

ROSA GARDUNO, Appellant,)	CASE NO. 102249
and)	
STATE OF IOWA (IOWA WORKFORCE DEVELOPMENT), Appellee.)	ORDER NUNC PRO TUNC

IT IS HEREBY ORDERED that the decision be corrected in the above respects.

PUBLIC EMPLOYMENT RELATIONS BOARD

/s/ Mary T. Gannon
Mary T. Gannon, Board Member

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STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

ROSA GARDUNO,
Appellant,

and

STATE OF IOWA
(IOWA WORKFORCE DEVELOPMENT),
Appellee.

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CASE NO. 102249

DECISION AND ORDER

Appellant Rosa Garduno 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(8)(8A,20). Garduno asserts that there was not just cause to support the State's termination of her employment on August 8, 2018, for her alleged violation of Iowa Workforce Development work rules and provisions of the State of Iowa employee handbook. The hearing was closed to the public pursuant to Iowa Code section 8A.415(2)(b) and PERB subrule 11.5(1).

Pursuant to notice, an evidentiary hearing on the merit appeal was held before the Board on February 26 and 27, 2019. Attorneys Henry Widen and Alla Mintzer Zaprudsky represented the State and AFSCME representative Melissa Speed represented Garduno. The parties filed post-hearing briefs on June 3, 2019.

Based upon the entirety of the record, and having reviewed and considered the parties' briefs, we conclude the State established just cause existed to support its termination of Rosa Garduno's employment.

I. FINDINGS OF FACT

On November 4, 2005, Garduno began employment for the State, Iowa Workforce Development (IWD), which is responsible for enforcement of workplace safety and labor laws. She first worked as a compliance officer for IWD's Occupational Health and Safety Administration then as an investigator for IWD's Contractor Registration division in 2010 and finally as a Wage Investigator II for the Wage and Hour division beginning in 2013.

At the time of Garduno's termination, there were two other investigators: Diana Norman was relatively new and worked on both wage and child labor cases; and Jim Harris worked as the lead investigator. With respect to wage claims, the investigators responded to email and telephone inquiries and resolved wage claims submitted to their office by employees or contractors. In 2015, the division had implemented written claim procedures that required claims to be accepted or denied within three days. If a claim was accepted, the investigator notified the employer who was given 14 days to pay the claim or submit a written response. If the employer failed to respond, the investigator sent a second letter to the employer who was then given 10 days to pay the claim or respond. Ninety-five percent of the claims were typically resolved in 30 to 45 days.

In January 2016, Deb Babbs became the investigators' supervisor. According to Garduno, Babbs was all about closing cases for the division that

historically had a substantial backlog of cases. She also merged the wage claim and child labor investigations. During Babbs' first year of supervision, Babbs did not evaluate Garduno or engage in any substantive performance discussions with her as a means of providing feedback. Garduno had always received a "meets" or "exceeds" expectations in her performance evaluations. In Garduno's March 3, 2017, evaluation, Babbs rated Garduno with an overall performance as "Does Not Meet Expectations." Garduno did not sign her evaluation because she had been rated on child labor investigative duties that she had not been trained to do. Thereafter, Garduno was not trained on those duties, but she was not given those responsibilities either.

As the lead worker, Harris assigned wage claims evenly to Garduno and Norman and reviewed their work. However, Harris did not assign child labor issues or denied claims to Garduno. The investigators used two template letters and a form for their case referral to legal. The three investigators met weekly with the area's attorney Mitch Mahan and Babb to discuss cases and claim questions. Claims were never put on hold and were meant to be moved forward in the investigators' processing.

