

Counsel for Krieger, Nathan Boulton, and the attorney for the State, Alla Minter Zaprudsky, presented their oral arguments to the Board on December 11, 2019. Prior to oral arguments, the parties filed briefs outlining their respective positions.

Pursuant to Iowa Code section 17A.15(3), on review of the proposed decision, the Board possesses all powers that it would have possessed had it elected to preside at the evidentiary hearing in the place of the ALJ.

We have fully considered all of the State's arguments on review. None have persuaded us to reach conclusions different than those reached by the ALJ. Based upon our review of the record before the ALJ, as well as the parties' briefs and oral arguments, we agree with the ALJ's Proposed Decision and Order. The State failed to establish just cause for terminating Krieger's employment. We make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The ALJ's findings of fact, as set forth in the Proposed Decision and Order attached as "Appendix A," are fully supported by the record. We adopt the ALJ's factual findings as our own with the following additions and discussion:

The facts of this case are simple. A brief summary is helpful before turning to the State's disputed findings. Krieger returned to work the day after she was taken to the hospital for a panic attack on May 23, 2018. She was at work when it happened. Within the week, she provided a return to work release to her supervisors as they had requested. She had two follow-up doctor appointments, one of which was scheduled for June 5. Although not requested from her

supervisors, Krieger redacted her medical appointment verification sheet for her appointment and provided it to her supervisors for her absence that day, June 5. The redacted information referred to her diagnostic testing to rule out syncope. The next day, Krieger went to her supervisors and conveyed what she had done with the redaction. Krieger had not been diagnosed with syncope. Krieger's redacted medical appointment verification sheet is the basis for her termination.

The State disputes two areas of the ALJ's findings. First, the State disputes the ALJ's finding that Krieger's provided her appointment verification sheet only for the purpose of showing documentation for her absence for the appointment. Second, the State disputes the credibility determination the ALJ gives to Krieger's account of a conversation she had with a coworker.

With respect to the State's first disputed finding, at oral arguments, the State conceded Krieger provided her appointment verification sheet as documentation for her doctor's appointment and absence that same day, June 5. As the findings provide and the evidence supports, Krieger did this voluntarily and had not been requested to submit documentation for this purpose. The State asserts however, although Krieger had also submitted a doctor's note to return to work, her supervisors had told her that they would need a note reflecting that she could perform all her duties. The State contends that Krieger's appointment verification sheet served this purpose. There is no evidence to support the State's contention.

Krieger's supervisors had only requested a doctor's note, which Krieger provided within a week. The note stated she could return to work. On May 25, Krieger had discussed this request with her two supervisors Quinta Miller and Kathy Shultz along with manager Mary Ford. As the ALJ aptly noted, these three individuals could have been witnesses, but the record does not contain evidence that they were interviewed in the investigation. They did not testify at hearing. Only the two investigators and Krieger testified at the hearing. The record, consisting of their testimony and the parties' exhibits, including the investigatory interview of Krieger, is absent of evidence that Krieger's supervisors requested documentation that Krieger could perform her duties. The record is also absent of evidence that Krieger was required to provide documentation to be absent for her doctor's appointment on June 5. The record supports finding Krieger voluntarily provided the appointment verification sheet as documentation of her absence for her doctor appointment and Krieger's supervisors only requested a return to work note that she provided within the week.

A second challenge raised by the State is the ALJ's credibility determination regarding Krieger's conversation with a senior coworker. Krieger confided in the coworker and recalled the coworker's advice upon which Krieger relied. The State asserts the ALJ incorrectly accepted Krieger's testimony about the conversation without corroborating evidence.

We agree with the ALJ's findings and the weight the ALJ has given this evidence. As the State is aware, the advice given, as testified to by Krieger, is admissible hearsay pursuant to Iowa Code section 17A.14(1). However, the State

misconstrues the material relevance of this evidence to the ALJ's ultimate conclusion. The ALJ correctly determined that the redacted verification sheet was not a required document and therefore, its redaction did not constitute a falsification of a record. Thus, the reason for the redaction, *i.e.*, reliance upon the advice of another, is irrelevant to the ALJ's ultimate conclusion. The ALJ correctly admitted this testimony in as part of the record and afforded it the appropriate weight.

