."

Munir used three computers; an IDR desktop, IDR laptop, and an OCIO laptop. In late April 2018, Kinney requested from Dan Powers, head of Information Security, remote access to Munir's OCIO laptop, which was the computer set up for IVH documentation. This request was approved. Remote

¹⁶ 2 State's Exhibit 1 at 1.

access allowed Kinney to see when Munir was logged onto the OCIO laptop, and what was being worked upon. April 24 was the first day Kinney had remote access, and he began monitoring Munir's OCIO laptop at 8:15 a.m. As Kinney monitored Munir's computer, he noted times, Munir's activity, and he made comments.¹⁷ Comments included:

9:10-9:20 = Aamir was reading the news (Toronto domestic terrorist story)
9:20-9:44 = Aamir was looking at his MSDN subscription but no work being done. Just reading. Then read an email.
9:44 = Logged out. I noticed Aamir was talking on the phone in the lobby of B level.
10:35 and he still hasn't logged back in. 11:05 and not logged back in.
11:09-11:26 = Aamir logged back in. Searched for 'How to send contact info on iPhone', thats [sic] it.
11:26 = He closed his search and checked email. Didn't do anything, just opened the tab.
11:31 = Tried to IM (name) but (name) was offline. Still no work being done.
11:33 = Steve left desk to heat lunch.
11:37 = Steve returned to desk. Aamir was updating IVH Maintenance Inventory and Time Tracker.
11:41 = searched for a flight on Qatar airways
11:47 = Printed a flight from Islamabad to ORD on Friday, 4/27 for (name). He then went and cleared his browser history.
11:50 = started working on IVH Maint Inventory and Time Tracker again.
11:52 = He started flipping around in documents, ones that (name) updated 11 days ago. I think he is looking for more HIPAA examples on a sharepoint folder he doesn't need access to.¹⁸

In the afternoon, Kinney noted that Munir was composing congratulatory emails which he did not send, and checked calendars. At 2:56 p.m. Kinney noted "[s]pending time documenting the 'HIPAA violation' he feels he found. He

¹⁷ Although Kinney's notes had specific names, I have redacted the names.

¹⁸ 3 State's Exhibit 11 at 15.

bcc's a 'contact.'"¹⁹ In order to determine who was the "bcc," Kinney requested access to Munir's emails. It was determined that the "bcc" was Munir's personal email account. At the end of the day, Kinney noted that Munir focused on work-related tasks for approximately 90 minutes, and spent four hours away from his desk.

On April 26, Kinney reviewed all emails Munir had sent from his work email to his personal email account. Included was the above-referenced April 16 email sent at 7:52 a.m. with the subject line "HIPAA violation?" This email was sent from Munir's state email account to Rietz, Kinney, and Lenerz, and bcc'd to his personal email account. It stated:

Jeri,

As Michelle and Steve are not available at this time. So just forwarding you this to take appropriate action.

Thanks²⁰

Attached to the email were two snapshots of IVH documentation for Laserfiche and Web Access. These snapshots were of a deceased veteran's personal health information (PHI) and included the veteran's name, order date and a list of prescriptions administered to him as an IVH patient. The documentation was in a secure Google drive folder and accessible only to certain OCIO and IVH employees. Although Munir had access to this folder, he did not have any work assignments which necessitated his accessing that folder or any reason to view the document containing the PHI. Upon seeing this email, Kinney met with Matt

¹⁹ 3 State's Exhibit 11 at 16.

²⁰ 3 State's Exhibit 11 at 16.

Behrens, Deputy Chief Information Officer, and showed him the email. Behrens then contacted von Wolfradt and Franklin, who consulted with Luke Dawson, an Assistant Attorney General.

Also on April 26, OCIO commenced a formal investigation. Munir was placed on administrative leave and informed that he was being suspended with pay pending the completion of an investigation regarding allegations of misconduct. Since he had access to sensitive or confidential information as part of his job duties, he was required to promptly return all state property and destroy any confidential or sensitive information that was in his possession or in a third parties' possession. When leaving OCIO, Munir handed Kinney copies of documents which he had emailed to himself. There is discrepancy as to where the documents were stored. Kinney testified that they were in an unsecured location on Munir's desk whereas Munir testified that he kept them in a locked drawer and that he unlocked the drawer and handed them to Kinney.

Additionally, OCIO scanned Munir's computers and phone. Although the document attached to the email titled "HIPAA violation?" contained PHI, it did not become a HIPAA violation until Munir emailed these screenshots to his personal email account. This was the only document containing HIPAA information that was "stored or transferred from his machines or accounts" to his personal email account.

