

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

TIMOTHY A. MILLIGAN,
Appellant,

and

STATE OF IOWA (DEPARTMENT
OF CORRECTIONS – IOWA STATE
PENITENTIARY),
Appellee.

CASE NO. 102259

PROPOSED DECISION AND ORDER

The Appellant, Timothy A. Milligan, filed a state employee disciplinary action appeal with the Public Employment Relations Board (PERB or Board) pursuant to Iowa Code section 8A.415(2)(b) and PERB rule 621—11.2(8A,20), alleging the one-day paper suspension imposed on him by the Iowa Department of Corrections – Iowa State Penitentiary on July 6, 2018, was not supported by just cause.

Pursuant to notice, an evidentiary hearing on the merits of the appeal was held before me on June 13, 2019. The hearing was closed to the public in accordance with section 8A.415(2)(b). Milligan represented himself pro se and attorney Henry Widen represented the State. Both parties filed post-hearing briefs, the last of which was filed on August 23, 2019.

Based upon the entirety of the record, and having reviewed and considered the parties' briefs, I conclude the State has not established just cause existed to support issuing Milligan a one-day paper suspension.

FINDINGS OF FACT

Background

The Iowa State Penitentiary (ISP), part of the Iowa Department of Corrections, is a maximum and minimum-security correctional institution located in Fort Madison, Iowa. ISP's primary facility is a maximum-security institution housing approximately 640 inmates. The facility contains three primary inmate-housing units, each housing between 220 and 260 inmates. It also contains a fourth unit housing inmates with special medical needs.

Housing Unit-3 is the least restrictive unit and houses the inmates who exhibit the best behavior and create the fewest problems. Unit-3 is the only housing unit that assigns two inmates to each cell.

Appellant, Timothy Milligan, has been an employee of the Iowa Department of Corrections assigned to ISP since 2002. Milligan started at ISP as a Correctional Officer, but in 2015, he was promoted to Senior Correctional Officer and obtained the rank of Sergeant.

The duties of a senior correctional officer involve supervising other correctional officers to ensure ISP safety and security operations, such as unit patrols, perimeter patrols, inmate transportation, and report writing are conducted safely and effectively. In addition to supervising other officers, senior correctional officers also supervise inmates to ensure they follow ISP rules and regulations and to address violations by taking appropriate corrective action.

Throughout his tenure at ISP Milligan has been regarded by management as a good, if not exceptional, employee. Prior to the one-day suspension, which

precipitated the instant appeal, Milligan had not been the recipient of any workplace discipline. The annual performance evaluations offered into evidence, which cover the three-year period from January 1, 2014, to February 28, 2017,¹ rate Milligan's performance as either meeting or exceeding expectations.

The suspension at issue in this appeal arose from Milligan's conduct in two separate, but related incidents concerning inmate A.B. on May 5, 2018. The first incident involved instructing officers to writing a major disciplinary report and the second concerned a cell extraction requiring the use of force. Thus, a brief overview of ISP's rules and procedures concerning inmate discipline and cell extractions is necessary.

When an inmate violates ISP rules, the Iowa Department of Corrections Offender Rulebook establishes three levels of disciplinary action officers can take to address the violation: they can address the violation informally, file a minor report, or file a major report. In general, an offender should receive the lowest reasonable level of disciplinary action for the type of violation. However, there are several factors officers must consider which may serve to mitigate or aggravate the level of discipline imposed. In determining the appropriate action, staff must consider the seriousness of the offense, the action necessary to facilitate change and prevent future victims, the offender's disciplinary record, and the offender's attitude and current mental health.

If an officer writes a minor report, the officer may immediately sanction an inmate. However, the inmate may request to have the report reviewed by a

¹ Evaluations for the periods after February 28, 2017, were not offered into evidence.

sergeant or captain. Upon review, the sergeant or captain will either uphold or modify the discipline, as they deem appropriate.

However, if an offender violates a major rule and an officer writes a major report, the Shift Supervisor on duty must review and approve the report. If approved, the Shift Supervisor determines whether to place the inmate in investigative segregation and an investigative sergeant investigates the report. After the investigation, a hearing is held with the inmate before an ISP Administrative Law Judge (ALJ) who makes a final decision concerning the appropriateness of the discipline.

The record shows Milligan received training on ISP's work rules and code of conduct. It also shows Milligan had a firm understanding of ISP's inmate disciplinary procedures. Specifically, in the most recent performance evaluation in the record, under "Client Supervision," Milligan was rated as "exceeding expectations" and his supervisor wrote:

"Sgt. Milligan knows very well how to use the disciplinary system as well as his discretion to gain compliance and encourage prosocial behavior from the offenders. He often takes a strong approach in his expectation of offender behavior and he is very successful in having his expectations met. While the harder approach is what he is known for, he knows when to utilize a softer approach as well and accomplishes that balance successfully. He is a consistent positive influence on offender behavior in a unit known for its unpredictability. He has succeeded where many others have struggled."

