

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

DEREK KROGMAN,)	
Appellant,)	
)	
and)	CASE NO. 102276
)	
STATE OF IOWA (DEPARTMENT OF)	
HUMAN SERVICES-WOODWARD)	
RESOURCE CENTER),)	
Appellee.)	

DECISION AND ORDER

This case is before the Public Employment Relations Board (PERB or Board) on Appellant Derek Krogman’s petition for review of a proposed decision and order issued by an administrative law judge (ALJ) following an evidentiary hearing on Krogman’s Iowa Code section 8A.415(2) State employee disciplinary action appeal. Krogman filed his appeal challenging the State’s termination of his employment as a Residential Treatment Worker (RTW) for the State of Iowa, Department of Human Services (DHS), Woodward Resource Center (WRC). The State alleged Krogman had violated DHS standards of conduct and work rules with respect to an individual in WRC’s care. In her proposed decision issued March 4, 2020, the ALJ concluded the State had established just cause supported its termination of Krogman’s employment.

Due to COVID-19, oral arguments were delayed to November 17, 2020. Prior to oral arguments, Krogman filed a brief for the Board’s review and the State relied on its post-hearing brief. Attorney Nathan Reckman

for the State, and attorney Charles Gribble for Krogman, telephonically presented oral arguments to the Board.

Pursuant to Iowa Code section 17A.15(3), on appeal from an ALJ's proposed decision, we possess all powers that we would have possessed had we elected, pursuant to PERB rule 621–2.1(20), to preside at the evidentiary hearing in the place of the ALJ. Pursuant to PERB rules 621–11.8(8A,20) and 621–9.5(17A,20), on this petition for review we have utilized the record as submitted to the ALJ.

Based upon our review of this record, as well as the parties' briefs and oral arguments, we adopt the ALJ's findings of fact with an addition and we adopt the ALJ's conclusions with additional discussion. We concur with the ALJ and conclude the State established just cause supported its termination of Krogman's employment.

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 addition:

Altman was interviewed by the investigator at 6:01 p.m. on the day of the incident, October 20. In Altman's account of the incident, she described hearing a "smacking noise." As Altman rounded the corner leaving the office, she "heard the same smacking noise again" and saw a man standing behind the individual who was in WRC's care. Altman reported in part, "The male's right hand was up in the air his arm was out

at shoulder level his hand was open fingers pointing out. His left hand was to his side.”

As reflected in Altman’s witness statement, she ordered the man to her office. Once there, Krogman identified himself to Altman then stated, “Please don’t turn me in, I won’t hit her again.” After Altman stated that she needed to follow procedures, Krogman stated, “I can get fired don’t turn me in.”

CONCLUSIONS OF LAW

We agree with the ALJ’s conclusions as set out in Appendix A and adopt them as our own, with the following additional discussion:

On review, Krogman argues that progressive discipline should apply under the circumstances and termination is too severe of a penalty for his actions. We are not persuaded by Krogman’s assertions and concur with the ALJ’s reasons for concluding the State established just cause supported its termination of Krogman’s employment. Despite Krogman’s lengthy employment history, the ALJ determined the State was justified in foregoing progressive discipline given the “severity of the incident at issue coupled with the nature of Krogman’s relationship with the individual.” We agree.

In some cases, the underlying offense may be so serious or egregious that progressive discipline is inapplicable. *Wilkerson-Moore & State (Dep’t of Human Servs.)*, 2018 PERB 100788 at App. 20 (misuse of funds); *Woods & State (Dep’t of Inspection & Appeals)*, 2003 MA 01 (PERB) at 17 (grievant

transmitted and received explicit material as a supervisor); and *Hoffman & State (Dep't of Transp.)*, 1993 MA 21 (PERB) at 26 (in supervisory role, grievant sent rude and disrespectful letter to the public). Such is the case here when Krogman's underlying offense is so serious that progressive discipline is inapplicable. Krogman slapped a dependent elderly non-verbal woman not once, but twice. The slaps were of a force that were loud enough to be heard outside of the room where Krogman was present. The woman was entrusted to Krogman's care.

For the reasons set out in the ALJ's decision, including what we emphasize here, Krogman's case is distinguishable from other cases cited by Krogman where progressive discipline was applicable and lesser discipline imposed. Krogman's conduct constitutes a serious offense where progressive discipline is not applicable. After considering the totality of circumstances, we agree with the ALJ that the State established just cause supported its termination of Krogman's employment.