On May 9, Munir signed two attestations; that he returned all state-owned equipment and that he had permanently destroyed any confidential or sensitive

information that he had transmitted or stored on his personal devices or non-State-affiliated systems.

Also on May 9, OCIO notified IVH that Munir had emailed some PHI to a personal email account and requested that IVH complete a risk analysis to determine if a breach had occurred. A breach “is defined as an acquisition, access, use or disclosure of protected health information in a manner that’s not permitted under subpart E, the privacy rule of HIPAA, which compromises the security or privacy of protected health information.”²¹ Amanda Ruff, a Compliance Officer 2 for IVH conducted the assessment to determine if a breach occurred. The Breach Assessment was completed on May 24, 2018. Ruff concluded that a HIPAA violation occurred, but it was not a breach because Munir had the authority to view the information. Ruff also concluded that Munir’s action constituted a security incident because he did not have the authority to send it to his personal email. Due to the security incident, IVH was required to create a remediation plan to correct the deficiencies. The plan included the request that Munir “not work with IVH’s sensitive data if he should remain employed with OCIO, as doing so could jeopardize IVH’s HIPAA compliance.” Additionally, it requested “confirmation that he will not be working with IVH’s sensitive data.”²²

Michael Chesmore, OCIO Manager for Cloud Based Operations conducted OCIO’s formal investigation into the matter. The investigation concerned five

²¹ Transcript at 513.

²² 3 State’s Exhibit 11 at 13.

allegations: (1) Munir intentionally sent emails containing PHI of an IVH resident from his work email account to his personal email account, (2) Munir stored printed copies of screenshots containing HIPAA protected information in an unsecure manner, (3) Munir violated the directive in his individual performance plan that required him to notify his supervisor of unscheduled absences from his desk, (4) Munir violated the November 27, 2017²³ work directive by not being at his desk when required, and (5) Munir violated the January 19, 2018 directive and did not consistently focus on assigned tasks and work when he was at his desk.

Three employees were interviewed. The State interviewed Munir on May 18, and the State interviewed two employees who sat near Munir, Carlson and Chandra Kumar, on May 23. Chesmore interviewed Munir with Rietz attending. The interview centered around the five allegations listed above. Munir stated that he notified his supervisor when he was away from his desk by keeping his calendar up to date. When asked about Kinney's observation that Munir had only spent 90 minutes doing "work related activities," Chesmore was told that he worked on multiple systems, but most of his work was done on his desktop. Most of the investigatory interview centered around handling sensitive information. Munir admitted that he had printed documents which contained sensitive information, but that these documents were in a locked drawer when not in use. He mentioned that when another employee had uploaded sensitive information to the Google drive, that employee had not been disciplined, but

²³ This work directive was dated August 27, 2017, not November 27, 2017.

that he, Munir, had been disciplined after putting sensitive information on the Google drive. Finally, when asked about forwarding an email containing HIPAA information to his personal email address he admitted that he had done so and had been previously disciplined for that. Munir asserted that since his first disciplinary action he had only sent emails that did not contain sensitive information. Munir explained he sent the emails for grievances and appeals. Chesmore did not interview Kinney. Instead Kinney prepared a statement of observations in which he rebutted Munir's response to Chesmore's questions.

Additionally, Chesmore was provided several documents: (1) showing that Munir had completed various security trainings, (2) Munir's signed acknowledgment of receipt of OCIO's employee handbook, (3) Ruff's Breach Risk Assessment, (4) the remote view monitoring Munir's work activity, (5) Kinney's email timeline summarizing actions taken by OCIO to identify whether other emails of this nature had been sent to Munir's personal email account, (6) the redacted emails subject to the investigation, (7) a screenshot of Munir's April 24 calendar, (8) a summary of findings from OCIO's device examination, (9) Munir's past disciplinary history, which included the work directives, the written reprimand, the suspensions, and (10) the individual performance plan.

On May 31, 2018, Chesmore presented his investigation summary to OCIO leadership, which included his findings, the rationale for each finding, and the documents used in the investigation. In addition, Chesmore included summaries of the investigatory interviews. Based upon his investigation, Chesmore concluded that all five allegations were founded. Behrens, von

Wolffradt and Dawson discussed the findings, and von Wolffradt made the decision to terminate Munir.

On June 6, 2018, Kinney conducted a *Loudermill* meeting in which the State terminated Munir's employment. The June 6 letter noted the State was taking this disciplinary action as a result of its investigation. It noted the five investigatory findings, that Munir's actions violated 19.1, 19.3, and 19.4 of the OCIO employee handbook which pertained to disclosure and handling of confidential or sensitive information, and stated that as a result of previous disciplinary actions termination of Munir's employment was warranted.