For cell extractions involving the use of force, ISP Policy IO-SC-08 defines two different use of force situations, a "planned use of force" and an

“unplanned/reactive use of force,” with different procedures applying to each situation. Planned uses of force are “Those situations, such as cell extractions, in which there is time to devise a plan and get staff and equipment in place.” A planned use of force “must be authorized by the Warden/Superintendent or designee, normally the Shift Supervisor, and carried out only under their direction.”

Conversely, unplanned/reactive uses of force are “Those situations, such as an immediate assault on your person, in which you are required to take immediate action and there isn’t time to get staff and equipment in place.” In a reactive use of force situation, “the involved staff member(s) shall notify the designated supervisor as soon as possible.”

Prior to using force, if time and circumstances permit, ISP policy requires officers to attempt alternative approaches to resolve the situation. The alternative approaches include mediation by a trained member of the Hostage Negotiation Team (HNT), the use of an experienced and skilled supervisor or staff member in the absence of an HNT, and other verbal and non-verbal de-escalation techniques. However, the policy states, “A member of the Hostage Negotiation Team will be contacted by the Shift Supervisor in a final attempt to have the offender comply with directives.”

If a planned use of force cell extraction is necessary, IO-SC-28 establishes a set of requirements the Shift Supervisor and extraction team leader must follow. The Shift Supervisor must review the situation by communicating with staff on the scene, authorize the use of a cell extraction team, assemble a

competent team of qualified personnel, and identify an extraction team leader. In addition, prior to authorizing the use of chemical agents, if feasible, the Shift Supervisor shall “check with Health Services staff to ascertain if the use of chemical agent on a particular incarcerated individual may be hazardous to that incarcerated individual’s health in any foreseeable way.” IO-SC-09(IV)(B)(2).

The duties of the extraction team leader include: briefing the Shift Supervisor; determining whether the inmate has any medical conditions preventing the use of electric or chemical agents; arranging to have the unit air handling system turned off; ensuring the extraction team is issued proper protective gear; and, when time and circumstances permit, briefing the team members about their duties prior to entering the cell.

While IO-SC-28 provides clear procedures for planned cell extractions, it provides little guidance for emergency cell extractions. For emergency cell extractions, the policy states:

In those instances where an incarcerated individual is unresponsive in his/her cell or experiencing a medical emergency the situation needs to be carefully evaluated and extreme caution needs to be taken. In a locked housing unit whether a segregation unit or general population unit in a locked and secure status, cell doors will be unlocked and opened only when a minimum of two staff are present and other staff are en route.

The record shows Milligan received annual training on the rules and procedures governing single inmate cell extractions, the use of force, and the use of chemical agents. Milligan testified that since 2009 he has been involved in more than 60 cell extractions, often as the extraction team leader. However, prior

to the events at issue in this appeal, Milligan had never received training nor experienced a cell extraction of an inmate who shared a cell with a cellmate who was not involved in the disruptive behavior.

Incidents on May 5, 2018

As noted above, the discipline at issue in this appeal involves a major disciplinary report concerning inmate A.B., which ultimately resulted in a cell extraction requiring the use of force. These incidents spawned an investigation that involved interviews of fifteen staff members and two inmates. In addition, three individuals testified at hearing, one of whom was interviewed in the course of management's investigation.

In making the following findings I have attempted to reconcile perceived conflicts in the evidence, which consists of the interviews of individuals collected during management's investigation, testimony elicited at hearing, and documents admitted at hearing. Where the evidence is not reasonably reconcilable, I have noted the discrepancies and credited that which is most reasonable and consistent with other credible evidence. In making these findings, I have considered the established criteria for the making of credibility determinations, such as the witnesses' actual knowledge of the facts, memory, interest in the outcome of the case and candor. *See Barnard & State of Iowa (Dep't of Human Servs.)*, 2017 ALJ 100758 at 3.

On the afternoon of May 5, 2018, Correctional Officers Brecount, Weakley, and Koller were watching inmates from Housing Unit-3 and Housing Unit-4 in the ISP exercise yard. The officers were standing on the inside edge of a track

used by the inmates for exercise. The track is about eight-feet wide and the officers stood partially on the grass with their backs turned to the track. Milligan was the Yard Supervisor on duty, but he was not standing with the officers at the time.

