

Based upon the entirety of the record, and having reviewed and considered the parties' arguments, I find the DOC had just cause to terminate Supino's employment.

FINDINGS OF FACT

ICIW houses approximately 750 female inmates. The custody level of the inmates ranges from minimum live-out to maximum security. As with any prison, the institution operates in a highly structured manner.

Staff attendance and punctuality are critical in a prison setting. Each staff member has an important role to fulfill during a shift. The institution has minimum staffing requirements for each shift. Any employee who fails to timely report to work must be replaced by another employee. This is generally accomplished by mandating a staff member from the previous shift to stay until the tardy employee reports to work.

Supino began her employment at ICIW in November 2010 as a registered nurse (RN). She was part of ICIW's medical department, which consists of registered nurses, nurse practitioners, physicians, physician assistants, and mental health professionals. Nursing Services Director Kerri Freidhof was Supino's direct supervisor. Freidhof was responsible for ensuring ICIW's patient care was adequately staffed and operating appropriately. The nursing work environment is fast-paced as nurses are busy fulfilling their various functions during the entirety of their shifts. Attendance and punctuality are important in the nursing department. Deficient attendance and punctuality may delay patient

care that must be delivered at the institution. It can also interfere with staff morale as the institution is forced to mandate employees to work longer in order to cover for another employee's absence. Nurses must remain on duty until they are relieved by another staff.

Supino's performance evaluations covering the time period of September 2016 through September 2018 are part of the record. During this period of time, Supino was rated overall as meeting expectations. Management noted in these evaluations that punctuality was a performance issue for Supino and encouraged her to continue improving in that area. On the other aspects of Supino's job, however, ICIW rated her as meeting or exceeding expectations.

Supino was terminated for tardiness under the DOC's Attendance, Timekeeping and Leave policy, AD-PR-08. The policy was last updated in June 2018. The pertinent parts of the policy state:

IV. PROCEDURES

A. Scheduled Hours of Work

1. Employees shall report to work as scheduled. All schedule changes must be pre-approved by the employee's supervisor.
2. Employees shall contact their supervisor or shift supervisor/designee (if their supervisor is unavailable) if they are unable to report at their scheduled start time.
3. Employees who fail to report to work on time up to 60 minutes after their scheduled start time shall be tardy and shall not be allowed to use available leave time. Tardy instances within twelve month periods shall be subject to the following violation schedule:
 - a. 3rd Tardy within 12 months - Written Reprimand.
 - b. 4th Tardy - 1 day paper suspension.

- c. 5th Tardy – 3 day paper suspension.
 - d. 6th Tardy – 5 day paper suspension.
 - e. 7th Tardy – Termination.
- 4. The department head shall consider the requests to have an incident of tardiness excused (found valid) with verification/documentation provided within 48 hours of the incident. The department head shall bring these instances to the Executive team for review in order to ensure consistency.
 - 5. A consecutive twelve month period without a tardy shall suspend movement to the next violation level in the schedule.

Under the policy, an employee who reports to work more than 60 minutes after the start of their shift is disciplined under a separate track of the policy, the unauthorized leave without pay track.

The policy applies to all ICIW staff, including the nursing department where Supino worked, and all ICIW staff is held accountable under the policy. The institution has disciplined and terminated other employees for tardy incidents in accordance with the step progression outlined in the policy.

The executive team may excuse a tardy upon request from the employee within 48 hours of the tardy incident. These requests are examined on a case-by-case basis. The committee considers the extenuating circumstances that caused an employee to be late. Tardy incidents that have been excused by the committee are those that are outside the employee's control, such as: involvement in a traffic accident; traffic events that cause unforeseen traffic back-up; weather-related delays. ICIW contends that traffic violations are not and have not been excused by the committee in the past.

Disciplinary action under the policy begins after the third tardy within a 12-month period. The first two tardy incidents are deemed “freebies” for which management will only counsel an employee about punctuality. Once an employee receives a third tardy within a 12-month period, discipline begins with a written reprimand. Once an employee is on a disciplinary track, the policy does not allow for incidents to fall off. However, if an employee goes 12 months without a tardy incident, the discipline does not progress at the next tardy violation. Instead, discipline is suspended at the same level they previously received. This is intended to recognize that the employee’s punctuality has improved because 12 months have passed without an incident. The policy has been applied in this manner since April 2014.

The record demonstrates that ICIW had an attendance policy prior to April 2014 that operated on a 12-month rolling period. As such, a tardy incident only counted toward discipline if it occurred within the same 12-month period. Although Supino claimed this pre-2014 policy had the same language as the current policy, there is no documentary evidence to support this assertion. Supino did not provide a copy of the pre-2014 policy or any other evidence that the policies had identical language.