Munir appealed the termination on June 12, 2018, and DAS issued the third step response on July 12, 2018, denying Munir's grievance. Munir timely appealed the third step response to PERB on August 9, 2018.

CONCLUSIONS OF LAW

Munir alleges the State lacked just cause to support the one-day and three-day paper suspensions as well as the termination of his employment. The appeals were filed pursuant to Iowa Code section 8A.415(2)(b) which provides in relevant part:

2. Discipline Resolution

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 rule 11—60.2 sets forth the specific 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.

In discipline cases, the State bears the burden of establishing that just cause supports the discipline imposed. *Stein and State of Iowa (Iowa Workforce Dev.)*, 2020 PERB 102304 at 16; *Cole and State of Iowa (Dep’t of Human Serv.)*, 2020 PERB 102113, App. A at 19; *Phillips and State of Iowa (Dep’t of Human Res.)*, 12-MA-05, App. A at 11. The term “just cause” as used in section 8A.415(2)(b) and DAS rule 11-60.2 is not defined. *Cole*, 2020 PERB 102113, App. A at 19; *Wilkerson-Moore and State of Iowa (Dep’t of Human Serv.-Fiscal Mgmt. Div.)*, 2018 PERB 100788, App. A at 13.

PERB has long held that just cause determinations “require an analysis of all of the relevant circumstances concerning the conduct which precipitated the disciplinary action and not a mechanical, inflexible application of fixed ‘elements’ which may or may not have any real applicability to the case under consideration.” *Palmer and State of Iowa (Dep’t of Corr.)*, 2019 ALJ 102115 at

14; *Hunsaker and State of Iowa (Dep't of Emp't Serv.)*, 90-MA-13 at 40. Instead, the Board looks to the totality of the circumstances, which may include:

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.

PERB also considers how other similarly situated employees have been treated as a relevant factor when determining whether just cause exists. *Stein*, 2020 PERB 102304 at 16; *Phillips*, 12-MA-05, App. A at 12. All employees who engage in the same type of conduct must be treated the same unless a reasonable basis exists for a difference in the discipline imposed. *Stein*, 2020 PERB 102304 at 16.

Munir argues that the disciplines that have been issued: the work directive, written reprimand, one-day and three-day paper suspensions as well as the termination were in retaliation for filing the civil rights complaint as well as his conversations with Connell regarding his concerns about OCIO's staffing changes and shortage of employees/contractors assigned to IVH. Munir views his conversations with Connell as protected pursuant to Iowa Code section 70A.28.

Although merit system employees or employees covered by a collective bargaining agreement are not entitled to pursue a 70A.28 action with PERB,

evidence of an improper or retaliatory motive is relevant to just cause determinations under section 8A.415(2) and DAS rule 11.60(2). *Nimry & State of Iowa (Dep't of Corr.)*, 2011 PERB 08-MA-09 & 08-MA-18 at 7. As a result, the retaliation claim will be considered as part of the totality of circumstances relevant to the just cause determination for the one-day and three-day suspensions as well as Munir's termination. However, whether the August 27, 2017, written directive, the September 14, 2017, written reprimand or the out of sequence evaluation issued within weeks of the ICRC complaint were retaliatory in nature is not for my determination. Munir did not appeal these actions and as a result, they cannot be revived now for my determination as to whether the State's actions were retaliatory. *Kirchner & State of Iowa (Dep't of Human Servs. – Independence Mental Health Institute)*, 2019 ALJ 102196 at 20; *Alleman & State of Iowa (Dep't of Revenue & Finance)*, 97-MA-07 at 13.

Case No. 102162: One-Day Suspension:

Although there was extensive testimony concerning deficiencies as noted in both the August 27, 2017, work directive and the June 26, 2017 through November 21, 2017, shortened performance evaluation, this testimony is not part of my consideration as these deficiencies were not listed in the January 19, 2019, disciplinary letter.

PERB has consistently held that the disciplinary letter must contain the reasons for the disciplinary action and that just cause must be determined upon the reasons stated in this document. *Phillips*, 12-MA-05, App. A at 12; *Barnard & State of Iowa (Dep't of Human Serv.)*, 2017 ALJ 100758 at 16; *Rode & State of*

Iowa (Dep't of Corr.), 2015 ALJ 100041 at 11; *Eaves & State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14. The reason given for the one-day suspension was that Munir failed to complete documentations for 15-20 applications per week using the template provided in accordance with verbal and written directives. Therefore, the existence of just cause for Munir's one-day suspension must be based upon that reason alone.