As a final point in our review of the findings, the State does not dispute the ALJ's finding, "The appointment verification document did not state that Krieger had syncope, but did state she was being referred for that condition." The finding is material to the ALJ's conclusion and our agreement with that conclusion in our review. The State repeatedly asserts Krieger was diagnosed with syncope although the State failed to meet its burden and provide evidence of a diagnosis. The record reflects the contrary; Krieger had scheduled diagnostic tests to rule out syncope. There had not been a diagnosis.

CONCLUSIONS OF LAW

The ALJ's conclusions of law, as set out in Appendix A, are correct. We adopt them as our own with the following discussion:

We agree with the ALJ's determinations in reaching her correct conclusion that Krieger did not violate the DOT work rule. As the uncontroverted facts reflect, Krieger provided the appointment verification sheet voluntarily and solely to prove to management her absence from work was excusable. Despite having the burden of proof, the State failed to provide evidence that it requested a note

for Krieger's absence or a note stating the nature and purpose of the doctor's appointment. Management did not make a request for this document.

Thus, as the ALJ reasoned, the only information on the appointment verification document that was relevant to that purpose was the time, date, and location of the appointment. All other information was immaterial and unnecessary. Therefore, as the ALJ logically concluded, Krieger did not falsify a record in violation of the DOT work rule.

The State seeks to now expand the basis of its decision to terminate Krieger's employment. The ALJ's just cause analysis was correctly limited to the State's letter of termination to Krieger. As required by Iowa Code section 8A.413(19)(b), the person discharged shall be given a written statement of the reasons for the discharge. *See* Iowa Code § 8A.413(19)(b). It is well established precedent that the presence or absence of just cause must be determined upon the stated reasons alone. *See Wilkerson-Moore & State (Dep't of Human Servs.)*, 2018 PERB 100788 at 7 (citing *e.g., Eaves & State (Dep't of Corrs.)*, 2003 MA 04 at 14).

The State's letter to Krieger stated she was being terminated because she had "altered the medical verification that you turned in to your supervisor on June 5, 2018." The State found Krieger's actions were in violation of the DOT work rule, "Intentionally falsifying records, dishonesty, or giving false information." Thus, the State's reason for terminating Krieger was limited to her "alteration" of the appointment verification sheet she turned in on June 5.

As the ALJ correctly determined on this issue,

The termination letter is not broad enough to implicate Krieger's dishonesty in failing to disclose she was referred to a doctor for syncope. The reason for termination given in the termination letter was merely an alteration of a part of a document the State has not demonstrated that it was entitled to review.

For another reason on this issue we disagree with the State's assertion Krieger "intentionally concealed the fact that she had been given a diagnosis of syncope" and was therefore, dishonest. Again, the undisputed finding, supported by the evidence, reflects that Krieger had not been given a diagnosis of syncope. As even Krieger indicated in this appeal, had Krieger hid a diagnosis of syncope then this case would be a whole other story.

We agree with Krieger, too, that even if Krieger's actions constituted a violation of DOT work rules, the penalty of termination was excessive. As Krieger pointed out, she felt guilty and went to her supervisors the day following her appointment on June 5 and told them what she had done. Their response was to "bring the hammer down." Whether the penalty imposed is proportionate to the offense is one of the factors that may be relevant to a just cause determination. *See Hoffman & State (Dep't of Transp.)*, 1993 MA 21 at 22. PERB has long rejected a mechanical, inflexible application of fixed elements and instead required an analysis of all relevant circumstances in a just cause analysis. *See Hunsaker & State (Dep't of Emp't Servs.)*, 1990 MA 13 at 40. In our review, we have also noted Krieger's positive evaluation where her strengths were noted as "honesty and compassion for others" and she was "accountable for the whole team."

There are other factors that, in this case, may have been relevant to consider in a just cause analysis. However, the State failed to meet its burden and establish Krieger violated the DOT work rule. As the ALJ correctly, concluded, “Without proof of guilt, the State cannot establish just cause for any discipline, much less termination.”