In March 2017, attorney Mahan responded to Garduno's concern about his availability and explained that he spent more time with Harris because of the nature of the escalated claims that Harris processed and more time with Norman because she was new. He offered his availability when Garduno needed his legal advice. In a November 28, 2017, memo, Mahan recommended that Garduno take on the responsibility of closing her own cases. This was because Mahan

received a high percentage of her claim referrals that had not been processed and could have been immediately closed by Garduno rather than Mahan. For many cases, Garduno simply noted, “no employer response.” On November 30, 2017, written wage procedures were implemented that required all investigator correspondence, closed cases, and legal referrals to be reviewed and approved by Harris. In a subsequent email correspondence on February 15, 2018, Babbs told Garduno to “[p]lease use the exact verbiage” Harris had instructed Garduno to use in a letter.

In December 2017, IWD human resource representative, Andrea Macy, began an investigation of Garduno’s work performance issues. As part of her investigation, Macy reviewed policies and spent time to understand the underlying wage claim processing procedures. Macy interviewed Garduno on January 23 and February 27, 2018. During February, Harris reassigned 19 of Garduno’s claims to himself because they were 55 to 105 days old.

As a result of the investigation, on March 6, 2018, Garduno received a three-day suspension for failure to timely and accurately complete work from September through November 2017; providing false information regarding her contact with a claimant; and failure to follow a directive on February 15, 2018. All of which were in violation of IWD work rules. Management relied on deficiencies in over a dozen specific cases. For example, Garduno failed to meet the expected timelines for processing and would often note action on a file that she had yet to complete. Management considered terminating Garduno’s employment, but reduced the disciplinary action due to her years of service.

Garduno grieved the suspension and asserted management did not adequately convey performance expectations, obstructed her ability to perform her duties, and frequently reassigned her case files. For instance, Garduno alleged Babbs or Harris had not returned her case files, some of the cases at issue had been a point of discussion in weekly meetings and no concerns were presented, and in some cases, delay had been due to interim contact by the employer. When the State denied her grievance, Garduno did not appeal her grievance to PERB.

On January 19, 2018, during the period of management's investigation of Garduno's work performance, Garduno emailed Harris and copied Babbs, IWD Commissioner Michael Mauro and the Iowa Department of Administrative Services ("DAS" a/k/a personnel) Director Janet Phipps a list of allegations against Harris and Babbs. Among other things, Garduno alleged they harassed and intimidated her, took claims out of her office, and retaliated when she asked questions by transferring her case files. By letter dated February 27, 2018, DAS notified Garduno that its investigation of her Discrimination and Violence in the Workplace complaint was completed and the case was closed.

Following her suspension, Garduno went on family leave from March 9 through 30, 2018. When Garduno returned to work on April 2, she did not have any pending wage claims. She assumed primarily responsibility for answering the telephone. Harris assigned Garduno 14 wage claims in April, 14 wage claims in May, and 11 wage claims in June. Although Harris assigned Garduno and

Norman wage claims evenly, Norman was also assigned child labor investigations. These and denied wage claims were not assigned to Garduno.

On April 4, 2018, Babbs implemented a wage claim referral log form to be stapled on the outside of each claim file to document when the file was transferred to another person for referral or review since Garduno had alleged other people had her files. Babbs created a phone message log, on April 12 to be completed for each case since Garduno would note contacts in a file that she had not made. With Macy's assistance, Babbs provided Garduno with a list of work directives on April 23, 2018. In addition to others, the directives required lead worker Harris to review all correspondence before it was sent; and required Garduno to provide a written explanation for action dates that she had not been met. The directives clarified the requirement that the message log contained only steps taken and not those to be taken.

On June 26, 2018, Garduno was placed on administrative leave while there was an investigation conducted by Macy into Garduno's work performance. At this time, 18-19 of Garduno's claim cases were reassigned to Harris and he was able to close 6 to 7 within the next day or two. During the previous six-month period, Harris was responsible for half the wage claim cases, including the ones reassigned from Garduno. Management found deficiencies in 18 of Garduno's 35 cases. The deficiencies can be summarized as untimeliness of issuing letters; failing to obtain required approval for letters; inability to properly analyze claims and determine amounts or procedures necessary or information required to move the case forward.