In situations involving alleged deficiencies in job performance, PERB has considered most relevant such factors as whether the employee was aware of the duties and responsibilities expected of him, whether there is sufficient evidence establishing deficiencies in the performance of these duties and responsibilities, and whether the employee was aware of these deficiencies and given a reasonable opportunity to correct them. *Carruthers & State of Iowa (Dep't of Corr.)*, 97-MA-19 at 2.

It is clear that Munir was aware of the duties and responsibilities expected of him, and given a reasonable time to correct the deficiencies. In a meeting between Lenerz and Munir, Munir proposed the goal of completing documentation for 15-20 applications per week. This goal was agreed upon by both parties. Lenerz, in an October 25, 2017, email, confirmed the agreement with the caveat that he would use the required template. Further, the November 21, 2017 through February 21, 2018, performance plan listed this goal as the performance criterion.

Munir argues that he agreed to this goal when the documentations were between one and two pages. However, the required template made

documentation more complicated and thus the goal of 15-20 applications was no longer realistic. If in fact this was the case, Munir should have told Lenerz that the goal was not attainable due to the use of the template. Further, Lenerz provided him the opportunity to revise the criterion when they met November 21, approximately three weeks later, for the individual performance plan meeting. But since Munir did not provide an alternative, this was the criterion upon which Munir was evaluated.

Munir argues that OCIO has overstated his lack of compliance as well as the assistance offered to him. Although Munir asserts that he was seeking help from people who were not willing to help him, I do not find this was the case. After the criterion was established and during the ensuing weeks, Carlson, Lenerz and Kinney met frequently with Munir to review the documentation. In addition, Lenerz provided electronic feedback. Thus it is clear that OCIO was attempting to provide the assistance needed so that Munir could meet the established criterion of completed documentations for 15-20 applications per week.

Munir further asserts that he was essentially meeting the criterion, but that management was finding minor differences in order to show noncompliance. Assuming *arguendo*, that Munir's documentation may have been adequate to assist a technician in troubleshooting problems, and further that some deficiencies in the documentation were cosmetic in nature (*i.e.* changing the color of a box), the documentation was not in accordance with the required template, which was the criterion by which OCIO determined the

number of completed documentations. Since his work did not conform to the required template, it is clear that Munir did not meet the criterion of completed documentation for 15-20 applications per week as required in his individual performance plan.

Munir argues the timing of the one-day paper suspension is highly suggestive of retaliation. It is clear that Munir disagreed with Lernerz and OCIO management about ITE staffing for IVH and that OCIO knew about the ICRC complaint, as well as the conversation between Munir and Connell. However, this by itself this does not establish that OCIO retaliated against Munir. Munir's primary job duty was to provide documentation for IVH applications, and OCIO had a legitimate expectation this documentation would be completed using the required template in a timely manner. When this did not occur, OCIO implemented an individual performance plan with the criterion that Munir would provide complete documentation for 15-20 applications per week. When given the opportunity to propose an alternative criterion for this plan, Munir did not do so. Further, there is no evidence to suggest that requiring Munir to use this template was retaliatory in nature since all OCIO employees completing documentation for applications used the template. Consequently, I cannot find the State's decision to impose a one-day paper suspension was in reprisal for Munir speaking to Connell or the filing of the civil rights complaint. I further conclude there is sufficient evidence to establish that Munir failed to follow previous verbal and written directions that required him to complete

documentation for 15-20 applications each week using the template, provided and thus discipline was warranted.

Having concluded that the State had just cause to discipline Munir for violating the directive which required him to complete documentations for 15-20 applications weekly, the State has the burden to prove that the level of discipline issued was appropriate.

Thus, the question before me is whether the one-day paper suspension was appropriate discipline considering the totality of the circumstances. Such inquiry involves examining the applicability of progressive discipline.

PERB has consistently held that when a rule violation occurs which requires some form of discipline, the discipline should be progressive and proportional to the violation. *Wilkerson-Moore*, 18 PERB 100788, App. A at 20; *Phillips*, 12-MA-05, App. A at 16. Progressive discipline addresses an employee's behavior over time through escalating penalties. *Wilkerson-Moore*, 18 PERB 100788, App. A at 20; *Phillips*, 12-MA-05, App. A at 16. The purpose of progressive discipline is to correct the unacceptable behavior while affording the employee the opportunity to improve. *Wilkerson-Moore*, 18 PERB 100788, App. A at 20; *Phillips*, 12-MA-05, App. A at 16.