Inmate A.B., a Housing Unit-3 inmate, was walking laps around the track when the officers arrived. On five separate occasions from 2:50 P.M. to 3:06 P.M. inmate A.B. walked past the officers on the inside edge of the track, passing closely behind the officers. On A.B.'s first pass, he walked closely enough that his shirt brushed Officer Brecount's back. Brecount later reported that the brush-by put him "on guard." A.B.'s next four passes were "within a couple inches" of the officers, however, A.B. did not again physically touch any of the officers.

After A.B.'s third close pass, officer Weakley attempted to get A.B.'s attention by saying "hey, you're gettin' a little close." However, A.B. was wearing earbuds and either did not hear Weakley or chose to ignore him. After A.B.'s fifth pass, the officers left the track and sat down at a picnic table.

After the officers left the track, A.B. complained to Milligan that the officers had been standing in the middle of the track and that he had been forced to walk around the officers. Milligan went to the officers and instructed them not to block the track. However, the officers told Milligan they had stood on the edge of the track, not in the middle, and the inmates had nearly eight-feet of track with which to pass them. Milligan left the officers and had a second conversation with A.B.

After learning A.B. had complained about them, Brecount and Weakley wanted to show Milligan where they stood on the track. At 3:40 P.M., Brecount and Weakley joined Milligan in the Programs Building to review video footage of the track. As they watched, Milligan noticed during one of A.B.'s passes that A.B. had started in the middle of the track, but as he approached the officers, he intentionally stepped to the edge of the track to line up with the officers.

Seeing this, Milligan told the officers A.B.'s conduct was a problem they should have addressed in the exercise yard. Milligan believed A.B.'s intention had been to intimidate the officers so they would move off the track and that the officers should address A.B.'s misconduct by writing a major report for threats and intimidation. At the hearing, Milligan testified that A.B. has a history of assaulting officers and other inmates from behind. Milligan said A.B.'s history was, in part, why he believed his conduct required a major report. After discussing A.B.'s behavior and re-watching the video, Brecount and Weakley agreed A.B.'s intention for passing so closely had been to intimidate the officers so they would get off the track.

Officer Brecount wrote a major disciplinary report for threats and intimidation and Milligan called the Shift Supervisor, Captain Rodolfo Gonzales, to inform him of the report and recommend putting A.B. in investigative segregation. After speaking with Officer Weakley, reading the report, and reviewing the video of the track, Captain Gonzales approved the major report. Gonzales then ordered two correctional officers—Officers Shaffer and Johnson—to go to Unit-3 to escort A.B. to investigative segregation.

At 5:14 P.M., Shaffer and Johnson arrived at A.B.'s cell to escort him to investigative segregation. When Shaffer explained to A.B. why he was being taken to investigative segregation, A.B. became angry and refused to put on restraints. Shaffer, who is a trained negotiator, talked to A.B. for nine-minutes trying to convince him to comply with the order, but A.B. refused and demanded to speak with a sergeant or captain. A.B. shared his cell with a cellmate, T.C.

Milligan was in the shift supervisor's office with Captain Gonzales when Officer Johnson called and told him A.B. was noncompliant and wanted to speak to a sergeant or captain. In prior similar situations, Gonzales had sent Milligan to talk to noncompliant inmates; Milligan had managed to resolve the situations through negotiation, initiating a planned use of force had not been necessary. For this reason, Gonzales asked Milligan to talk to A.B. and see if he could gain compliance.

At 5:23 P.M., Milligan arrived at the cell front and began talking to A.B., explaining to him why he needed to put on restraints and leave the cell. Milligan said as they talked, A.B. became more agitated, started pacing back and forth, and eventually picked up a padlock and told Milligan he would fight anybody that came into the cell. As the situation escalated, Milligan grew concerned for the safety of A.B.'s cellmate, T.C., who was standing behind A.B. in the back corner of the cell. Milligan said on several occasions T.C. asked him to "get me outta here."

At 5:30 P.M., additional officers arrived at the cell front and an officer began recording the situation with a camera. While Milligan talked to A.B.,

Milligan stood with his face near the cell door's glass window. Milligan repeatedly instructed A.B. to come to the cell door and "cuff up," but A.B. refused. After multiple refusals, Milligan said, "Okay, then I'm going to have a hostage negotiator come over here and talk to you, at this point we're going way deeper than we need to and you're only making it worse." However, before Milligan could finish, A.B. threw the padlock at the cell door causing Milligan to jolt back. As A.B. attempted to pick the padlock back up Milligan administered OC pepper spray, causing A.B. to drop the lock. Milligan had not checked the status of medical conditions for either A.B. or T.C. before administering the spray and Milligan was unaware T.C. had asthma. Milligan testified it was his belief A.B. threw the lock in an attempt to break the cell door's glass window and that administering the OC pepper spray was a reactive use of force.