Accordingly, we enter the following:

ORDER

Krogman's Iowa Code section 8A.415(2) State employee disciplinary action appeal is DISMISSED.

The cost of reporting and of the agency-requested transcript in the amount of \$942.00 are assessed against the appellant, Derek Krogman, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9(20). A bill

of costs will be issued to Derek Krogman in accordance with PERB subrule 11.9(3).

This decision constitutes final agency action.

DATED at Des Moines, Iowa, this 29th day of April, 2021.

PUBLIC EMPLOYMENT RELATIONS BOARD



Mary T. Gannon, Board Member



Erik M. Helland, Board Member

Original filed EDMS.

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

DEREK KROGMAN, Appellant,	}	CASE NO. 102276
and		PROPOSED DECISION AND ORDER
STATE OF IOWA (DEPARTMENT OF HUMAN SERVICES-WOODWARD RESOURCE CENTER), Appellee.		

Appellant, Derek Krogman, 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. Krogman appeals the third-step response of the Iowa Department of Administrative Services (DAS) denying his termination appeal.

Krogman worked as a Residential Treatment Worker (RTW) for the State of Iowa, Department of Human Services (DHS), Woodward Resource Center (WRC). Krogman alleges the State did not have just cause to terminate his employment on October 26, 2018. The State denies Krogman’s termination was not supported by just cause.

A closed, evidentiary hearing was held on September 17, 2019. Blake Parker represented Krogman. Alla Mintzer Zaprudsky represented the State. The parties submitted post-hearing briefs on October 30, 2019. After considering the evidence and arguments of the parties, I propose the following:

FINDINGS OF FACT

Krogman worked for the State for over twenty-three years, and has worked as an RTW at WRC for over twenty years. WRC works with individuals with intellectual disabilities. WRC serves 132 individuals living on campus and 40 to 45 individuals who live in community settings. The on-campus community at Woodward includes 11 houses. Krogman worked almost his entire tenure for WRC, but did briefly work at the mailroom in Des Moines, while still employed with DHS.

RTWs at WRC provide a variety of different care for individuals, including assistance with hygiene, diet, and behavioral needs. The individuals at WRC have a wide range of abilities. Some are able to feed themselves, others are not. Some are able to talk and others are not. Some of the individuals can walk or walk with assistance, while others are wheel chair bound. RTWs receive training on different aspects of job duties and responsibilities including training on the implementation of Behavior Support Plans (BSPs), that are developed by an interdisciplinary team of doctors, nurses, supervisors, treatment program managers, psychologists, RTWs, and psychiatrists. WRC expects the staff to follow the BSPs when taking care of an individual.

The RTWs, including Krogman, receive annual training about the Incident Management Policy. This policy describes types of abuse, exploitation, neglect, appropriate contact, and reporting. The Incident Management Policy training that Krogman received specifically provided that abuse shall not be tolerated. The training defined physical abuse as “Any act that causes or may have caused

injury to an individual.” The training further added that “All persons who provide services to individuals as employees . . . shall treat people with dignity, respect, and concern for safety.” The materials asserted that an employee in violation of the Incident Management policy is subject to discipline or termination, whichever applies.

WRC also annually trained RTWs, including Krogman, about the Mandt system. The Mandt system teaches staff the appropriate techniques for caring for individuals. Mandt is a comprehensive system that discusses how to prevent interfering behaviors, how to redirect an individual, and as a last resort how to intervene to keep the person safe. Under the Mandt system, physical intervention is a last resort, only to be used to prevent an individual from physically harming themselves or others. Krogman acknowledged that staff have frequent discussions about blocking and redirecting.

WRC staff were trained to intervene primarily by occupying a person’s hands. If the individual was doing something harmful, the RTW would block the individual. A redirect and block could include holding an individual’s hand and moving it down. Redirection involves keeping the person’s hands busy with something else.

WRC expects RTWs to not only follow the BSP, but also to maintain data sheets that list an individual’s needs, programming, and other information so the staff can prepare for working with the individuals within their care. Each individual at WRC has a data sheet. These data sheets may have early warning signs to watch for if a person is nonverbal. On the backside of the data sheets is

an area for signatures. The RTW assigned to work with an individual signs the data sheet to assume accountability. The staff are to have the data sheets of the individuals with them as they work.