Progressive discipline is generally used for less serious work rule violations and improper conduct. *Stockbridge and State of Iowa (Dep't of Corr.)*, 2006-ALJ-06 at 16. Even so, PERB has long recognized instances when the employer is justified in skipping some of the steps in the disciplinary process. *Stein*, 2020 PERB 102304 at 16; *Cole*, 20 PERB 102113, App. A at 27. However,

based upon the totality of the record, the State has not established that Munir committed the type of misconduct that warrants skipping steps in the disciplinary process.

In determining the appropriate type of discipline in situations involving alleged deficiencies in job performance, PERB has previously examined whether the discipline imposed was proportionate to the problem, whether any mitigating circumstances existed, and whether the employee's record has been given due consideration. *Carruthers*, 97-MA-19 at 5.

At the time of the one-day suspension, Munir had worked for the State since 2007, and OCIO since 2014. During this time period, he usually met expectations. In Munir's June 26, 2016 to June 26, 2017, evaluation, Munir once again met expectations and received positive comments from Lenerz regarding his support of IVH. However, based upon Kinney's testimony, in determining the level of discipline prior performance and Munir's years of service were not considered. Instead, Munir's performance during the last seven weeks weighed heavily in determining the level of discipline. During that time period, Munir had not completed documentation using the required template for a single application.

Although Munir had previously received a written reprimand, this reprimand was not related to Munir's performance with regards to documentation. The purpose of discipline is to put the employee on notice that more severe punishment may be imposed if the offense is repeated. Therefore, in order for the written reprimand to serve as a prelude to more severe discipline,

there must be a nexus between the employee's past misconduct and the conduct at issue. Otherwise, the employee is precluded from correcting their behavior before receiving heightened discipline. Norman Brand, *Discipline and Discharge in Arbitration*, at 2-90 (BNA Books, 2015); *Wise & State of Iowa (Dep't of Human Serv.)*, 2016 PERB 100005, App. A at 25-26.

Munir's prior conduct for which he received a written reprimand is unrelated to Munir's conduct at issue in this case. The written reprimand imposed on September 14, 2017, was due to Munir's violation of OCIO's directive to cease conversations about concerns regarding staffing issues at IVH. In the instant case, Munir was disciplined for failure to complete documentations for 15-20 applications using the required template. Since Munir's current conduct is unrelated to the conduct for which he received the previous discipline, the written reprimand would not have put Munir on notice regarding the requirement to provide complete documentation. As a result, I conclude OCIO did not comply with the tenets of progressive discipline and the one-day paper suspension was not proportionate to the offense.

While Munir's conduct does not constitute just cause for a one-day paper suspension, it is clear that Munir did not complete documentation for 15-20 applications per week using the required template, which violated both oral and written directives. As a result, discipline is warranted. In determining the appropriate level of discipline, I have taken into consideration that Munir was a long-term employee whose performance, more often than not, met expectations. Based upon the criterion established in the individual performance plan,

Munir's performance was clearly not acceptable. Consistent with the tenets of progressive discipline to correct Munir's unacceptable behavior while affording him the opportunity to improve, I conclude just cause existed for the issuance of a written reprimand, the first step in OCIO's progressive system of discipline.

Case No. 102184: Three-Day Suspension:

The reason for Munir's three-day paper suspension as cited in the notice of discipline was that he violated previous verbal and written directives regarding the handling of sensitive information. Those directives as stated in OCIO's employee handbook numbers 19.1 through 19.4 state:

- Employees are prohibited from the unauthorized use, disclosure, retention, or negligent handling of confidential or sensitive information;
- Employees are prohibited from discussing confidential or sensitive information processed, stored, transmitted, or managed by OCIO with anyone not authorized to have the information;
- Employees may only use, disclose, retain, or otherwise handle confidential or sensitive information as is necessary to do so to complete their assigned duties;
- Employees must diligently comply with the physical, electronic, and administrative safeguards implemented by OCIO to prevent unauthorized access to, disclosure of, or handling of confidential or sensitive information;²⁴

OCIO was concerned about Munir's poor job performance and lack of attention to detail and asserts the mishandling of sensitive information is indicative of Munir's poor job performance. Although Munir's inclusion of

²⁴ Exhibit 2, at 1. See Exhibit 13, at 7. The first bullet point is 19.1, the second bullet point is 19.2, the third bullet point is 19.3 and the fourth bullet point is 19.4.

sensitive information into the screenshot may be indicative of Munir's poor performance, this is not part of my consideration. Pursuant to PERB case law discussed above, the letter only referred to Munir's failure to follow 19.1 through 19.4 of OCIO's employee handbook which pertained to the handling of confidential and sensitive information. As a result, the existence of just cause for the three-day suspension must be based upon this ground alone and my determination is based only upon the inclusion of sensitive information in the IVH Facesheet documentation.