After spraying A.B., Milligan ordered an officer to get a NOVA shield, which is a large rectangular shield that, by pushing a button, administers an electric shock used to immobilize an inmate. ISP Policy IO-SC-28 requires a NOVA shield be used during planned use of force cell extractions. However, it states an officer is not to use the electronic portion of the shield unless an order is given by the designated extraction team leader. Moreover, the electronic portion of the shield should not be used if an inmate has a seizure disorder or heart disease. At the time, Milligan was unaware A.B. had a cardiac impairment.

A.B. began throwing a stool and ink pens at the door of the cell and Milligan said he sprayed A.B. several times to prevent him from throwing the stool. Milligan radioed Captain Gonzales and requested an extraction team. At

5:36 PM, Milligan instructed Officer Weakley, who is a trained negotiator, to talk to A.B. However, A.B. recognized Weakley and refused to talk to him.

Milligan radioed Captain Gonzales a second time to inform him that A.B. was armed, the situation was critical, and Milligan requested authorization to use a pepper ball launcher. Gonzales authorized the use of the pepper ball launcher and Milligan sent an officer to get the launcher from Master Control.²

At 5:39 P.M., the officer returned with the NOVA shield. Milligan was aware the officers were not wearing protective gear, however, according to Milligan, A.B. was swinging the stool like a club and Milligan was concerned A.B. might harm his cellmate. Milligan ordered the officers to line up behind the NOVA shield and to be prepared to enter the cell in the event an emergency entry was necessary.

While the officers were in position outside the cell, Officer Weakley arrived with the pepper ball launcher. Milligan tried twice to use the pepper ball launcher, but it failed to shoot. At this point, one of the officers told Milligan they should get protective gear.

During his interview, Milligan said there was a brief period where A.B. calmed down a little, so he sent the officers to get protective gear. It is unclear from the video of the incident whether A.B.'s behavior changed, but it shows Milligan agreed with the officer and sent five officers to Housing Unit-1 to put on protective gear. Milligan remained at the cell door with three other officers to

² ISP Policy IO-SC-28 states, "The pepper ball launcher shall only be used upon the Warden's approval." When Gonzales authorized its use, he did not yet have approval from the Warden. However, the record shows Milligan was unaware Gonzales did not have approval to authorize use of the pepper ball launcher.

monitor the situation and continue talking to A.B. While the five officers were gone, one of the officers at the cell front fixed the pepper ball launcher.

Milligan talked to A.B. for twelve-minutes until the five officers returned from Housing Unit-1. The five officers were in full protective gear except they were not wearing gas masks. Milligan realized the officers did not have gas masks, however, he believed it was necessary to get T.C. out of the cell and that it would take too long to send the officers back to Unit-1 to get masks. ISP policy IO-SC-09 states, "Properly fitted and tested protective masks are [to be] worn by all staff likely to come in contact with chemical agents other than OC/Pepper Spray." The only chemical Milligan administered into the cell was OC pepper spray.

Milligan testified that he believed the situation was critical and that it was necessary to enter the cell immediately. As soon as the officers arrived at the cell front, Milligan ordered them to line up, choosing not to brief the officers on their individual duties during the extraction. Milligan then fired the pepper ball launcher at A.B.'s legs causing A.B. to drop the stool he was wielding and the extraction team entered the cell. Milligan never ordered the officers to use the electronic portion of the NOVA shield and the record is absent evidence it was used during the cell extraction.

It took approximately 43-seconds for the team to subdue A.B., put him in restraints, and remove him from the cell. The officers escorted A.B. to Unit-1, where he was offered water for decontamination, but A.B. refused to

decontaminate. The officers then took A.B. to a segregation cell and placed him in body restraints.

ISP policy requires all uses of force incidents be documented in a report, which is reviewed by the Associate Warden of Security (AWS), John Fedler, to ensure proper procedures were followed and to determine whether further investigation is necessary. Fedler testified that when he reviewed the incident, he noticed the officers were not initially wearing protective gear and that Milligan used the pepper ball launcher without approval from the Warden. For these reasons, Fedler assigned Major David Rhodes and Investigator Randy VanWye to investigate the incident.

Rhodes and VanWye reviewed video from the exercise yard and Unit-3 and conducted interviews with the individuals involved in the incident from May 9 to May 17, 2018. On May 17, Rhodes and VanWye interviewed Milligan and questioned him about instructing the major disciplinary report and cell extraction.

During the interview, Milligan explained his reasoning for instructing the report and he said administering the OC pepper spray was a reactive use of force. Milligan told the investigators he believed the situation became an emergency because A.B. could have harmed T.C. either intentionally or unintentionally and that he did not have time to follow the planned use of force procedures. During the interview Major Rhodes disagreed, stating the planned use of force began, or should have begun, when Milligan first learned A.B. was refusing to comply.