Accordingly, we enter the following:

ORDER

The Department of Transportation shall reinstate Tiffany Krieger to her former position (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore her benefit accounts to reflect accumulations she would have received but for the discharge; make appropriate adjustments to her personnel records and take all other actions necessary to restore her to the position she would have been in had she not been terminated on June 27, 2018.

The cost of reporting and of the agency-requested transcript in the amount of \$270.83 are assessed against the State of Iowa, Department of Transportation, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the State of Iowa in accordance with PERB subrule 11.9(3).

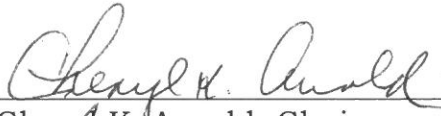
This decision constitutes final agency action only on the issue of whether the State established just cause for Krieger’s termination. The Board retains jurisdiction of this matter in order to address any remedy-related matters, which might hereafter arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, in the event the parties fail

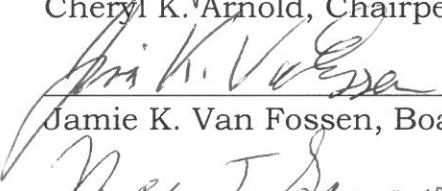
to reach agreement and in the absence of a party filing a petition for judicial review, the Board will schedule a hearing within 45 days of the below date to receive evidence and arguments on the precise terms of the remedy. Agency action on the appropriate remedy will not be final until its specifics are approved or determined by the Board. The Board retains jurisdiction to enter whatever orders may be necessary or appropriate to address any remedy-related matters which may hereafter arise.

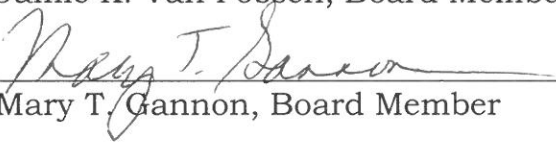
DATED at Des Moines, Iowa, this 6th day of March, 2020.

PUBLIC EMPLOYMENT RELATIONS BOARD

By:


Cheryl K. Arnold, Chairperson


Jamie K. Van Fossen, Board Member


Mary T. Gannon, Board Member

Original filed EDMS.

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

TIFFANY KRIEGER, Appellant,)	CASE NO. 102243
and)	
)	PROPOSED DECISION AND ORDER
STATE OF IOWA (DEPARTMENT OF TRANSPORTATION),)	
Appellee.)	

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

Krieger worked as a Drivers License Examiner (DLE) for the Iowa Department of Transportation (DOT) at the Iowa Motor Vehicle Division in Ankeny. Krieger alleges the State did not have just cause to terminate her employment on June 27, 2018. The State denies that Krieger's termination was not supported by just cause.

A closed evidentiary hearing was held on March 12, 2019. Krieger represented herself. Alla Mintzer Zaprudsky represented the State. The parties submitted post-hearing briefs on May 14, 2019. After considering the evidence and the arguments of the parties, I propose the following:

FINDINGS OF FACT

Krieger worked at the Ankeny drivers license station service center as a Drivers License Examiner for the Iowa DOT at the time of her termination.

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Krieger began her employment with the DOT in October 2013 as a clerk senior in Fort Dodge. In December 2017, she applied for and received the DLE position in Ankeny. As a DLE, Krieger administered drivers license skill and road driving examinations. She also reviewed drivers license applicants' eligibility and qualifications to assure that drivers licenses and ID cards were issued in compliance with Iowa laws, DOT rules, and established procedure. To be employed as a DLE, a person must maintain a valid Operator's, Chauffeur's or Commercial Drivers License for the duration of the employment in the DLE classification. The drivers license station also employs clerks, clerk seniors, and administrative assistants. The DOT and its employees view a DLE as the lead person since a DLE generally has more knowledge and experience than the other positions, but a DLE is not a supervisor.

