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STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

RENEE L. OHL, Appellant, and STATE OF IOWA (DEPARTMENT OF HUMAN SERVICES), Appellee.	)	CASE NO. 102232

PROPOSED DECISION AND ORDER

Appellant Renee L. Ohl filed a State 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. Ohl asserts that there was not just cause to support the Iowa Department of Human Services' termination of her employment on July 3, 2018, for her alleged violation of attendance work rules and policy. The hearing was closed to the public pursuant to Iowa Code section 8A.415(2)(*b*) and PERB rule 621—11.6.

Pursuant to notice, an evidentiary hearing on the merit appeal was rescheduled then held before the undersigned administrative law judge on August 6, 2019. Attorney Alla Mintzer Zaprudsky represented the State and AFSCME representative Robin White represented Ohl. The parties filed post-hearing briefs on September 12, 2019.

Based upon the entirety of the record, and having reviewed and considered the parties' briefs, I conclude the State established just cause existed to support its termination of Renee L. Ohl's employment.

I. FINDINGS OF FACT.

On April 9, 2007, Ohl began employment as a residential treatment worker (RTW) for the State, Department of Human Services (DHS). Ohl worked at the State's Independence Mental Health Institute (IMHI), which provides in-patient psychiatric services for adults, adolescents, and children. Many of the patients are ones who could not be treated at other institutions and transferred to IMHI. The patients suffer from chronic mental illness, primarily bipolar disorder or schizophrenia. Some patients require one-on-one care from IMHI staff.

Relevant to the date at issue, Georgeanne Cassidy-Westcott was IMHI's Administrator of Nursing. Sandra Evens was the IMHI nursing supervisor who maintained staffing and ensured staff followed rules, regulations, and policies for the care and safety of the patients. There were several DHS and IMHI attendance policies and rules in effect at the time.

A. Attendance rules and policies.

DHS employee handbook. Ohl received and signed for a copy of the handbook, which provided in relevant part:

> Section D-2. Attendance and Punctuality.
> Each employee is expected to be on the job, on time, each scheduled workday and observe the time limits for meals and breaks. . . . Excessive absenteeism and/or tardiness will not be tolerated. A continuing record of unsatisfactory attendance or lack of punctuality may result in discipline up to and including discharge. . . .

DHS attendance policy. The DHS attendance policy provided in part:

> This Policy is intended to ensure consistent enforcement of attendance regulations at all Iowa Department of Human Services ("DHS" or the "Department") facilities. However, it is noted many of DHS institutions and work units have unique needs and may have different requirements to meet those needs.

The policy contained several relevant definitions related to attendance:

> Occurrence—failure of an employee to be at his or her assigned work location, post or station, on time and ready to work; also includes an early departure from a scheduled shift *without prior management approval. . . .*
> Absence—an occurrence when the employee is not at work for 4 hours or more for a scheduled work shift, or an employee leaves his/her scheduled shift early without prior management approval.
> Tardy—an occurrence when the employee arrives after the start of his/her scheduled shift without prior management approval and is not at work for less than 4 hours.
> Unscheduled occurrence—an employee has an absence or tardy and the time away from work has not been approved by management.
> Excessive Tardy—six (6) or more unscheduled tardies during a 12 month rolling period.

According to the policy, there were two discipline tracks, one for an absence and one for a tardy. Both were tracked on a 12-month rolling period and provided:

> 1st-5th occurrence—tracked
> 6th occurrence—written reprimand
> 7th occurrence—1 day suspension
> 8th occurrence—3 day suspension
> 9th occurrence—5 day suspension with a final warning
> 10th occurrence—termination

(Each of the suspensions were paper suspensions).

The DHS attendance policy required a review committee, consisting of two management representatives and the employee's supervisor, to review the facts and make recommendations for proposed discipline, including a reduction if extenuating circumstances warranted. The policy required a supervisory

investigation to precede the review committee. For calendar year 2018, there was a significant number of employee disciplinary actions for occurrences of an unscheduled absence or a tardy. One such employee received a five-day suspension for a tardy occurrence.

Nursing department scheduling policy.

IMHI nursing department had a scheduling policy for leave procedures and specified that the DHS attendance policy would be followed. For an unscheduled absence, the policy provided that staff must "notify the Nursing Supervisor or their designee of their unavailability for their scheduled work shift as soon as that unavailability is known." Additionally, the policy provided in relevant part:

> 7. Anyone who signs in after the start of their shift, or returns late from a 15 minute or lunch break, will be considered tardy.