In Krogman's twenty-plus years with the State, Krogman only had one evaluation in which he did not meet expectations in one category of that evaluation due to unscheduled absences. In 2013 and 2014, Krogman received discipline for attendance issues. In evaluations, Krogman's supervisors stated, "Derek's calm demeanor serves as a role model to the individuals he supports. Derek genuinely cares about the individuals he supports." In another evaluation management stated, "Derek knows the individuals well and has formed relationships with them enabling them to trust him. He remains calm during difficult situations and gets along with his peers." Even after his termination, Krogman's peers stated that Krogman was a hard worker that cared for the individuals at WRC and treated them with dignity and respect. They reiterated that despite difficult situations such as being struck, Krogman did not lose his temper, but maintained professionalism.

Krogman acknowledged in 2017 that he received the DHS Handbook and acknowledged in 2018 that he received the State of Iowa Employee Handbook.

Krogman worked at the house at 108 Franklin at WRC for over 10 years. House 108 Franklin is a 6,200 square foot house. The house accommodates both women and men. The individuals residing at House 108 Franklin have intellectual challenges, and many of the individuals are medically fragile with

lots of medical needs. The house has a few critical-care individuals. Most of the individuals require assistance in day-to-day activities.

The incident at issue in this case occurred on October 20, 2018, and involved an individual residing at 108 Franklin, Individual BO. At the time of the incident, Individual BO was an 85-year-old female with anxiety disorder and severe intellectual disability. This individual had self-injurious behavior (SIB). The BSP indicates that she would yell, scream, act restlessly, and have an inability to relax if agitated. This individual may not react in a typical way or could have a reaction counter to what is expected in certain situations. Individual BO does not talk, but does make noises and likes to hug people. She walks by herself, but with a gait belt. This individual likes to walk and prior to her limited mobility, she was known to escape. She engages in SIB when peers are loud or she is not feeling well. This individual's BSP states that the appropriate redirection for her is to place her hands in her lap or her pockets.

Although not in her support plan, Krogman and other staff noted that Individual BO frequently spits in her hand and rubs it in her hair. Staff noted that asking this individual to stop may be ineffectual, so it may be necessary to redirect her hands to keep them busy with something else.

On Sunday, October 20, 2018, Krogman worked the evening shift from 1:45 p.m. to 10:15 p.m. When arriving at work Krogman would typically talk to the morning staff to see how the day was going and then he would sign the data sheets to take accountability for the individuals he would be working with that

day. Krogman normally did activities with individuals, got them ready for dinner, assisted with dinner, and then did showers.

Earlier on this particular evening, Krogman assisted with supper. He helped the individuals he was accountable for with toileting. He assisted Individual BO with a shower. After the shower, he helped her dry off, get dressed, and do treatments. He then escorted her to the dining room.

Individual BO was sitting in the dining room with another female that resides at the house when Treatment Program Manager (TPM), Ruth Altman entered 108 Franklin. Altman does not normally supervise this house, but came in to the house to do rounds. She was the assigned TPM for various houses that day.

Altman entered the house through the kitchen, and said hello, but no one was in the room. Altman then entered the dining room and saw the two individuals, one of whom was Individual BO. Altman said hello to the individuals. She exited the dining room into a hallway and then entered the office to check which staff member was assigned to take accountability for each individual that shift. The office was approximately 10-15 feet away from the dining room, but did not have a direct view into the dining room. Altman left the office door open.

At the time Altman was in the office, Krogman was in the dining room with the two individuals, including Individual BO. Krogman saw Individual BO spitting in her hand and putting it in her hair. Krogman then slapped Individual BO's hand or wrist twice. Krogman claims he slapped Individual BO's hand

lightly. However, Altman heard the slap from the office approximately 10-15 feet away.

Altman stated the first slap was loud enough to draw her attention. She stopped what she was doing and went to see what was happening when she heard a second slap. When Altman entered the dining room, she saw Krogman standing near Individual BO. Altman could not see Individual BO's face, as the individual had her back toward Altman, and was facing the window.

Upon arriving at the scene, Altman told Krogman to go to the office. He immediately complied. Individual BO was making noises, but Altman could not characterize the type of noises she was making. The other person in the room did not seem to be acting as though the incident had any effect on her. No other staff member was close by in the building during the incident.

