

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

BRITTANY CEREN,
Appellant,

and

STATE OF IOWA (IOWA VETERANS HOME),
Appellee.

CASE NO. 102163

PROPOSED DECISION AND ORDER

The Appellant, Brittany Ceren, filed this state merit employee disciplinary action appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 8A.415(2) and PERB rule 621-11.2. Ceren alleges the three-day paper suspension imposed on her by the State of Iowa (Iowa Veterans Home) on January 31, 2018, was not supported by just cause.

Pursuant to notice, a closed evidentiary hearing on the merits of the appeal was held before me on November 15, 2018, in Marshalltown, Iowa. Ceren was represented by Matthew Butler and the State was represented by attorney Alla Mintzer Zaprudsky. Both parties filed post-hearing briefs on January 11, 2019.

FINDINGS OF FACT

The Iowa Veterans Home (IVH) is a facility which provides residential and nursing care to Iowa's veterans and their spouses. Appellant, Brittany Ceren, has been employed at IVH since August 2003 in various capacities; as a resident treatment worker (RTW), licensed practical nurse (LPN), and registered nurse (RN). As an RN, Ceren is bound by IVH policies and work rules as well

as standards set by the Iowa Board of Nursing. One standard nursing practice is that neurological (neuro) checks can be discontinued by an RN under certain circumstances and must be noted in their assessment. Another standard nursing practice is that when a nurse receives a physician's order, the order is repeated back to the physician prior to noting it on the physician order sheet. Generally, it is not an acceptable practice to take the order from anyone other than the physician because doing so could be considered as working out of the scope of one's practice, and a complaint could be filed with the Iowa Board of Nursing.

On January 17, 2018, a resident at IVH was receiving end of life care. As RN Jo Lynch, LPN Patricia Campbell and Dr. Einar Arason were leaving the building, Arason told them it was acceptable to discontinue the resident's vital signs and neuro checks. Campbell, who was on lunch break, and Arason, who had completed his work day, continued out the building. Lynch, who had also completed her work day, walked back into the building and called Ceren, who was on duty. Campbell was aware that Lynch was going to call Ceren regarding the discontinue order.

Lynch told Ceren that Arason had given her a verbal order to discontinue the vital and neuro checks on the resident. There was conflicting testimony as to what transpired and what was actually said. However, it is uncontested that Ceren entered the order to discontinue the vital and neuro checks. The entry stated that the verbal order was given by Arason to Ceren, when in fact the

order was given by Arason to Lynch and Campbell. Ceren believed that by entering the order into the electronic medical record system, she was assisting her peers as well as “doing the right thing” for the resident. Per the order, the vital and neuro checks were discontinued. The resident subsequently passed away.

On January 25, 2018, Ceren spoke to Administrator of Nursing Bobbi Hills over a mobile phone. Hills asked her if she had ever written an order that was not given to her. There is a discrepancy as to Ceren’s response. The State claims that Ceren told Hills that she “did it all the time.” Ceren claims she told Hills, “we help each other out all the time.”

The next day, January 26, a formal investigation commenced. Penny Cutler-Bermudez, Division Administrator of Human Resources, and Nikki Betz, Nursing Services Director and Ceren’s supervisor conducted interviews. According to Cutler-Bermudez, the purpose of the investigation was to determine (1) if Ceren had received the verbal order from Arason and (2) Ceren’s reasoning for why she did not follow the standard of nursing practice when she entered an order not given to her by a physician.

The State interviewed Ceren and Campbell on January 26, 2018, Lynch on January 29, and Keller and Hills on January 30. The State did not formally interview Arason, but Cutler-Bermudez had a conversation with him about this incident. The contents of that conversation are not part of the record before me. However, in a written statement prepared prior to this hearing, Arason

wrote, he believed the “action for which Ceren violated protocol was in the interest of patient’s care and comfort and that any oversight could be attributed to Ceren’s sense of duty to provide the best care to the resident under her charge and to work in a team model, helping her fellow RN.”¹

Prior to her investigatory interview, Ceren was not told this was an investigation that could lead to corrective action. During the interview, Ceren answered one of the main questions posed by the investigation: whether Ceren received a verbal order from Arason. Ceren acknowledged that she entered the order discontinuing the resident’s vital and neuro checks, that the verbal order had not been given to her directly by Arason, but from Lynch who had indicated this was Arason’s order. Ceren also indicated that prior to this incident she had never written an order without speaking directly with the physician.