IMHI sent out the policy to all staff, resent the policy each time it was revised, and discussed it at staff meetings. Administrator Cassidy-Wescott emailed the revised policy to all staff on July 3, 2017. Ohl received a copy of the nursing department scheduling policy.[1]

B. Prior discipline.

For the year preceding her termination, Ohl was tardy on many occasions and subject to disciplinary actions as a result. Because the disciplinary track was based on a rolling 12-month period, a previous "occurrence" of tardy could drop off the track when computing disciplinary action and result in the same discipline

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1 Through testimony and documents, there is substantial evidence that Ohl received a copy of the nursing scheduling policy. Ohl did not offer evidence, even by her own testimony, to rebut this finding.

for successive tardies, *e.g.*, one-day suspension for a seventh occurrence of tardy on May 1 and a one-day suspension for what also counted as a seventh occurrence of tardy on May 15. The letters of disciplinary action to Ohl were generally issued on a date following the day she was tardy. For instance, Ohl was tardy to work on March 13, but the letter of disciplinary action was not issued until March 19. Presumably, the delay was due in part to the committee's review of her discipline. The letters of disciplinary action also referred to her previous dates of discipline when issued rather than the dates she was tardy.

In reconciling these factors, Ohl had nine occurrences of tardy in the twelve months prior to July 1, 2018.[2] A tardy is referenced as "tardy" or "unscheduled tardy" or "unscheduled absence (tardy)." Ohl had also received discipline for her unscheduled absence that did not constitute a tardy. The letters issuing discipline to Ohl were dated and provided in part:

March 14, 2018-issued written reprimand. Ohl was tardy to work on March 11, 2018, and received a written reprimand for "six occurrences of unscheduled tardy since March 21, 2017." Ohl had been "coached and counseled" on December 22, 2017, and March 5, 2018, regarding Ohl's tardiness after her "fifth occurrence of being late to work each time."

March 19, 2018-issued one-day suspension. Ohl was tardy to work on March 13, 2018, and, as of that date, had "seven occurrences of being tardy for the

2 Relevant is the fact that the letters of disciplinary action stated the occurrence as follows: May 2, 2018 (seven occurrences); May 24, 2018 (eight occurrences); and June 19, 2018 (nine occurrences). There is no evidence that Ohl contested the characterization or count of each tardy occasion.

[previous] twelve months." On March 19, the review committee determined her unscheduled absences (tardy) in the previous twelve months were excessive. Five of the occurrences were greater than an hour and ranged from 1.08 to 3.17 hours. Ohl received a one-day paper suspension.

May 3, 2018-one-day suspension. Ohl was tardy to work on May 1, 2018, and, as of that date, had "seven occurrences of being tardy in the [previous] twelve months." On May 3, the review committee determined her unscheduled absences (tardy) were excessive. She was issued a one-day paper suspension.

May 6, 2018—issued written reprimand. As of March 14, 2018, Ohl had "six occurrences of unscheduled absence since July 17, 2017 totaling 33 scheduled work shifts." It appears the reprimand is not related to unscheduled absence (tardy) and the discipline was issued late due to Ohl's leave of absence.

May 15, 2018-issued one-day suspension. Ohl was tardy for work on May 15, 2018. As of that date, she had "seven occurrences of being tardy in the [previous] twelve months." In four occurrences, she was late over one hour. On May 15, the review committee determined her unscheduled absences (tardy) were excessive and she was issued a one-day paper suspension.

May 24, 2018-issued three-day suspension. Ohl was tardy for work on May 19, 2018. This constituted the eighth tardy occurrence "with six of them in the [previous] three months." In four of the occurrences, Ohl was late to work by greater than one hour. The hours ranged from .57 to 3.17 hours and the "significant impact to work operations" was noted. On May 24, the review committee determined her unscheduled absences (tardy) were excessive.

June 19, 2018-issued five-day suspension. Ohl was tardy for work by 2.43 hours on June 17, 2018, which constituted her ninth occurrence of tardy in the previous twelve months. It was noted that seven had occurred in the previous four months; five were greater than one hour; and hours ranged from .57 to 3.17 hours and had a "significant impact on work operations." On June 19, the review committee determined her unscheduled absences (tardy) were excessive.