Altman went into the office with Krogman. Altman stated that when she talked to Krogman, he asked her not to turn him in because he did not want to be fired. She told him she had to follow procedures.

Altman contacted the nurse so the nurse could do an assessment of Individual BO. Altman then transferred care of the individuals assigned to Krogman to other staff members.

Altman then notified the administrative officer on duty (AOD) about the situation. The AOD called the WRC investigation team. Krogman was told to wait in a different building. Krogman waited three hours before being interviewed.

A nurse completed an assessment of Individual BO within an hour of the incident.¹ She found no bruising or swelling. She also noted that there was no pain and the individual was not aggressive, anxious, restless, irritable, or uncooperative. Individual BO was happy and laughing while vitals and the assessment were completed. The individual hugged the nurse and verbalized as usual. The other staff on duty that evening reiterated the nurse's findings that Individual BO was smiling, laughing, and being her normal self.

WRC began its investigation into the incident that night. The investigations coordinator assigned Brian Strait to investigate potential abuse. Strait interviewed Altman within an hour of the incident because the investigations coordinator sent her in first. Strait also interviewed Krogman that night. After these initial interviews, Strait interviewed the responding resident treatment supervisors and the TPM for the house. A couple days later, Strait interviewed the other staff working in the house the evening of October 20. Strait did not take notes nor record any of the interviews, but typed the statements and then had the interviewee review the document for accuracy before the interviewee signed the document.

Strait did not interview Individual BO or the other individual that was in the room at the time of the incident. He also did not observe these individuals. Strait contends these two individuals would not be able to contribute to the

¹ Altman contends she told the nurse to do a check of the individual, but the original nurse's report said Altman told her to check Individual BO's scalp. At the direction of the investigator, the nurse completed another assessment of the individual a few hours later, checking the individual's hands and wrists to determine if there was an injury.

investigation as neither could communicate in the forms of questions and answers. Strait also commented that Individual BO would not have a typical reaction if she were upset.

During Strait's interview of Krogman, Krogman claims he said something to Individual BO about spitting in her hair and then he slapped her hand or wrist. Krogman said it was an honest mistake. He told Strait that in all his years he has never neglected or abused anybody. When asked why he slapped Individual BO, Krogman reportedly replied, "Honestly I don't know. I had a break down or something like that I don't typically do that."

Other staff members that saw Krogman before the incident said Krogman behaved normally. Staff members also said that Individual BO was acting normally when they saw her before and after the incident. Staff members described Krogman as calm prior to the incident.

Strait did not review Krogman's personnel file as part of the investigation. Strait's primary focus was whether abuse occurred, not whether an employee should be disciplined. Strait reviewed a diagram of the house, the nurse's report, event log entries, behavior and individual support plans, training records of the staff, and the interviews when making a determination. Strait determined the physical abuse allegation was founded pursuant to the Incident Management Policy's definition of abuse. Strait made no recommendation on Krogman's employment status.

Strait provided his report to the Incident Review Committee. This committee is comprised of management-level staff and department heads who

review the investigation, determine if other interviews need to be conducted, and determine whether they would review if they disagreed with the investigator's findings. Neither Strait nor Altman were included in this committee.

After reviewing Strait's report as well as Krogman's personnel file, Marsha Edgington, the WRC superintendent, determined that termination was the appropriate discipline in this case. Upon reviewing Krogman's file, Edgington believed mitigating circumstances did not exist for a lesser discipline because Krogman had been adequately trained. Edgington determined Krogman did not maintain appropriate control of himself and mistreated one of the individuals within his care. The superintendent stated that abuse is not tolerated. She believes the only way to prevent abuse from happening again is to show that abuse is not tolerated by terminating Krogman's employment thus ensuring he cannot do this again. She determined that because of the seriousness of the rule violation, progressive discipline was not appropriate in this case. Edgington stated she has dealt with other situations where she has had to make similar decisions.

The assistant superintendent conducted the *Loudermill* interview with Krogman. Edgington was not present for the *Loudermill* interview, but was informed about it. Krogman told those present that he had been at the facility for almost 24 years and had never had any incident of abuse. He reiterated that he was not trying to abuse the individual and that he loved taking care of his clients. Krogman also said he had been a good employee.

After the interview, Edgington determined Krogman had not presented anything new, and proceeded forward with the termination.