Although the disciplinary notice listed four bullet points, there is no evidence that Munir discussed the sensitive information with any non-authorized person (bullet point number 2). Nor was there evidence that unauthorized individuals accessed, or handled sensitive information, or that it was disclosed to any unauthorized individuals (bullet point number 4). Finally, because Munir's assignment was the development of documentation for the IVH Facesheet, it was necessary for Munir to handle the sensitive information. I do not find that OCIO's direction not to use a snapshot of a complete browser page instead of the cropped relevant portion of the page sufficient evidence that Munir misused the sensitive information in the completion of his assigned duties (bullet point number 3). As a result, I do not find the State has proven Munir violated the last three bullet points, 19.2 through 19.4 of the OCIO's employee handbook.

I do, however, find that Munir violated the first bullet point, or 19.1 of the employee handbook, which prohibits negligent handling of confidential or

sensitive information. It is uncontested that Munir included confidential or sensitive information in a screenshot. Although it was done accidentally, the PII information is clearly contained in the document. If Munir would have reviewed the document before putting it on the Google drive, he would have discovered his mistake. In not doing so and posting the document on the Google drive, Munir was negligent in the handling of sensitive information. As a result, the State has provided sufficient proof that he violated a previous work directive which is 19.1 of the employee handbook.

Munir again argues the timing of the suspension is circumspect, and he believes the State imposed discipline in retaliation. As noted above, mere timing is insufficient to prove retaliation. Munir does not refute that he included sensitive information, but that it was a mistake that sensitive information was disclosed, and thus discipline is not warranted. I find the State established that discipline was warranted.

Having found that OCIO had just cause to discipline Munir for negligently handling sensitive information, the next question is whether the three-day paper suspension was appropriate discipline considering the totality of the circumstances.

The State determined that a three-day paper suspension was appropriate because Munir had previously received a written warning and a one-day paper suspension, both prior previous steps in OCIO's disciplinary process, and thus the three-day paper suspension was the next step in the sequence.

However, as previously discussed above, in order for the State to proceed through the disciplinary steps, there must be a nexus between an employee's past misconduct and a subsequent offense. This was the first time that Munir had ever been disciplined for negligently handling sensitive information. This instant discipline is not similar to the disciplines previously imposed. The September 14, 2017, written reprimand pertained to Munir's violation of OCIO's directive to cease conversations about staffing concerns at IVH, and the January 19, 2018, one-day paper suspension concerned Munir's failure to complete 15-20 documentations weekly using the required template. Further, a three-day suspension is too severe a penalty for Munir's negligent behavior.

The record reveals that OCIO clearly believed that Munir's work product was not improving in either quantity or quality. In determining the level of discipline, OCIO placed undue emphasis on the fact that Munir's performance was not improving, as illustrated by his lack of attention to detail and failure to follow the previous directives and instructions he had received. By taking into consideration these deficiencies not discussed in the disciplinary letter, I conclude the three-day paper suspension was not proportional to the offense.

However, it is clear that Munir's actions were negligent and preventable. He made a mistake when he included the sensitive information in the screenshot which was placed on the Google drive. Although under other circumstances, this type of conduct may not have resulted in discipline, in this case discipline is warranted. Munir did not accept responsibility, but instead deflected his responsibility by noting that it occurred due to the pressure he felt

to do his job and satisfy expectations. Further, at hearing, he testified that it was because he was too “detailed-oriented.” Additionally, Munir minimized the error by noting the screenshot was on a Google drive whose access was controlled by his supervisor, and minimized the error by noting that the document was only seen by IVH technicians. Since the OCIO employee handbook treats violations of the confidentiality section as a serious offense, and due to his failure to acknowledge and accept some responsibility for his actions, discipline must be imposed. Consistent with the tenets of progressive discipline, I conclude just cause existed for the issuance of a written reprimand.

PERB Case No. 102222: Termination:

Munir alleges the State failed to establish just cause for his termination because the conduct on which OCIO based the decision constituted protected activity, that he was treated differently than another employee who was not disciplined for putting confidential or sensitive information on OCIO’s Google drive, and that the timing of the termination was highly suggestive of retaliation.