As to the second question, there are inconsistent statements with respect to Ceren’s reason for taking the action she did. In her interview, Ceren stated the reason she put the order in was that she thought Campbell felt uncomfortable about entering orders into the electronic medical record system, so she just entered it for her. Ceren clarified that statement, saying that “she (Campbell) expressed those feelings to Jo (Lynch) and so Jo called me to

¹ Union’s Exhibit 5 at 2. The State objected to this exhibit arguing that the statements contained in this exhibit were hearsay. I find this statement relevant, and not hearsay, as Dr. Arason testified at hearing and was subject to cross-examination with regards to this statement.

consult with me and told me to talk to Patty (Campbell) about it.”² When asked, Ceren said that she did not know when she talked to Campbell, but that it was before putting in the order. Shortly after Ceren’s interview was completed, the State interviewed Campbell. Unlike Ceren’s interview, Campbell was told that this was an investigation that could lead to corrective action. When asked if she had a conversation with anyone about feeling uncomfortable writing the order, Campbell replied “No.” The State asked Lynch in her interview, “so when talking to Britt (Ceren), was there any conversation about Patty (Campbell) being uncomfortable?” Lynch responded that she did not remember Campbell being uncomfortable.³ Hills, in her interview, stated that Ceren told her she wrote the order because she received it from an RN and that she did that all the time.

Based upon these statements, a committee which included Cutler-Bermudez, Bentz, Hills, and the licensed nursing home administrator met and determined that Ceren violated two Commission of Veteran Affairs work rules and these infractions warranted discipline. Although the committee discussed termination, it was determined that a three-day paper suspension was appropriate. The State based its decision on the discrepancies between Ceren’s statements and the other statements, the severity of the infraction, and past IVH disciplinary practices. Previously, three employees who had worked outside the scope of their practices had been terminated. No details were

² State Exhibit 6 at 3.

³ State Exhibit 8 at 2.

provided with respect to two employees who had been terminated. The State provided minimal detail with regards to the third employee; a long-term RN had written an order for a urinalysis (UA) and had not spoken to the physician. The physician discovered the RN's order and notified the administrator of nursing. The committee took into consideration Ceren's length of service, but not her previous disciplines. The committee believed Ceren "needed to recognize that this practice could never happen again, that a nurse has to be trustworthy and has to be truthful and never work outside the scope of a licensed nurse."⁴

On January 31, 2018, the State issued Ceren a three-day paper suspension for falsifying a physician's order by indicating that Arason told her directly when in fact he had not, and not being truthful during the investigation in violation of the Commission of Veterans Affairs work rules B(6) and B(7). These rules provide:

B. PERFORMANCE OF DUTIES

6. Intentionally falsifying records or giving false information regarding residents or programs is prohibited.
7. You are required to cooperate fully and to be honest in written and oral statements concerning activities that affect the Commission and its operations. You may not withhold information or impede any inquiry, investigation or hearing.

⁴ Transcript at 34.

Ceren appealed the three-day paper suspension and DAS issued the third-step response on March 2, 2018, denying Ceren's grievance. Ceren timely appealed the third-step response to PERB on March 26, 2018.

CONCLUSIONS OF LAW

Ceren filed this appeal 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 4; *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.

Additionally, PERB has also considered 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.

Ceren argues the State lacked just cause for the three-day paper suspension and the penalty imposed was too severe for the offense.

Based upon the record before me, the State has established that Ceren had notice of the rules at issue and that violation of these rules could result in disciplinary action as acknowledged by her signature on the receipt of the Iowa Commission of Veterans Affairs Code of Conduct and Work Rules.

Further, the State adequately communicated the reasons for the discipline through the disciplinary letter. The two rule violations were listed and the letter specified the reasons for the discipline; that Ceren was disciplined due to (1) her falsification of a physician's order on January 17, 2018, and (2) not being truthful during the January 26 investigatory interview.

Based upon the record, however, I cannot conclude the State has established that Ceren violated work rule B(7) by not being truthful during her investigatory interview. Although the disciplinary letter is not clear as to how Ceren was not truthful, Cutler-Bermudez testified that Ceren was not truthful due to the inconsistencies between her statement and the statements of other

employees. These inconsistencies centered around how Ceren determined that Campbell was uncomfortable with entering the physician's order and whether Ceren had told the former director of nursing that she wrote orders from RN's all the time.

In her investigative interview, Ceren admitted that she entered the order to discontinue the vital and neuro checks after receiving a phone call from Lynch, not Arason, and that she notified the RN and LPN of the order. Based upon that statement, the investigative team interviewed most of the employees having knowledge of the incident with the exception of the RN on duty.