Rhodes also said there was no evidence that T.C. was in danger and Milligan should have followed a planned use of force.

On June 4, 2018, VanWye submitted a report detailing their findings to a review committee consisting of the Warden, the Deputy Warden, and AWS Fedler. The committee reviewed the officers' statements, the video footage, the investigators' report, and ISP work rules and policies and made the determination that Milligan should receive a one-day paper suspension as a result of his actions on May 5, 2018.

On July 6, 2018, Fedler issued Milligan a letter advising him he was receiving a one-day paper suspension, stating in relevant part:

An investigatory interview was held with you on May 17, 2018 to discuss your actions during an incident with Offender [A.B.] on May 5, 2018. The investigation determined that your actions during this incident were unacceptable and inadequate.

Your actions violated Iowa DOC Policy AD-PR-11 General Rules of Employee Conduct, as follows:

C. Code of Conduct

#2 – Employees are charged with the responsibility of complying with IDOC's, Institution, and Judicial District Department's work rules, orders, policies and procedures, along with municipal, county, state and federal laws, and the applicable rules of regulatory agencies that apply to them.

#3 – Employees are expected to be familiar with their job description, essential functions, performance standards and job duties. Employees are expected to perform their duties in an impartial manner.

E. Personal Ethics

#1 – Employees shall conduct themselves in a professional manner that creates and maintains respect for the IDOC and the individuals served.

#4 – Employees shall obey all applicable federal, state, and local laws and the policies of the IDOC, institutions, or judicial districts.

H. Professional Demeanor

#1 – Employees shall treat other employees, offenders, guests, visitors and the public with respect, courtesy and fairness.

#3 – Employees shall control offender behavior using only the force necessary to defend yourself, another person, property, or to prevent an escape. Any use of physical force shall be reported and documented in accordance with departmental policy.

#4 – Employees shall correct offender behavior using the appropriate level of corrective action when an offender fails to follow rules and regulations.

K. Security

#1 – Employees shall respond and contain emergency situations as quickly and safely as possible using available personnel, skills and resources and following all institution/facility directions.

Your actions were also in violation of Iowa DOC Policy IO-SC-08 Use of Force; Iowa DOC Policy IO-SC-09 Use of Chemical Agents; and Iowa DOC Policy IO-SC-28 Cell Extractions.

At the hearing, Fedler testified that ISP also disciplined Captain Gonzales for his actions during these incidents. On September 28, 2018, following the third-step grievance, the Department of Administrative Services (DAS) Director's designee denied Milligan's grievance concluding the one-day paper suspension was supported by just cause. On October 25, 2018, Milligan filed the present appeal.

CONCLUSIONS OF LAW

Milligan filed this appeal 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 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 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 shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal of a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

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 of Iowa (Dep't of Human Servs.)*, 05-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 & State of Iowa (Dep't of Human Servs.)*, 01-MA-03 at 13-14. In analyzing the totality of circumstances, examples of factors that 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 & State of Iowa (Dep't of Transp.), 09-MA-01 at 16-17.

PERB also considers the treatment afforded other, similarly situated employees relevant to a just cause determination. See *Woods & State of Iowa (Dep't of Inspects. and Appeals)*, 03-MA-01 at 2. All employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for a difference in the penalty imposed. *Id.*

A preliminary issue in this case concerns the stated reasons for Milligan's discipline. As required by Iowa Code section 8A.413(19)(b), DAS subrule 11—60.2(1)(b) requires the State to provide the employee being disciplined with a written statement of the reasons for the discipline. PERB has long held that the presence or absence of just cause must be determined upon the stated reasons in the disciplinary letter alone. *See Eaves & State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14; *see also, Hunsaker & State of Iowa (Dep't of Emp't Servs.)*, 90-MA-13 at p. 46, n. 27.

The reasons for Milligan's discipline contained in the suspension letter are that he violated eight DOC General Rules of Employee Conduct and three DOC security policies when, on May 5, 2018, "[Milligan's] actions during an incident with Offender [A.B.]...were unacceptable and inadequate." The suspension letter does not specify which of Milligan's actions were allegedly "unacceptable and inadequate" nor how those actions allegedly violated the work rules. Although the disciplinary notice is no model of clarity, at the hearing, AWS Fedler provided greater insight concerning the specific actions the review committee concluded were "unacceptable and inadequate." Fedler explained, first, Milligan exhibited bad judgment when he instructed the officers to write a major disciplinary report and second, Milligan failed to follow the planned use of force procedures during A.B.'s cell extraction.