Munir argues that he sent the screenshot containing the deceased veteran’s protected health information (PHI) for the purpose of preparing his grievances and appeals and thus was engaged in protected activity. However, I am not persuaded by Munir’s argument. In the instant case, the screenshots in question were located in a secure Google drive folder. Although he had access to this folder, his work assignments did not require him to have access or view this documentation. Munir had no reason to possess this document nor did he inadvertently discover it. Instead, it appears that Munir actively searched out

a document which contained sensitive information so that he could use it to assert disparate treatment. Further, when Munir sent this document to his personal email account, not only did he violate OCIO's policies regarding dissemination of confidential or sensitive information, but also created a HIPAA violation which resulted in a security incident. Based upon these circumstances, I cannot conclude that Munir's conduct was protected.

Munir argues the timing of the discipline is highly suggestive of retaliation. However, as previously discussed, timing alone is insufficient to prove retaliation. Of the five reasons contained in Munir's termination letter, the State has established four: (1) that Munir sent an email which contained PHI, (2) that Munir violated the August 27, 2017, work directive; (3) that Munir violated the November 21, 2017, individual performance plan, and (4) that Munir violated the January 19, 2018, work directive. The State did not establish that Munir stored printed copies containing protected HIPAA information in an unsecure manner.

The State's first established reason for Munir's discharge is that he sent an email containing PHI to his personal email account. It is uncontested that on April 16, 2018, Munir sent an email from his work email account to his personal email account which contained private health information of a deceased resident of IVH. As a result, there is sufficient proof to establish that Munir violated the OCIO employee handbook numbers 19.1, 19.3 and 19.4 which pertain to the unauthorized use of confidential and sensitive information.

The second and third established reasons are that Munir violated the August 27, 2017, work directive, which required Munir to be at his desk at all times except on breaks and scheduled IVH support meetings, and that he violated the November 21, 2017, individual performance plan which required Munir to notify his supervisor of unscheduled absences from desk. Since both relate to Munir being at his desk, I will consider them jointly.

According to Kinney's log, on April 24, Munir talked on the phone for approximately one hour in the lobby of level B. Although Munir noted he records his time away from his desk, there is no notation made on his calendar for that time period. Further, Lenerz testified that since the work directive was issued, Munir has only notified her once that he would be away from his desk. Since these examples reflect times when Munir was not at his desk and there is no evidence of Munir notifying his supervisor of the unscheduled absences as required, I find there is sufficient proof to establish that Munir has violated both the work directive as well as his individual performance plan.

The fourth established reason given for Munir's termination was that Munir violated the January 19, 2018, work directive which required Munir to have no idle, non-billable time other than breaks or scheduled meetings.

Although the directive primarily concerned IVH documentation, the requirement of no idle, non-billable time was contained in this directive. The remote access printout included such non-billable time as browsing the internet (*i.e.* reading the news (10 minutes), flights (9 minutes), and how to send contact information to an iPhone (15 minutes). Additionally, the printout also included

other non-billable activities (*i.e.* flipping around in non-IVH job related documents, composing congratulatory emails and checking calendars). Since the above-listed activities are not billable time, I find that there is sufficient proof to support OCIO's claim that Munir violated the January 19, 2018, work directive which required Munir to not have any idle, or non-billable time.

The State has failed to establish that Munir stored printed copies of screenshots containing HIPAA protected information in an unsecure manner. I cannot find the State conducted a thorough investigation that yielded sufficient proof that Munir did not secure protected HIPAA information. Rather, the record reveals Munir's explanation was that he printed the document, put it in his drawer and locked it, and then unlocked the drawer and handed the documents to Kinney. Kinney refuted Munir's explanation and noted the three pages were sitting on top of a pile of papers in a corner of Munir's desk to the right of his monitors. They were not locked up and were in plain sight.

Based upon Kinney's testimony, the investigator found that Munir's explanation did not match Kinney's observations or recollections and determined the allegation was founded. In order to reach this conclusion, it appears that because the explanations did not match, the benefit of the doubt was resolved in favor of OCIO. However, the State must provide sufficient evidence or proof of the employee's guilt. There was no other testimony in the record regarding this allegation, nor did the investigator follow up with Munir in an attempt to resolve the inconsistencies. Without additional evidence or follow up, there is insufficient proof to support OCIO's claim that Munir stored

printed copies of screenshots containing protected HIPAA information in an unsecured manner.

The State argues Munir's conduct was so egregious that just cause existed for termination. As previously discussed, PERB has long recognized there are instances where the State is justified in skipping some steps in the disciplinary process. Although the violations of Munir's individual performance plan and two work directives were not the type of serious violations which would warrant skipping steps in OCIO's disciplinary process, the sending of the email from his work email to his personal email which contained private health information warrants discharge.

PERB has long recognized that treatment accorded similarly situated employees may be relevant in determining the level of discipline. *Kuhn & State of Iowa (Comm'n of Veterans Affairs)*, 04-MA-04 at 48. Just cause requires the employer to treat similarly situated employees in the same manner. *Smith & State of Iowa (Dep't of Human Serv.)*, 2019 ALJ 102220 at 14.