A DLE can remove or suspend a driver's license based on the person's loss of consciousness or loss of voluntary control. One such example of a condition that could potentially lead to a suspension of a driver's license is syncope. If a person suffers syncope, that would be a reason for the DLE to require the individual to see a doctor to receive a Medical Report, which would indicate whether the person was fit to drive and whether the loss of consciousness was a one-time event.¹ The Medical Advisory Board would then review the matter. In

¹ DOT's rules previously stated: "The department shall not knowingly license any person who suffers from syncope of any cause, any type of periodic or episodic loss of consciousness, or any paroxysmal disturbances of consciousness, including but not limited to epilepsy, until that person has not had an episode of loss of consciousness or loss of voluntary control for six months, and then only upon receipt of a medical report favorable toward licensing." Iowa Administrative Code 761—600.4 (June 2017) (this rule has subsequently been moved to IAC 761—605.4).

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her position as a DLE, Krieger was aware of and charged with enforcing these rules regarding syncope.

Prior to Krieger's termination she met expectations in all her evaluations. Her supervisors noted that she "gets things done" and contributes to the team. Her supervisor stated that Krieger "encourages team members to be open and honest, and accountable for the whole team." Krieger had no discipline prior to the termination at issue. Krieger acknowledged receipt of the department's rules.

One of the requirements of Krieger's job is to display high standards of ethical conduct, and to exhibit honesty and integrity. The DOT asserts that ethical considerations in the DLE position are important as the DOT has to maintain utmost safety for highway transportation and the DOT must preserve a high standard of trust from the public.

In January and February prior to Krieger's termination, she had been involved in two accidents. These accidents, according to Krieger, led to anxiety issues.

On May 23, 2018, Krieger was at work conducting a driving test with a drivers license applicant. The applicant was not a very good driver. This incident led to Krieger's increased anxiety. After the driving test, Krieger took a lunch break to rest and control her emotions. After her lunch break, Krieger was walking back in to the drivers license station, but she did not feel better. A coworker noticed Krieger's demeanor and helped her get inside and seated her on a bench away from the view of the public. That coworker went to find another DLE to help while a different coworker gave Krieger a Gatorade. While inside the

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building, Krieger fell to the floor and her chest tightened. Krieger was taken by ambulance to the hospital. This incident was later determined to be a severe panic attack.

The next day, one of Krieger's supervisors, Quinta Miller, asked if Krieger had a note from the doctor and Krieger said no, but that she could get one. Within the next day, Krieger was sitting with supervisors Quinta Miller and Kathy Schultz and the public service manager, Mary Ford, and they talked about the May 23 incident. At that time, Krieger realized her supervisors were requiring her to get a doctor's note.

Within the next week, Krieger went to the doctor to obtain the note. She gave that note to her supervisors. The note stated she could return to work. The doctor also scheduled her for a follow-up appointment with a neurologist and a cardiologist.

One of Krieger's follow-up appointments was scheduled for June 5, and she took leave in order to attend the appointment. Krieger did not have a doctor's note to supply to her supervisors about the appointment so on the day of her appointment Krieger chose to provide her supervisors, Miller and Schultz, and the public service manager, Ford, with an appointment verification sheet that contained notes and personal information. The record does not contain evidence that the DOT required Krieger to provide any documentation in order to take leave, but Krieger felt she should provide a note. Krieger redacted that document without her supervisors' knowledge.

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The unredacted appointment verification sheet included information regarding upcoming appointments and the reasons for the referral regarding the upcoming appointments. The document listed Mercy Clinics Family Medicine Fort Dodge as the provider and contained Krieger's personal information as well as a task list and notes of Krieger's past and future appointments. The appointment verification provided in the part relevant to this appeal:

Per Dr. Birkett-pt needs CT Head or Brain WO Contrast (CPT Code: 70450) due to Syncope (ICD10 Code:R55)

....

Pt's CT has been scheduled for Tuesday, June 5, 2018 at 5:30pm. Pt will need to register through entrance C at 5:00pm. If apt time or date does not work pt can call 515-574-6772 to reschedule

....

Per Dr. Birkett-pt needs apt with Iowa Heart due to palpitations and syncope

....

Pt's Iowa Heart apt has been scheduled for Monday, June 11, 2018 at 11:00am with Dr. Justice. He is located in POB East on the 2nd floor, if apt time or date does not work pt can call 515-574-6840 to reschedule.

After Krieger's redactions those lines read:

Per Dr. Birkett-pt needs CT Head or Brain WO Contrast

....