I agree with the State that Ceren's statements with respect to how Ceren determined Campbell was uncomfortable were not consistent with the statements of the other employees. Nor was Ceren's statement consistent with the director of nursing's statement. However, I cannot find that the State conducted a thorough investigation that yielded sufficient proof that Ceren was not truthful. Rather, the record reveals the State asked a few questions of the employees, and IVH did not follow up with Ceren in an attempt to resolve the inconsistent statements. Ceren should have been given the opportunity to provide an explanation or clarification with respect to the inconsistent statements. Without this follow up, there is insufficient proof to support IVH's claim that Ceren was untruthful in her investigatory interview. As a result, I cannot conclude that Ceren was not truthful during the investigatory interview in violation of work rule B(7).

I do, however, conclude that the State has established that Ceren violated the Commission of Veterans Affairs work rule B(6) which prohibits intentionally falsifying records. It is clear that Ceren entered the order to discontinue the resident's vital signs and neuro checks into the medical record system for the resident without receiving the order directly from the physician. Even though the testimony reflects she placed the discontinue order because she thought that she was doing the right thing for the patient and her peers, the fact remains that Ceren entered an order that was not given to her by a physician. Misrepresenting on the physician order sheet that Arason communicated the order to her, when he did not, is a falsification of record and a violation of Commission of Veterans Affairs work rule B(6).

Having found that IVH had just cause to discipline Ceren, the next question is whether the three-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. 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 Ceren committed the type of misconduct that warrants skipping steps in IVH's disciplinary process.

It is clear that Ceren's decision to enter a doctor's order without personally receiving the order was poor judgment and warrants discipline. However, at the time of the incident, Ceren had been employed at IVH for approximately 15 years. Given that Ceren's past disciplinary actions played no role in the determination of discipline imposed, I conclude that a less severe form of discipline would have been more appropriate given Ceren's years of experience with IVH.

Further, PERB has long recognized that treatment accorded other similarly situated employees may be relevant in determining the level of discipline. *Kuhn and State of Iowa (Comm'n of Veterans Affairs)*, 04-MA-04 at 48. Both the State and Ceren presented arguments with respect to disparate treatment.

The State argues that Ceren was not treated the same as other employees who worked outside the scope of their employment, and in fact received less discipline than three other employees, all of whom had been terminated from employment. Conversely, Ceren argues that she was not treated the same as others involved in this situation, as the other employees involved (*i.e.*, Lynch or Campbell) were not disciplined.

Although the State claimed three IVH employees were terminated for working outside the scope of practice, evidence of only one of these terminations was provided. In that instance, a long-time RN worked outside the scope of practice by entering a physician's order for a UA that he had not given. In Ceren's case, however, the physician had given the order albeit not directly to Ceren.

Additionally, unlike an order for a UA, which must be ordered by a physician, an RN does not need a physician's order to discontinue neuro checks. Rather, an RN may discontinue these checks while noting the reason for the discontinuance in the note on the patient's record. Further, unlike the physician who alerted IVH of the nurse working outside the scope of her employment by ordering an UA, Arason believed Ceren's actions were in the best interests of the patient and reflected her desire to provide the best care to the resident. In comparing Ceren's actions to those of the RN who was discharged, I do not find that Ceren's conduct is similarly situated to the RN who was terminated.

More importantly, none of the other employees involved in this incident were disciplined. While Ceren entered the order, the order was given by Arason to RN Lynch and LPN Campbell. It was their responsibility to enter the physician's order. Ceren would not have entered the order, but for being informed by Lynch that Arason had directed that such an order could be entered. This fact justifies a lesser penalty since Lynch and Campbell were similarly situated to Ceren and were not disciplined.

Although Ceren appears to be a capable RN who strives to assist her peers and provide the best care possible, and had the dying resident's interest at heart, working outside a nurse's scope of practice is a serious breach of protocol. However, given Ceren's long tenure at IVH, the disparate treatment of the other employees who were involved in this incident, and the failure of the State to prove a violation of work rule B(7), I believe that Ceren's actions do not constitute just cause for a three-day paper suspension. Instead, consistent with the tenets of progressive discipline, I conclude just cause existed for the issuance of a written reprimand.

I consequently propose the following:

ORDER:

The State shall rescind and remove the original and all copies of the three-day paper suspension issued to Ceren on January 31, 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 Ceren.

The costs of reporting and of the agency-requested transcript in the amount of \$577.75 are assessed against the Appellee, State of Iowa (Iowa Veterans Home), 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).

This proposed decision will become PERB's final agency action on the merits of Ceren'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 27th day of April, 2020.



Susan M. Bolte
Administrative Law Judge

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