Munir argues that he was not treated the same as another employee who included sensitive information in a document because that employee was not disciplined. However, Munir has not demonstrated the State treated him differently than other similarly situated employees. In the other instance, IVH had a SharePoint site which needed to be upgraded. Because there was not a clear migration path from the old version to the new version, this employee's task was to take the data from the old SharePoint site, copy it and place it on the Google drive so the data could be uploaded to the new SharePoint site at a

later date. Unlike that situation, Munir did not include sensitive information in a document, but emailed the document containing PII from his state email address to his private email address. Thus, I cannot find that Munir and the other employee were similarly situated. Further, because the record does not contain examples of other employees who emailed sensitive information from a work email account to a personal email account, Munir has not established that there was disparate treatment of similarly situated employees.

Munir also contends that termination is not proportionate for his offense. As discussed above, Munir was very knowledgeable with regards to the handling of sensitive data. There is no question that Munir knew this information must be handled with great care and caution. Additionally, this was not the first time that Munir misused confidential and sensitive information. Unlike the first instance in which Munir negligently included sensitive information on the Google drive which was clearly a mistake, the emailing of another person's personal health information to his personal email was not done accidentally or negligently, but intentionally.

Although it is understandable that Munir was becoming increasingly frustrated and depressed, Munir has not acknowledged wrongdoing nor has he accepted responsibility about emailing the documents to his personal email account. In prior cases, PERB has found the failure to acknowledge wrongdoing or accept responsibility are factors that support a finding of just cause for discipline imposed. *Kuhn*, 04-MA-04 at 50. Instead, Munir argues that he printed and emailed the pages containing the personal health information to

himself because he believed that OCIO was committing a security breach by allowing these documents to be located on the Google drive. Whether placing these documents on a Google drive constitutes a security breach is not material, as emailing these documents to his personal email account is a HIPAA violation, which in this case resulted in a security incident. This type of behavior cannot be condoned. Further, his steadfast defense of all aspects of his behavior can be viewed as supporting OCIO's argument that a lesser progressive discipline would not correct his demonstrated poor judgment and that his discharge was appropriate.

After consideration of the entirety of the record and the arguments raised by the parties, I conclude there is sufficient evidence to support the termination of Munir's employment from OCIO. Although violations of the work directives and individual performance plan are not the types of violations which would be grounds for discharge, the sending of an email containing private health information created a situation in which OCIO no longer had trust or confidence in Munir, and justifies the State's discharge of his employment. *Salier & State of Iowa (Dep't of Corr.)*, 95-MA-05, at 17-18. Coupled with this serious violation is Munir's failure to acknowledge and recognize that his behavior was not appropriate, which justifies skipping steps in the disciplinary process. A lesser penalty allowing for his continued employment would not be warranted. Accordingly, I conclude the State had just cause for Munir's termination.

I consequently propose the following:

ORDER:

CASE NUMBER 102162 (one-day suspension): the State shall rescind and remove the original and all copies of the one-day paper suspension issued to Munir on January 19, 2018, and replace it with a written reprimand. Additionally, the State will remove any other documentation of the suspension from all personnel files maintained by the State concerning Munir.

The costs of reporting and of the agency-requested transcript in the amount of \$1617.75 are assessed against the Appellee, State of Iowa (Office of the Chief Information Officer), pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the State in accordance with PERB subrule 11.9(3).

CASE NUMBER 102184 (three-day suspension): the State shall rescind and remove the original and all copies of the three-day suspension issued to Munir on January 19, 2018, and replace it with a written reprimand. Additionally, the State will remove any other documentation of the suspension from all personnel files maintained by the State concerning Munir.

The costs of reporting and of the agency-requested transcript in the amount of \$673.50 are assessed against the Appellee, State of Iowa (Office of the Chief Information Officer), pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the State in accordance with PERB subrule 11.9(3).

CASE NUMBER 102222 (termination): Aamir Munir's merit disciplinary action appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of \$575.00 are assessed against the Appellant, Aamir Munir, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Munir in accordance with PERB subrule 11.9(3).

This proposed decision will become PERB's final agency action on the merits of Munir's appeal pursuant to PERB rule 621—11.7 unless, within 20 days of the date below, a party aggrieved by the proposed decision files an appeal to the Board or the Board determines to review the proposed decision.

DATED at Des Moines, Iowa, this 13th day of July, 2020.

Susan M. Bolte

Susan M. Bolte
Administrative Law Judge

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