Pt's CT has been scheduled for Tuesday, June 5, 2018 at 5:30pm. Pt will need to register through entrance C at 5:00pm. If apt time or date does not work pt can call 515-574-6772 to reschedule

....

Per Dr. Birkett-pt needs apt with Iowa Heart due to palpitations

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....

Pt's Iowa Heart apt has been scheduled for Monday, June 11, 2018 at 11:00am with Dr. Justice. He is located in POB East on the 2nd floor, if apt time or date does not work pt can call 515-574-6840 to reschedule.

Prior to providing the appointment verification document to her supervisors Krieger redacted, using white out, any mention of syncope. The appointment verification document did not state that Krieger had syncope, but did state she was being referred for that condition.

Before providing this redacted appointment verification sheet, Krieger hinted to her supervisors that she was concerned about the paperwork she received from the doctor. Krieger told Schultz that she "didn't want to give [the appointment verification sheet] to [Schultz] because of what it says. I'll get my license suspended." Schultz did not respond. Krieger also spoke with another, more senior DLE and explained her concern about the use of the word "syncope" on her appointment verification document and the other DLE told her not to say anything about it. Krieger knew that because of her medical episode on May 23, she should have a medical report that would clear her of syncope in order to maintain her license. However, Krieger was waiting for her supervisors or someone else to order her to obtain a medical report.

Krieger attended her doctor's appointment on June 5. On June 6, one day after providing the redacted appointment verification sheet to her supervisors and Ford, Krieger admitted what she had done. Krieger was brought into an office with Ford, Schultz, and Miller to discuss reasonable accommodations for her anxiety due to the previous car accidents. At that time, Krieger admitted that she

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had redacted the appointment verification document to omit the reference to syncope.

The DOT placed Krieger on administrative leave on June 7.² Darcy Doty, the director of driver and identification services, led the investigation. Emily Newton, the DOT employee relations officer, assisted in the investigation as well. Doty conducted the investigation as Ford, Schultz, and Miller all could have been witnesses in the matter as they received the redacted document from Krieger and were present when Krieger admitted to whiting out certain parts of that document.³

Doty conducted the investigation. Krieger was interviewed on June 20. During Krieger's interview, she provided a copy of the original, unredacted appointment verification sheet. Krieger explained that she initially redacted the document because she did not want to lose her job or to get in trouble. She also stated that she was not sure she had to tell her supervisors about the reason for the referral to the cardiologist and neurologist. Krieger also stated that she told Miller and Schultz that she did not want to give them the form because of what it said on it. Krieger claims she told her supervisors that she was concerned about the document in order to get them to ask her about it so she could admit the problem. However, her supervisors did not react to her cryptic statements regarding the appointment verification sheet. Krieger explained that she came

² Krieger's license was not suspended during this time, but was suspended after the termination of her employment. Krieger's license was suspended for a couple of weeks before being reinstated after the successful completion of a Medical Report.

³ The record does not contain evidence that these three individuals were actually interviewed during the investigation.

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forward because she felt it was hypocritical to white out that part of her appointment verification sheet when she knew it could lead to a six-month suspension of her drivers license, which could place her job in jeopardy. Krieger also stated that she knew what she did was wrong.

Doty worked with the DOT office of employee services (DOT-OES) and the division director in making the decision to terminate Krieger's employment. The DOT determined this type of falsification was egregious because of the nexus to Krieger's daily job responsibilities as a DLE. Doty testified the DOT cannot trust Krieger to perform her job responsibilities because of this incident. Doty also conducted a *Loudermill* interview with Krieger.

The DOT terminated Krieger's employment on June 27, 2018, because she "altered the medical verification that you turned in to your supervisor on June 5, 2018." The State found Krieger's actions were in violation of the following DOT work rule:

I. WORK PERFORMANCE

.....

5. Intentionally falsifying records, dishonesty, or giving false information.

Krieger filed the present appeal on September 25, 2018.

CONCLUSIONS OF LAW

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

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2. Discipline Resolution

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

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

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

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

. . . .