Each of the above-referenced written notices of disciplinary actions provided Ohl's actions were in violation of:

1. The Employees Responsibilities and Work Rules, Section D-2, Attendance and Punctuality: "Each employee is expected to be on the job, on time, each scheduled workday and observe the time limits for meals and breaks."
2. The Iowa Department of Human Services Attendance Policy.

C. Ohl's evaluation and other discipline.

For Ohl's evaluation period March 8, 2016, to October 24, 2017, she received a "meets expectations" for all, but two areas. Management commented Ohl was quick to respond to emergency situations and could be counted on to assist as needed or directed. Management indicated Ohl did not meet expectations on work efficiency and her timeliness to work was noted as an issue. Ohl did not meet expectations on standards of excellence due to her frustrations and interactions with patients.

Due to Ohl's use of profanity, management took the following actions for each occasion: on May 31, 2017, Ohl was issued work directives; on March 1, 2018, she received a written reprimand; and on May 3, 2018, she was suspended for one day and received work directives.

D. July 1, 2018.

On July 1, 2018, there were six staff scheduled for Ohl's assigned patient ward. Each IMHI ward had a daily assignment sheet, which listed the on-duty RN and each assigned staff and their assigned time of rounds, precautions, lunch, and other activities. The assignment sheet allowed nursing supervisor Evens to ensure there was adequate staffing; staff were able to get their breaks; rounds and one-on-ones were completed; and patients received appropriate care. When staff were not at their scheduled assignment, it affected other staff employees' breaks and patient activities.

On that day, Ohl was scheduled for rounds at 9:00-10:00 and 13:00-14:00; one-on-one precautions at 7:00-8:00 and 11:00-12:00; and lunch at 10:30. Early in the day, Evens received complaints from other staff that Ohl had arrived late. Around 10:25, Evens searched for Ohl to complete an investigatory interview with her regarding a previous attendance issue. RN Autumn Terhune reported that Ohl had left for lunch. Just minutes prior, at 10:20, Terhune had learned from other staff that Ohl had left. Ohl had not received permission to leave early.[3]

When Evens called back at 11:00, Ohl had not returned. At 11:10, as RN Terhune went to cover Ohl's one-on-one precautions assignment and relieve another RTW for a scheduled break, Terhune saw Ohl returning. Ohl reported to her precautions assignment at 11:18.[4]

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3 Although there was conflicting testimony whether permission was necessary for Ohl to leave early when she did not have an assignment, Ohl was not terminated for this reason.

4 The precautions assignment requires a staff person to be with the patient at all times.

Evens was relieving the switchboard for break at 12:30 when Ohl called her and claimed that she had been looking for Evens in "meds." Evens completed the investigatory interview with Ohl later that day (13:50). During the interview, Ohl was upset about personal issues, but denied needing the employee assistance program (EAP). Evens gathered statements from Ohl's co-workers and determined Ohl took a 50-minute lunch that day.[5] Evens reported her findings to Administrator of Nursing Cassidy-Westcott. Evens placed Ohl on administrative leave.

Administrator Cassidy-Westcott reviewed the statements collected by Evens and interviewed Ohl on July 2, 2018. Initially, Ohl questioned the veracity of her co-workers' accounts of the times they saw her leave and arrive on July 1 and she seemingly questioned their motives. Ohl stated she left for lunch at 10:27 then later in the interview, she stated that she left at 10:25 according to the clock. Ohl indicated she returned at 10:57, but later stated, "It was about 11:10 I suppose." Later yet, she indicated, "Maybe 11:07, maybe." Ohl provided varying explanations for her extended lunch absence. At hearing, Ohl testified that she left for lunch at 10:20 on July 1, 2018; and should have been gone for 30 minutes, but she was gone for 50 minutes.

Cassidy-Westcott reviewed Ohl's past work performance and appraisal, Ohl's work directives, and her past 12 months of tardy occurrences. Cassidy-

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5 The statements ranged from seeing Ohl leave for lunch at 10:20 and 10:25 to seeing her arrive back at 11:10 and reporting to her one-on-one precautions at 11:18. A RTW reported seeing Ohl leave for lunch at 10:20 then he saw Ohl return as Ohl was entering the stairway door near the parking lot at 11:10 and he was leaving.