On October 26, 2018, Krogman was discharged from employment. The letter stated that Krogman admitted to slapping an individual on her hand or wrist once or twice. The letter found Krogman's conduct was in violation of the following relevant section of the DHS Employee Handbook²:

B-1 General Standards of Conduct and Work Rules

5. Employees are expected to maintain appropriate control of themselves, even under provocation. The use of abusive, profane, argumentative, offensive or threatening language or attempts to inflict bodily harm or mental anguish will not be tolerated.
23. Employees shall not mistreat, abuse, coerce, neglect or exploit employees, visitors or clients, verbally, physically, sexually or financially. When physical contact is a part of an employee's duties, each contact will be performed in a professional manner.

In addition to the WRC investigation, the Department of Inspections and Appeals (DIA) also conducted an investigation into the incident. On January 25, 2019, well after the State terminated Krogman's employment, DIA issued a finding that the abuse was "confirmed, not registered." This determination means that DIA confirmed that abuse occurred, but found the incident was "minor, isolated, and unlikely to reoccur" and thus did not warrant the caretaker's placement on the DHS central abuse registry. See Iowa Code section 235E.2. DIA reached that determination after finding the abuse alleged was

² The DHS Handbook admitted into evidence was from 2018. Krogman acknowledged that he had received the 2017 DHS Employee Handbook. It is unclear on this record whether there is any substantive difference between the 2017 and 2018 DHS Employee Handbook.

unreasonable punishment and assault pursuant to Iowa Code section 235E.1(5)(a)(1)(a).

CONCLUSIONS OF LAW

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

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 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.)*, 2012-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.)*, 2006-MA-06 at 21 (internal citations omitted). Determination of whether management has just cause to discipline an employee requires a 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)*, 1997-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.)*, 1990-MA-13 at 40. Although just cause requires examination

on a case-by-case basis, 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 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.), 1993-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)*, 2004-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.)*, 2003-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*, 1990-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.)*, 2009-MA-01 at 17–18, 21.

The discipline letter the State provided to Krogman on October 26 was sufficiently clear when it specified that Krogman admitted to slapping an

individual on the wrist or hand once or twice. In the letter, the State asserted that Krogman's admitted action of slapping an individual was a violation of the DHS rules. DHS rules require employees to maintain appropriate control of themselves and prohibit mistreatment or abuse of clients.

Krogman does not deny that he slapped Individual BO. In his investigatory interview, Krogman acknowledged that he slapped Individual BO on the wrist or hand once or twice. When asked during his interview why he slapped Individual BO, Krogman stated, "Honestly I don't know, I had a break down or something like that I don't typically do that." Krogman's admitted actions demonstrate a failure to maintain appropriate control and mistreatment of a client. The State has shown Krogman's actions violated the State's rules.

Krogman now claims he slapped Individual BO on the hand or wrist to block or redirect her. I find his argument unpersuasive. Krogman may have been attempting to stop Individual BO from getting saliva in her hair, but Krogman intentionally made physical contact with such force that someone in the next room heard it. Also, on the day of the incident, the investigator explicitly asked Krogman why he had slapped Individual BO. At that time, when the memory was still fresh, Krogman said he did not know.

Further, the State presented testimony and written documentation explaining that hitting or slapping an individual could never be considered a redirection or block because it is in violation of DHS rules. The facility's training, that Krogman received, explicitly stated that hitting a client is physical abuse. Krogman's coworkers testified that the proper redirection in this type of situation

would be to take Individual BO's hands and hold them or place them in her pockets.

Krogman received ample training that enabled him to recognize the facility would not tolerate slapping an individual in his care. Even if Krogman was attempting to block or redirect Individual BO, slapping one of the dependent adults in his care is still a violation of DHS rules. The State has demonstrated that Krogman's actions violated the rules listed in the termination letter, and Krogman knew his actions were a violation of the facility's rules.

Krogman also contends the investigation into the incident was insufficient and flawed. Krogman alleges, among other things, that he was not given a chance to respond and explain, the investigator failed to interview or observe the alleged victim or the eyewitness, the investigator failed to interview the nurse responding to the incident, the investigator failed to take notes, the investigator interpreted what was said rather than recording the direct quote, and the investigator failed to record the interviews.