One could surely regard the absence of greater specificity in the suspension letter as a failure to adequately communicate the reasons for the discipline to Milligan. However, even assuming the reasons contained in the

letter were adequate, other considerations relevant to a just cause determination warrant the conclusion that the State has not established just cause for Milligan's one-day paper suspension. The alleged violations to which AWS Fedler testified will be addressed independently and in succession, beginning with Milligan's alleged poor judgment instructing the officers to write the major disciplinary report followed by Milligan's alleged failure to follow planned use of force procedures during the cell extraction.

Alleged poor judgment instructing the major report

Milligan did not have foreknowledge or forewarning that his actions could result in discipline and the State did not assess discipline consistently.

First, it is important to note that the State has not alleged, nor does the evidence suggest, Milligan had an improper motive for instructing the officers to write the major report or that the instruction was made in bad faith. Those facts would present a different case.

Rather, the State argues that it was "bad judgment" for Milligan to instruct the officers to write the major report because the officers did not feel threatened by A.B.'s conduct and the situation could have been handled with lesser discipline. In this case, it is unnecessary to determine whether the major report was the appropriate level of discipline for A.B.'s conduct because ISP failed to forewarn Milligan that writing or instructing a report in good faith could subject him to discipline.

An important consideration when determining the existence or absence of just cause is whether the employer provided the employee with notice of the

possible or probable consequences resulting from specific conduct. Arbitrators have generally held that, to be enforceable, a rule must clearly and unambiguously establish the scope of prohibited conduct as well as the consequences of violations. See Norman Brand, *Discipline and Discharge in Arbitration*, BNA Books, 1998, p. 79. Further, for employees to have actual notice of an employer's expectations, the employer must generally enforce rules and assess discipline in a consistent manner. *Id.* PERB has long held that "employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for a difference in the penalty imposed." See *Woods & State of Iowa (Dep't of Inspects. and Appeals)*, 03-MA-01 at 2.

ISP Rule AD-PR-11(H)(4), states, "Employees shall correct offender behavior using the appropriate level of corrective action when an offender fails to follow rules and regulations." As discussed in the Findings of Fact, in order to determine the "appropriate" level of corrective action, the DOC Offender Rulebook instructs officers to evaluate an inmate's behavior, determine if rules were violated, and weigh six factors which "may serve to mitigate or aggravate the level of discipline imposed." These determinations, by their very nature, are often difficult decisions upon which reasonable minds may disagree.

Because the decisions are difficult, the DOC Offender Rulebook does not give final disciplinary authority to officers, rather, it requires all major reports to be approved by a shift supervisor, investigated by a sergeant, and reviewed by an ISP ALJ. At each step, the report can be denied or modified, as management deems appropriate. In this case, Milligan followed the proper procedures as

Captain Gonzales reviewed and approved the report. However, while the Rulebook notifies employees that management may deny or modify their recommended discipline, nothing in the written procedures notifies officers that, should management disagree with an officer's good faith report, the officer him or herself could be subject to disciplinary action.

In addition to the lack of written notice, Milligan's recent performance evaluation shows Milligan "was known for" his "strong" and "harder approach" in his expectation of offender behavior and use of the disciplinary system. However, despite management's awareness of Milligan's "harder approach," in his 17-year career at ISP, Milligan was never coached, counseled, disciplined, or otherwise notified that his approach could subject him to discipline. Rather, Milligan's supervisor praised Milligan's use of the disciplinary system, writing:

Sgt. Milligan knows very well how to use the disciplinary system as well as his discretion to gain compliance and encourage prosocial behavior from the offenders. He often takes a strong approach in his expectation of offender behavior and he is very successful in having his expectations met...He is a consistent positive influence on offender behavior...He has succeeded where many others have struggled.

Finally, the record is absent evidence that the State has applied its current interpretation of AD-PR-11(H)(4) to other employees in similar situations. At the hearing, Milligan submitted into evidence records of several major reports written by officers that ISP ALJs later reduced to minor reports. Milligan testified that, to his knowledge, ISP did not investigate nor discipline the officers who wrote the reports.

Although Milligan does not have direct knowledge of ISP's employee disciplinary records—and his testimony on the subject was given limited weight—the burden is on the State to establish just cause. Thus, it is the State's burden to provide evidence demonstrating consistent enforcement of its work rules and assessment of discipline. The record is absent of any such evidence.

In its post hearing brief, the State implicitly acknowledging Milligan's disparate discipline, but argued there was a reasonable basis for his discipline, stating:

[Milligan] did not receive the discipline simply because the report which he suggested the newer COs file was incorrectly submitted as a major report, but rather due to the numerous bad judgment calls and violations of ISP rules and procedures which ultimately occurred as a result of the major report.