Westcott believed management had followed progressive discipline and Ohl had been given previous opportunities to improve. IMHI determined to terminate Ohl's employment. Absent from the record is the explanation why Cassidy-Westcott received written question and answer forms about the July 1, 2018, incident from staff that were completed after Ohl was terminated. In any event, the narrative, open-ended statements provided from staff on the day of the incident are more credible.

E. Termination.

On July 3, 2018, the State terminated Ohl's employment. The termination letter provided in part:

> After a fair and thorough investigation, it was determined that on July 1, 2018, you returned twenty minutes late from your thirty minute unpaid lunch break. You admitted that you returned late from your lunch break. This is your tenth occurrence of being tardy in the past twelve months.

The letter further provided Ohl's conduct violated the following:

1. The Employees Responsibilities and Work Rules, Section D-2, Attendance and Punctuality: "Each employee is expected to be on the job, on time, each scheduled workday and observe the time limits for meals and breaks."
2. The Iowa Department of Human Services Attendance Policy.

Ohl's previous discipline was outlined:

> You received a written reprimand for six occurrences of unscheduled absence (tardy) on March 16, 2018, 1 day suspensions for seven occurrences of tardy on August 2, 2017, March 20, 2018, May 3, 2018, and May 15, 2018 and a three day suspension for eight occurrences of tardy on May 25, 2018. You received a five day and final warning for nine occurrences of tardy on June 21, 2018.

Ohl filed a third-step grievance challenging her termination with the Department of Administrative Services (DAS). Following DAS' denial of her grievance, Ohl timely filed her merit appeal with PERB.

II. CONCLUSIONS OF LAW.

A. Relevant statutory provision, rule, and just cause analysis.

Ohl's DAS and PERB appeals were filed pursuant to Iowa Code section 8A.415(2), which provides:

> 2. Discipline resolution.
> *a.* A merit system employee . . . who is discharged, suspended, demoted or otherwise receives a reduction in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the [DAS] director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.
> *b.* If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The employee has the right to a hearing closed to the public, unless a public hearing is requested by the employee. The hearing shall otherwise be conducted in accordance wit the rules of the public employment relations board and the Iowa administrative procedure Act, chapter 17A. 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 sets forth specific disciplinary 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 involving employees covered by collective bargaining agreements shall be in accordance with the provisions of

> the agreement. Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal or 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.

Iowa Code § 8A.415(2) and Iowa Admin. Code r. 11—60.2. Accordingly, just cause must exist to support the disciplinary action taken. The State bears the burden of establishing that just cause supports the discipline imposed. *Harrison & State (Dep't of Human Servs.)*, 2005-MA-04 at 9.

In the absence of a definition of "just cause," PERB has long considered the totality of circumstances and rejected a mechanical, inflexible application of fixed elements in its determination of whether just cause exists. *Wiarda and State (Dep't of Human Servs.)* 2001-MA-03 at App. 13-14. In analyzing the totality of circumstances, examples of factors which may be relevant to a just cause determination include, but are not limited to:

> whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether there is sufficient proof of the employee's guilt of the offense; whether progressive discipline was followed, or is 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.

Gleiser and State (Dep't of Transp.), 2009-MA-01 at 16-17; *Hunsaker & State (Dep't of Employment Servs.*, 1990 MA 13 at 40.

B. Analysis.

In this case, Ohl admits she exceeded her 30-minute lunch period on July 1, 2018. However, Ohl argues that the State did not have just cause for her termination because she did not receive proper notice of attendance requirements; the State did not conduct a sufficient investigation; and Ohl was not tardy on July 1, but rather, her conduct constituted an unscheduled absence. Ohl seemingly advances several other intermittent arguments, which I address as a final part of my analysis.

Notice and reasonableness of attendance rules and policy. Management provided notice of its attendance requirements to Ohl. These attendance rules and policies were reasonable and required to ensure around-the-clock patient care provided at IMHI. Ohl received a copy of the DHS attendance policy and contrary to Ohl's assertion, there is substantial evidence that she received a copy of the nursing department scheduling policy. This policy specifically provided that an employee who returned late from lunch would be considered "tardy." Ohl misconstrues what notice requires when she asserts there is "zero evidence" or "no proof" that she opened and read the documents. IMHI provided notice of its attendance requirements and expectations when it provided copies of the rules and policies to Ohl and these requirements were discussed at staff meetings.