Macy interviewed Garduno on August 9, 2018, and they went through each of the 18 cases. Garduno provided follow-up documentation the following day. That same day, IWD terminated Garduno's employment for poor work performance; failing to timely and accurately complete work; and failing to follow work directives in violation of the following:

IWD Work Rules

General Standards of Conduct

6. An employee must follow the instructions of their supervisor or other designated members of management at all times, unless those instructions would cause a violation of those Work Rules or other state or department policies, or pose a potential health or safety concern, in which case the employee should bring that to the attention of the next level supervisor.

9. An employee must comply with all applicable standards of conduct including, but not limited to, the Work Rules, Division and/or Bureau work rules, policies, procedures, and standard practices.

Work Performance

1. Employees are prohibited from deliberate and willful refusal to follow the written or oral instructions of supervisory authority, or to carry out work assignments.

2. Poor work is not acceptable. Employees are expected to perform their work properly and efficiently and to meet performance standards. Employees are expected to seek, accept and accurately complete assignments within deadlines and not neglect job duties and responsibilities.

Termination

Certain acts or omissions by an employee are egregious or sufficiently below the standard of conduct that IWD has a right to expect of its employees to warrant immediate termination of employment with the agency, regardless of the employee's prior performance or conduct on the job. Acts or omissions that may result in the immediate termination of employment include, but are not limited to, the following:

11. Insubordination, which includes, but is not limited to, defiance of authority, including insulting or unprofessional remarks

directed at a member of management, or intentional refusal to perform work as assigned.

For many of the cases where the action deadlines had passed, Garduno asserts the cases were ones discussed in the weekly meetings and no concerns were noted. In one case, Garduno explained a delay was due to Harris' failure to approve her second letter to the employer, but Garduno does not explain why she did not follow-up thereafter. For one case, the State alleges, according to the message log, Garduno noted "Case settled & closed" on June 18, 2018. In response, Garduno states that she presented the case for review in the weekly meeting on June 21, 2018. All of the claim files at issue were admitted into the record.

II. CONCLUSIONS OF LAW

Garduno'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 with 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.

The relevant DAS rule provides:

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.

In this case, Garduno argues there was an absence of just cause to support the State's termination of her employment. Garduno asserts she was not given sufficient notice of the expected conduct; the State did not conduct a fair investigation; there is not sufficient proof of deficiencies; and there were other mitigating circumstances which were not taken into consideration.

For the following reasons, we conclude there was just cause to support the State's termination of Garduno's employment.

Notice and reasonableness of expectations.

We are not persuaded that Garduno did not have sufficient notice of work expectations because she was not provided additional guidance and training to address performance deficiencies when she returned to work on April 2. Garduno was well aware of applicable claim deadlines that were outlined in the 2015 written procedures to move a case forward to closing. She knew and testified that the overriding goal was to close claim cases. Garduno was given notice of expected work performance when she was suspended for deficit work in over a dozen case examples in March 2018. In April, she was provided a list of work directives that gave her specific direction on processing claims. Garduno

received feedback, directly or indirectly, when her work was reviewed by Harris. She had an opportunity to get case direction in the weekly meetings.

We disagree with Garduno that management's work expectations and requirements of her were unreasonable. The State's work performance expectations of Garduno, including the directives, and the completion of the wage referral log and message log, were reasonable and necessary under the circumstances. Garduno asserts that she was "micromanaged" and we agree. However, it was necessary because of her excuses, the blame she directed at others, and her assertions of lacking direction from management. For example, Babbs created and required the wage claim referral log because Garduno asserted her delays were caused by Babbs and Harris having her files. It was reasonable for Babbs to require the phone log when Garduno noted contacts that had yet to be made. It was reasonable for Babbs to give Garduno a list of work directives in April based on the allegations Garduno made for her previous work deficiencies.