60.2(4) Discharge. An appointing authority may discharge an employee. Prior to the employee's being discharged, the appointing authority shall inform the employee during a face-to-face meeting of the impending discharge and the reasons for the discharge, and at that time the employee shall have the opportunity to respond. A written statement of the reasons for the discharge shall be sent to

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the employee within 24 hours after the effective date of the discharge, and a copy shall be sent to the director by the appointing authority at the same time.

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

When determining the existence of just cause, PERB examines the totality of the circumstances. *Cooper and State of Iowa (Dep't of Human Rights)*, 97-MA-12 at 29. The Board has stated the just cause determination "requires an analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical, inflexible application of fixed 'elements' which may or may not have any real applicability to the case under consideration." *Hunsaker and State of Iowa (Dep't of Emp't Servs.)*, 90-MA-13 at 40. Although just cause requires examination on a case-by-case basis to determine just cause, the Board has declared that the following factors may be relevant to the just cause determination:

While there is no fixed test to be applied, examples of some of the types of factors which may be relevant to a just cause determination, depending on the circumstances, include, but are not limited to: whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether sufficient evidence or proof of the employee's

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guilt of the offense is established; whether progressive discipline was followed, or not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.

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

PERB has determined the presence or absence of just cause rests on the reasons stated in the disciplinary letter. *Eaves and State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14. Iowa Code section 8A.413(19)(b) and DAS rule IAC 60—2.4 require the State to provide the employee being disciplined with a written statement of the reasons for the discipline. *See Hunsaker*, 90-MA-13 at 46, n.27. In order to establish just cause, the State must demonstrate the employee is guilty of violating the work rule, policy, or agreement cited in the termination letter. *Gleiser and State of Iowa (Dep't of Transp.)*, 09-MA-01 at 17–18, 21.

In the termination letter, the State claimed Krieger violated the DOT work rule that prohibits intentionally falsifying records, dishonesty, or giving false information. In the letter, the State specifies that when Krieger “altered the medical verification that you turned in to your supervisor on June 5, 2018,” she violated the work rule.

It is undisputed that Krieger altered the appointment verification document that she turned in to her supervisors. However, I disagree with the State's characterization that Krieger's action in redacting an immaterial and

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unnecessary part of the document was an intentional falsification of a record or was dishonesty that constitutes a violation of the work rule.

Krieger provided the appointment verification sheet to her supervisors on June 5 to prove that she had a doctor's appointment for which she needed leave from her scheduled hours of work. The information in the document that was material to that purpose includes the time, date, and location of the appointment. Krieger redacted only the information regarding the reason for the appointment. The medical reason for the appointment was immaterial and unnecessary to prove to management that her absence from work was excusable.

The State has the burden of proof in this case. The State has not provided evidence that it required Krieger to produce a note to be absent from work or that any note provided to management needed to list the nature or purpose of the appointment. Without that proof, the reason for the doctor's visit remains unnecessary and immaterial to Krieger's purpose in submitting the document to management. Without a showing that the reason for the visit was required or otherwise material, Krieger's redaction of the reason for the doctor's visit cannot be characterized as falsification of a record.

Although, in certain situations, an employer may request that an employee provide a doctor's note when an employee uses sick leave, the State has not established that it requested Krieger to do so or what the doctor's note needed to contain. See Equal Employment Opportunity Commission Enforcement Guidance, Questions and Answer: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the American with

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Disabilities Act (ADA) 2000 WL 33407183 at *4 (July 26, 2000) (stating that an employer may request a doctor's note as long as the employer has a policy or practice of requiring all employees to do so). Krieger was attending a medical appointment and did not wish to disclose the purpose of the appointment to her employer at that time. The State cannot establish Krieger was dishonest or intentionally falsified a record when Krieger redacted information the State did not demonstrate it had a right to review and that redacted information was immaterial to Krieger's purpose for submitting the document.

The State has also failed to demonstrate or even claim that there was any other reason for Krieger to submit that appointment verification on June 5 other than to prove the existence of a doctor's appointment. In testimony, Doty stated that Krieger's supervisors asked Krieger for a medical return to work document after the May 23 medical episode. Doty and Krieger both testified that Krieger provided that document to her supervisors within a few days of the request. The return to work note was not the same document as the appointment verification that Krieger submitted to her supervisors on June 5. Krieger only provided the appointment verification document on June 5 to prove the existence of a medical appointment so her absence from work would be excused.