Although the investigation could have been executed more precisely and robustly, the alleged deficiencies in the investigation do not undermine the finding that Krogman violated DHS rules. Krogman admitted during his interview that he slapped Individual BO once or twice on the hand or wrist. Krogman does not deny acting in such a manner or making that statement to the investigator. Despite all the alleged deficiencies, Krogman does not deny the accuracy of his statement to the investigator.

The investigator interviewed Krogman the night of the incident and gave Krogman a chance to explain the situation. The investigator asked what happened and asked why Krogman slapped the individual. Krogman explained that Individual BO was wiping saliva in her hair and that he said something to her about it before he slapped her hand or wrist. Krogman gave no further explanation. During the *Loudermill* interview, the State afforded Krogman with multiple chances to respond to the allegations, and explain any mitigating circumstances.

Krogman also faults the State for failing to interview or observe the alleged victim, the other dependent adult that was in the room at the time of the incident, or the nurse that examined the alleged victim. The State presented ample testimony that interviewing the alleged victim and the eyewitness was futile because both women are nonverbal. The State also presented testimony the victim's behavior may not mirror reality, so observation of the victim would be fruitless. The investigator had a copy of the nurse's report, so it is unclear what advantage could be obtained from interviewing the nurse.

Krogman also contends the procedures used by the investigator failed to follow the guidelines and policies for investigations. I cannot find the failure to take notes, record the interviews, or other perceived procedural deficiencies with the interviews negates just cause in this case.

The State provided Krogman the opportunity to respond to the allegation, and the chance to explain mitigating circumstances. The State interviewed other staff members about the events of that day. Although the investigation as

presented on the record was not robust and the State could have done more to safeguard the integrity of the investigation such as by recording the interviews, the State has shown this investigation was sufficient and fair.

Finally, Krogman contends his discipline was too severe especially given the tenets of progressive discipline and his employment history. Krogman also contends he was not treated the same as other similarly situated employees.

Progressive discipline is a system where measures of increasing severity are applied to repeated offenses until the behavior is corrected or it becomes clear that it cannot be corrected. *Nimry and State of Iowa (Dep't of Natural Resources)*, 2008-MA-09, 2008-MA-18, at App. 30. Progressive discipline is used to encourage employees to take corrective responsibility to follow work rules and employment obligations. *Stockbridge and State of Iowa (Dep't of Corrections)*, 2006-MA-06 at 28. Progressive discipline addresses employee's behavior over time through escalating penalties. The purpose is to correct the unacceptable behavior of an employee and to convey the seriousness of the behavior while affording the employee an opportunity to improve. *Phillips and State of Iowa (Dep't of Human Services)*, 2012-MA-05 at App. 16 (citing Norman Brand, *Discipline and Discharge in Arbitration* at 57 (BNA Books 1998)). When determining what discipline is appropriate, PERB considers the totality of the circumstances. *Hoffman and State of Iowa*, 1993-MA-21 at 12.

Progressive discipline may be inapplicable when the conduct underlying the discipline is a serious offense. *Phillips and State of Iowa (Dep't of Human Services)*, 2012-MA-05 at App. 1, 13, 16-18 (finding an employee's breach of

confidentiality a serious offense and imposing a 10-day suspension when the employee knowingly disclosed confidential information and the employee's job description involves maintenance of confidential records). When determining the appropriate type of discipline given the circumstances, PERB examines the severity and extent of violations, the position of responsibility held by the employee, the employee's prior work record, and whether the employer has developed a lack of trust and confidence in the employee to allow the employee to continue in that position, taking into account the conduct at the basis of the disciplinary action. *Phillips and State of Iowa (Dep't of Corrections)*, 1998-MA-09 at 15; *Estate of Salier and State of Iowa (Dep't of Corrections)*, 1995-MA-05 at 17.

The State contends that progressive discipline was inapplicable in the instant situation due to the egregiousness of Krogman's actions. Krogman intentionally slapped an individual on the wrist or hand. Krogman slapped the woman with enough force that it produced a sound that someone in another room heard. In the abuse investigation, DIA determined the abuse was founded, but was minor, isolated, and unlikely to reoccur. The action also did not result in any type of injury. Despite these mitigating circumstances, I find Krogman's action in slapping an individual within his care was egregious enough to warrant skipping lesser disciplinary penalties.