The record is replete with evidence of notice provided to Garduno of reasonable work performance expectations for timeliness and processing of wage claims.

Sufficient investigation.

The State did conduct a sufficient and fair investigation. Macy reviewed Garduno's case files and identified specific deficiencies as she had done in the previous March investigation. Macy had assisted Babbs in preparing the April 23 work directives and had previously taken time to understand claim processing

procedures. The deficiencies she identified were concrete instances such as a delay in processing or an incorrect calculation. Macy interviewed Garduno and gave her an opportunity to explain each identified deficiency in 18 cases. Garduno was also allowed an opportunity to provide other follow-up explanations or documentation. While Garduno disagrees with the outcome of the investigation, the State established that its investigation was sufficient and fair.

Sufficient proof of guilt.

Based on our review of all 18 case files and Garduno's explanation for each claimed deficiency, there is sufficient proof of Garduno's work performance deficiencies. Garduno was put on notice that she needed to move claims forward and document her action steps. It is not enough for Garduno to say she discussed the claim in their weekly meetings or Harris failed to approve a particular letter. The April 23 work directives clearly required Garduno to document the reason for failing to meet a deadline. She was also told to document only action that she had actually taken. Yet, she noted the closing of one case on June 18 and now claims that she presented the case in the weekly meeting on June 21. We think there are a few instances where Garduno's perceived performance deficiency was actually a result of miscommunication. Nonetheless, there is sufficient proof of her work performance deficiencies in the majority of the 18 cases.

Employment record and other mitigating circumstances.

We do not view the reason for Garduno's termination in the same light as Garduno. She asserts she was terminated in retaliation for her filing of the

complaint against Babbs and Harris in January 2017. We disagree. For one, Garduno did not successfully argue lack of merit in previously cited work deficiencies and the three-day suspension that came on the heels on her filing of the complaint. For another, we think her performance became an issue much earlier in time. Because of the backlog of cases, Babbs was all about closing cases when she became the area's supervisor in 2016. In 2017, it was brought to light that Garduno was not appropriately processing and closing cases. This set into motion a chain of events beginning with written procedures in November 2017, and the first investigation of her work performance in December 2017.

While Garduno claims she was harassed and micromanaged, the rest of the staff grew seemingly frustrated by her inadequate and untimely processing of claims. Her excuses for the delays and failure to document created more work for the rest of the staff. Because of her assertions, they had to implement the wage claim referral log and message log. Her cases had to be reassigned. She had to be micromanaged. Nor are we persuaded that Garduno's telephone duties unduly burdened her workload in comparison with the two other investigators Harris and Norman.

Garduno was given notice and a previous opportunity to correct her work deficiencies when she was suspended in March 2017. She was provided specific work directives that she failed to meet.

Summary.

In consideration of the totality of these circumstances, we conclude there was just cause to support the termination of Garduno's employment. We consequently propose the following:

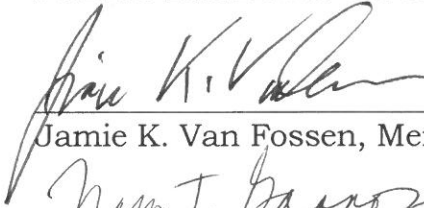
ORDER

Rosa Garduno's State merit disciplinary action appeal is DISMISSED.

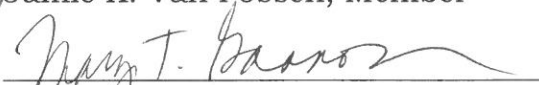
The cost of reporting and of the agency-requested transcript in the amount of \$2,335.50 are assessed against Rosa Garduno pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to Rosa Garduno in accordance with PERB subrule 11.9(3).

DATED at Des Moines, Iowa, this 22nd day of April, 2020.

PUBLIC EMPLOYMENT RELATIONS BOARD



Jamie K. Van Fossen, Member



Mary T. Gannon, Member

Original filed EDMS.