Ohl was aware that her late return from lunch would constitute a tardy occurrence and result in disciplinary action. Management repeatedly reminded Ohl of attendance requirements, including those for lunch, in her letters of disciplinary action. The letters referenced her prior occurrences and disciplinary

actions. Each letter contained the provision that she was expected to "observe the time limits for meals and breaks." Based on the assignment sheet, Ohl knew she was scheduled for a lunch break from 10:30 and due back by 11:00 for her one-on-one precautions assignment. The State established that Ohl had more than adequate notice of attendance requirements, including those for her lunch break on July 1, 2018.

Sufficient and fair investigation. Management conducted a sufficient and fair investigation of the time Ohl was away for her lunch break on July 1, 2018. While I agree with Ohl that statements collected after Ohl's termination are suspect, they were not necessary to determine the facts. The narrative statements provided on July 1 by staff and reviewed by Administrator Cassidy-Westcott are more credible.

More importantly, in her interview on July 2, 2018, Ohl claimed she left at 10:27 and arrived back at 11:07 or 11:10. The assignment sheet listed her lunch period as 10:30-11:00. She was assigned one-on-one precautions at 11:00. These facts alone, Ohl's admission and the assignment sheet, establish she exceeded her 30-minute lunch period and failed to be at her assignment at 11:00. Ohl was given an opportunity to explain her extended lunch and provided varying reasons to Cassidy-Westcott. Although RN Terhune reported Ohl did not come to her assignment until 11:18, Administrator Cassidy-Westcott determined Ohl was only twenty minutes late. Administrator Cassidy-Westcott conducted an investigation that was fair to Ohl and sufficiently garnered the facts to determine when Ohl was gone for lunch on July 1.

Sufficient proof Ohl was tardy. In her testimony, Ohl admits that she left for lunch at 10:20 on July 1, 2018; and should have been gone for thirty minutes, but she was gone for 50 minutes. However, Ohl argues that because she did not have permission to leave, she was absent rather than tardy pursuant to the DHS attendance policy definitions.

I am not persuaded that Ohl's extended lunch period constitutes an unscheduled absence. The late return from lunch comes within the meaning of tardy under both the DHS attendance policy and the nursing department scheduling policy. Whether Ohl had permission to leave is irrelevant. In the DHS work rules, both an unscheduled occurrence of an "absence" and a "tardy" are time away from work that has not been approved by management. In the DHS attendance policy definitions, "absence" is distinguished as 4 or more hours of a scheduled shift whereas "tardy" is defined in terms of less than 4 hours. The twenty minute late return from lunch is less than 4 hours.

Finally, the nursing scheduling policy specifically defines a late return from lunch as a tardy:

> 7. Anyone who signs in after the start of their shift, or returns late from a 15 minute or lunch break, will be considered tardy.

Management had sufficient proof that Ohl's late return from lunch on July 1, 2018, constituted a tardy and the documented tenth occurrence.

Work record, other employees, progressive discipline, and incorrect dates. While it is true Ohl was an eleven-year employee, it is not correct to assume, in the absence of supporting evidence, that she met expectations in her other evaluations. I also disagree with Ohl's assertion that the State failed to provide documentation

of other employees who were treated similarly to Ohl. The record reflects a list of many IMHI employees who were disciplined pursuant to the DHS attendance policy.

Ohl seemingly argues her prior disciplinary actions were not progressive because the letters of disciplinary action were issued on dates following the underlying actions. For one, Ohl never grieved or contested these prior disciplinary actions. Second, I fail to see how the disciplinary actions were less effective or corrective due to the issuance date of the formal letters. There were no undue delays in their issuance.

Finally, Ohl makes much of misstated dates referenced in management's documents. While the misstated dates require additional checking of the underlying facts, they appear to be oversights rather than an attempt to be intentionally misleading. Not one affects the veracity of the underlying document and its relevant substance.

Summary.

In consideration of the totality of these circumstances, I conclude the State established just cause supported its termination of Ohl's employment. Consequently, I propose the following:

ORDER

Renee L. Ohl's State merit disciplinary action appeal is DISMISSED.

The cost of reporting and of the agency-requested transcript in the amount of $ 477.55 are assessed against Renee L. Ohl pursuant to Iowa Code section

20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to Renee L. Ohl in accordance with PERB subrule 11.9(3).

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

DATED at Des Moines, Iowa, this 11th day of March, 2021.

Diana S. Machir
Administrative Law Judge

Original filed EDMS.