Krogman's primary duty as an RTW was to care for individuals with intellectual disabilities. Many of these individuals relied on Krogman for basic care. Based on the record prior to the incident, Krogman was a long-term, model

employee who treated persons within his care with respect and patience, and maintained a calm demeanor in difficult circumstances.

Nonetheless, these individuals may be entirely dependent upon the RTWs for their well-being. Arbitrators have found that employees acting as caregivers have a heightened duty of care in dealing with dependent persons. Norman Brand, *Discipline and Discharge in Arbitration* at 296–297 (BNA Books 1998). In the grievance arbitration setting, an employee who strikes a person within their care is usually discharged. *Id.*

Despite Krogman's years of service and strength as an RTW, the State, due to this incident, has developed a lack of trust in Krogman's abilities to maintain his calm demeanor. The administrator testified about her concern of Krogman repeating his actions, and the necessity of preventing abuse in the facility. The State's lack of trust led the State to finding progressive discipline was inapplicable and terminating Krogman's employment.

I find the State has shown just cause exists for foregoing progressive discipline and terminating Krogman's employment. Although Krogman's lengthy history of employment may suggest his behavior was an isolated incident and unlikely to occur again; nonetheless, the severity of the incident at issue coupled with the nature of Krogman's relationship with the individual justifies the State's refusal to exercise progressive discipline in this instance.

Krogman argues that just cause for his termination does not exist as demonstrated by the State's failure to treat similarly situated employees in a similar manner.

The State presented testimony that WRC has faced similar situations in which the State made similar disciplinary decisions. Although vague, this testimony was unrefuted. Krogman did not present evidence that WRC treated other employees differently than he was treated. Without evidence refuting the State's testimony that WRC has treated similarly situated employees in a similar manner, I find the State has demonstrated just cause for Krogman's termination.

Although Krogman does not present evidence of similarly situated employees receiving lesser discipline, Krogman does cite case law in which a reviewing agency or court reversed an employee's termination or lessened the discipline received. I find these cases to be unpersuasive. The cases cited were not relevant to the instant case as none of the cases relate to the on-duty physical abuse of a person within the employee's care.

PERB does have one case relevant to the incident at issue. In *Cole*, the State terminated an RTW at the Glenwood Resource Center for improper physical contact with a dependent adult within his care. *Cole and State of Iowa (Dep't of Human Servs.)*, 2020 PERB 102113. In *Cole*, the employee, who was seated at the time, raised his foot to block a resident from leaving the room because the resident was not fully clothed. *Id.* at 3. The resident came into contact with Cole's foot, but the resident was not injured. *Id.* Cole acknowledged that his blocking maneuver was inconsistent with the Mandt techniques and training he received. *Id.*

PERB determined the State did not demonstrate the existence of just cause for the termination of Cole's employment, but did establish just cause for a three-

day suspension. *Id.* at 12. PERB found Cole did not have adequate notice that failing to use the least restrictive intervention would constitute physical abuse. *Id.* at 11. PERB also determined that Cole's work history demonstrated his actions were minor, isolated, and unlikely to reoccur. *Id.* Based on the facts of the case, PERB decided that progressive discipline was not entirely inapplicable. *Id.* at App. 26. PERB determined the State had shown just cause for a three-day suspension. *Id.* at 12-13.

The facts in the instant case are distinguishable from *Cole*. First and foremost, unlike in *Cole*, Krogman intentionally slapped a woman that was within his care. The employee in *Cole* did not intend to come into physical contact with the resident that was in his care, and the physical contact did not occur solely because of the employee's actions. Cole's discipline stemmed from using the improper blocking technique, which resulted in unintentional physical contact with the resident. Additionally, in the instant case Krogman had more than adequate notice that his actions would constitute physical abuse under the Incident Management Policy used by WRC. Finally, unlike in *Cole*, the State in the instant case established that progressive discipline is entirely inapplicable.

Like the employee in *Cole*, Krogman had a lengthy and positive work history. However, Krogman intentionally slapped an individual in his care. Based on these facts, I cannot find PERB's decision in *Cole* demands a lesser discipline in this case.

The State has demonstrated just cause to terminate Krogman's employment. Consequently, I propose the following:

ORDER

Krogman's state employee disciplinary action appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of \$942.00 are assessed against the appellant, Derek Krogman, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellant 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 Krogman'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 4th day of March, 2020.

/s/ Amber DeSmet

Administrative Law Judge

Filed electronically.
Parties served via eFlex.