The State's argument is unpersuasive. As will be discussed in the next section, the State has failed to prove Milligan's actions during the cell extraction violated ISP's security policies. Therefore, the alleged "numerous bad judgment calls and violations of ISP rules and procedures" do not provide a reasonable basis for disparately disciplining Milligan for instructing the major report.

Accordingly, the record shows Milligan did not have foreknowledge or forewarning that instructing the officers to write a major disciplinary report would subject him to discipline. As sufficient notice and consistent treatment are necessary factors to establish just cause, it is unnecessary to address other potentially relevant factors with regard to this alleged violation.

Alleged failure to follow planned use of force procedures

The State has not provided sufficient proof Milligan's actions during A.B.'s cell extraction violated DOC Policies IO-SC-08–Use of Force, IO-SC-09–Use of Chemical Agents, or IO-SC-28–Cell Extractions.

The State argues A.B.'s cell extraction should have been a planned use of force and that, as the extraction team leader, Milligan violated ISP's security policies when he failed to follow the planned use of force procedures. Specifically, at the hearing, the State argued the situation became, or should have become, a planned use of force when the escort officers first informed Milligan that A.B. was refusing to leave his cell. At that point, the state argues, Milligan was required to brief the Shift Supervisor, get authorization to use force, send a negotiator to A.B.'s cell, contact the medical department, assemble and equip an extraction team, and brief the extraction team on their duties prior to entering the cell. However, Milligan failed to do so.

In addition, the State argues Milligan's use of chemical agents was not "reactive" and the situation was not an emergency because, in its view, T.C. was not actually in danger. Finally, at various points, the State has argued Milligan violated the rules because the extraction team did not wear gas masks, he did not brief the team before entering the cell, and he did not order the officer using the NOVA Shield not use the electronic immobilizing function. The State's arguments will be addressed in succession.

To begin, the undersigned agrees with the State that the situation at A.B.'s cell front likely would have been less chaotic had Gonzales and Milligan initiated

a planned use of force as soon as they received the call from the escort team. However, the problem with the State's argument is that the record shows Gonzales never authorized a planned use of force.

IO-SC-08(B)(3) states that a planned use of force must be authorized by the Warden or Shift Supervisor and carried out only under their direction. In this case, the record shows after Milligan and Gonzales were told A.B. was refusing to comply and wanted to speak with a sergeant or captain, Gonzales sent Milligan to talk to A.B. to try to gain compliance. Gonzales's order was not inconsistent with ISP security procedures—as IO-SC-08 allows sending a “skilled supervisor or staff member” to talk to an inmate prior to using force—and Milligan complied with his supervisor's order. Thus, Gonzales did not authorize a planned use of force prior to sending Milligan to A.B.'s cell front.

As Gonzales never authorized a planned use of force, Milligan was not required to follow the planned use of force procedures before going to A.B.'s cell front. Specifically, Milligan was not required to brief Gonzales, to contact the medical department to see if the inmates had any health conditions, nor assemble and equip an extraction team. Accordingly, the record shows Milligan did not violate the planned use of force procedures before arriving at A.B.'s cell front.

Concerning the State's argument that Milligan's use of chemical agents was not “reactive,” the undersigned disagrees. The record shows after arriving at the cell front and attempting to negotiate with A.B. for several minutes, Milligan said, “Okay, then I'm going to have a hostage negotiator come over here and talk

to you,” which is the first step in a planned use of force cell extraction. However, as Milligan was talking, A.B. forcefully threw a padlock at the cell door causing Milligan to jolt back, and when A.B. tried to pick it back up, Milligan administered the OC pepper spray.

IO-SC-08 authorizes officers to use reasonable force to prevent the serious destruction of property or physical harm to staff or offenders. When A.B. threw the lock, Milligan testified he believed A.B. was attempting to break the cell door’s glass window, which is a destruction of property that could lead to injury, and that spraying A.B. was an appropriate reactive use of force. Moreover, at the hearing, when asked whether he would have sprayed A.B. under these circumstances, Major David Rhodes stated, “I may have gave a chemical agent at that time.”

Milligan’s explanation for administering the OC pepper spray has remained consistent and is supported by the video evidence in the record. For these reasons, I find Milligan’s explanation credible. Moreover, Major Rhodes agreed that, under those circumstances, he might also have administered chemical agents as a reactive use of force. For these reasons, I conclude Milligan’s use of the OC pepper spray was a reactive use of force to prevent A.B. from throwing the padlock and possibly breaking the cell door window. As Milligan’s use of chemical agents was reactive, and Milligan was not required to check T.C.’s health status prior to its use, I conclude Milligan’s use of chemical agents did not violate ISP’s work rules and security procedures.