Based on the termination letter, the State terminated Krieger only because she altered the portion of an appointment verification document that the State was not entitled to review. I cannot find that Krieger was dishonest or intentionally falsified a record when she redacted an immaterial part of an appointment verification document.

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The State's argument largely focuses on Krieger's failure to disclose a potential medical condition that could affect her drivers license. This, however, is not the reason cited for Krieger's termination in the termination letter. The State is limited to the reasons given for the termination in the written statement provided to Krieger and cannot now add or broaden the basis for termination. *See Hunsaker*, 90-MA-13 at 46, n.27 (stating that although there may be alternate reasons for discipline, PERB's determination is limited to the reasons listed by the State in the written statement of discharge).

The termination letter is not broad enough to implicate Krieger's dishonesty in failing to disclose she was referred to a doctor for syncope. The reason for termination given in the termination letter was merely an alteration of a part of a document the State has not demonstrated that it was entitled to review. Therefore, I find Krieger did not violate the DOT rule regarding falsification of records and dishonesty in redacting the reason for the doctor's visit on the appointment verification document she provided to her employer as proof of a doctor's appointment. The State has not shown Krieger violated the work rule for which she was terminated.

However, even if the termination letter could be read broadly enough to encompass Krieger's failure to disclose her referral for syncope to her supervisors, the State has still failed to establish just cause exists to discipline Krieger on that basis. To prove that Krieger violated the rule regarding falsification of a record or dishonesty, the State would need to demonstrate that Krieger had an affirmative duty to disclose her referral for syncope and Krieger

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had knowledge of this rule. The State and Krieger discussed at length in testimony that a person with syncope would be subject to potential suspension of a driver's license. However, the State failed to establish that Krieger needed to disclose to management that she was being evaluated for syncope. The State required Krieger to disclose if her license was actually going to be revoked, suspended, or cancelled. However, the State has not demonstrated Krieger was required to disclose information that could lead to the suspension of her drivers license.

Further, Krieger was not on notice that she had an affirmative duty to disclose this type of information. Krieger was clearly conflicted about whether to disclose to her supervisors that she had been referred to a doctor to be evaluated for syncope. Krieger, cryptically, tried to initiate conversations with her supervisors to discuss this topic, but her attempts were ineffectual. Krieger also discussed her situation with a more senior DLE, and that employee told her she did not need to disclose the reason for her doctor's appointment. Although the State has not demonstrated Krieger had an affirmative duty to disclose her referral to a doctor for syncope, and Krieger was not aware of any such affirmative duty, she still disclosed her referral for syncope to her supervisors because she felt it would be hypocritical to stay silent.

The State has not established Krieger was required to self-report her referral diagnosis, and in the termination letter, the State did not discipline Krieger for the failure to self-report. Krieger's discipline was limited to her redaction of one of her referring diagnoses when she turned in an appointment

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verification form. The reason for the appointment was not a material or necessary component of Krieger's reason for providing the document to her employer. The State has not shown Krieger's actions in altering the reason for referral on an appointment verification document that she provided for the purpose of proving that she had an appointment was violative of any rules of the department. Without proof of guilt, the State cannot establish just cause for any discipline, much less termination.

Consequently, I propose the following:

ORDER

The State of Iowa, Department of Transportation shall reinstate Tiffany Krieger to her former position (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore her benefits accounts to reflect accumulations she would have received but for the discharge; make appropriate adjustments to her personnel records and take all other actions necessary to restore her to the position she would have been in had she not been terminated on June 27, 2018.

The costs of reporting and of the agency-requested transcript in the amount of \$270.83 are assessed against the State of Iowa, Department of Transportation 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 621—11.9(3).

The proposed decision and order will become PERB's final agency action on the merits of Krieger's appeal pursuant to PERB rule 621—9.1 unless, within

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20 days of the date below, a party files a petition for review with the Public Employment Relations Board or the Board determines to review the proposed decision on its own merits.

DATED at Des Moines, Iowa this 8th day of August, 2019.

/s/ Amber DeSmet

Administrative Law Judge

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