Next, the State argues that the situation was not an emergency and that Milligan should have left the cell front and followed the planned use of force procedures. Specifically, the State argues that, in its view, the evidence does not show T.C. was in danger of harm, Milligan did not need to remain at the cell front, and Milligan should not have put officers in formation without protective gear.

In this case, we cannot know what would have occurred had Milligan left the cell front to follow all planned use of force procedures. While it is possible, as the State argues, that T.C. would have been fine, it is also possible A.B. could have further escalated the situation and attempted to harm T.C.

While the record shows A.B. was directing his threats at the staff during the incident, it also shows he was repeatedly shouting that someone would die, that he was willing to die, and he was swinging a stool and throwing items. The situation was volatile and unpredictable and Milligan was required to make quick assessments and difficult decisions. Further, the record shows that neither Milligan nor Captain Gonzales had ever encountered a two-inmate cell extraction with an innocent cellmate and ISP did not train staff on what to do in this situation. Thus, Milligan had to make these difficult assessments and decisions without clear guidance or training.

Under these circumstances, I conclude it was reasonable for Milligan to fear, and want to prevent, a worst-case scenario, wherein A.B. either intentionally assaulted or inadvertently struck T.C. Milligan's concern that the situation could further escalate into an emergency is credible, rational, and has

support in the evidence of record. For these reasons, I conclude that Milligan's decision to remain at the cell front and have a team ready to enter in the event of an emergency was reasonable and consistent with ISP's emergency extraction procedures.

Finally, turning to the State's arguments that Milligan violated ISP rules and procedures by (1) failing to ensure the extraction team had gas masks, (2) failing to brief the extraction team before entering the cell, and (3) failing to instruct the officer with the NOVA Shield not to use the electronic immobilizer, the State's arguments are unsupported.

First, ISP policy IO-SC-09 states, "Properly fitted and tested protective masks are [to be] worn by all staff likely to come into contact with chemical agents other than OC/Pepper Spray." In this case, the only chemical agents Milligan administered into the cell were OC based chemical agents. Further, as discussed above, Milligan's assessment that he needed to remove T.C. from the cell immediately and there was not time to send the officers back to Housing Unit-1 to get gas masks was reasonable. For these reasons, I conclude it was not a violation of ISP procedures to send the officers into the cell without gas masks.

Second, with regard to not briefing the extraction team, ISP policy IO-SC-28(C)(1)(h) states that the extraction team leader shall "Brief Team members on video tape, where time and circumstances permit." As discussed above, Milligan's belief that T.C. was in danger of harm was reasonable. Further, after administering the OC pepper spray, it was reasonable to want to remove T.C. from the cell as quickly as possible. Under these circumstances, I conclude

Milligan's assessment that time and circumstances did not permit briefing the extraction team was reasonable and not a violation of ISP procedures.

Finally, with regard to failing to instruct the officer with the NOVA shield to not use the electronic immobilizer, IO-SC-28(C)(2)(g)(2) states, "If the order is given by the designated team leader to use the electronic restraining device (the NOVA Shield), the incarcerated individual shall be so informed and warned" (Parentheticals added). Thus, under ISP's rules, officers only have the authority to use the electronic immobilizer if the extraction team leader orders its use. Therefore, the rules do not require an extraction team leader to order officers *not* to use it, because, absent an order, officers do not have the authority to use the electronic immobilizer. In this case, consistent with IO-SC-28(C)(2)(g)(2), Milligan never ordered the officer to use the electronic immobilizer. Accordingly, I conclude Milligan's actions were consistent with ISP procedures.

As the record shows Gonzales never authorized a planned use of force, Milligan's use of chemical agents was "reactive," and Milligan's assessment that the volatile situation could become an emergency was credible, reasonable, and has support in the record, I conclude the State has not provided sufficient proof Milligan's failure to follow planned use of force procedures during A.B.'s cell extraction violated ISP's work rules and security policies. In consideration of the totality of these circumstances, there was not just cause to support the issuance of the one-day paper suspension. I consequently propose the following:


ORDER

The State shall rescind and remove the original and all copies of the July 6, 2018, notification of Timothy Milligan's one-day paper suspension, as well as any other documentation of the suspension, from all personnel files maintained concerning Milligan.

The costs of reporting and of the agency-requested transcript in the amount of \$1,194.20 are assessed against the Appellee, State of Iowa (Department of Corrections), pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellee in accordance with PERB subrule 11.9(3).

The proposed decision and order will become PERB's final agency action on the merits of Milligan'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 12th day of May, 2020.


Patrick B. Thomas
Administrative Law Judge

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