A review of the April 2014 and June 2018 policy versions reveal the pertinent language regarding tardies remained unchanged. The only change between the April 2014 and June 2018 attendance policy was the elimination of a ten-day suspension as a disciplinary level prior to termination. Pursuant to the

April 2014 version of the policy, an employee received a ten-day suspension after incurring seven unexcused tardies and was terminated after the eighth unexcused occurrence. As of June 2018, seven unexcused tardies resulted in termination.

Supino signed an acknowledgement form in January 2015 confirming that she received a copy of the revised attendance policy. She further testified that Freidhof held a meeting with the nursing staff in September 2016 during which Freidhof explicitly informed the staff that tardy instances no longer “fell off” after 12 months. Freidhof also informed the staff that the ten-day suspension level was eliminated.

Prior to termination, Supino had the following tardy incidents that progressed her on the disciplinary track.

- March 6, 2016 – 10 minutes tardy; counseled
- September 4, 2016 – 50 minutes tardy; counseled
- October 18, 2016 – 53 minutes tardy; written reprimand issued
- December 14, 2016 – 23 minutes tardy; 1-day suspension issued
- June 28, 2017 – 40 minutes tardy; 3-day suspension issued
- September 23, 2018 – 47 minutes tardy; 3-day suspension issued
- November 17, 2018 – 47 minutes tardy; 5-day suspension issued

Prior to the September 23 tardy, Supino had 12 consecutive months without a tardy incident. As such, under section IV. A.5 of the policy, a three-day suspension was repeated when she had a tardy incident on September 23. When she received a subsequent tardy on November 17, however, the discipline level progressed and she was issued a five-day suspension. Supino did not grieve any of her prior disciplines.

Supino's timecard from February 1, 2018, to July 10, 2019, is part of the record. The document reveals Supino had several tardy incidents that were excused by the executive team under part IV.A.4 of the policy. She had two tardy incidents in October 2018, for being one minute late, when she got held up going through security sliders before being able to clock in. In January 2019, Supino had two instances of not reporting to work on time due to childcare issues and involvement in a car accident. Although the State contends these were tardy instances that were excused, the record demonstrates she was late for more than 60 minutes. Thus, under the policy, these are considered as unauthorized leave without pay, not tardy incidents. ICIW management approved her leave for these instances.

On June 1, 2019, Supino was late reporting for her scheduled shift. In June 2019, Supino's shift was from 6:00 a.m. to 2:00 p.m. Supino did not clock in upon arrival. However, video surveillance revealed she walked past the time clock 7 minutes after the start of her 6:00 a.m. shift. This tardy occurrence resulted in Supino's termination.

ICIW's standard procedure when reviewing potential policy or rule violations is to first investigate. Upon the conclusion of the investigation, the information is reviewed by a DOC executive team who determines whether discipline will be imposed. A disciplinary notice is then drafted between management and HR personnel to be delivered to the employee. This process was followed in Supino's termination.

On June 13, ICIW conducted an investigatory interview with Supino. The interview was conducted by Freidhof and Bryan Reicks, Associate Warden of Security. Supino had a peer present during the interview. During the interview, management confirmed Supino's familiarity with the attendance policy. ICIW also reviewed her prior tardy incidents with her and confirmed that management addressed those incidents with her at the time of occurrence. Supino acknowledged that she knew the next tardy incident within a 12-month period of the five-day suspension could result in termination.

Supino indicated during the interview that she was late on June 1 because she was stopped for a traffic violation on her way to work. She ended up not receiving a citation, but a warning only. Supino stated she had the warning documentation, which management asked her to provide. Supino provided a copy of the traffic warning to Reicks on June 14.

Supino indicated she called the institution at 5:56 a.m. after she concluded with the officer, and spoke to Lauren. The record does not reveal Lauren's position or whether she communicated that information further. Supino indicated she did not notify her supervisor, Freidhof. Supino stated the incident occurred on a Saturday, and by the time Monday arrived when Freidhof worked, it had slipped her mind as she was preoccupied with other work tasks. Supino also acknowledged during the interview she did not think the tardy would be excused.

On June 19, Freidhof and Reicks conducted a *Loudermill* interview with Supino with Supino's peer present. Supino expressed that being terminated for having seven tardies over a three-year period is "ridiculous," particularly considering that she is frequently mandated to stay after her scheduled shift. Supino also referenced her tardy from November 17, 2018. On this date, she had overslept and was late to work. Supino claimed during the *Loudermill* that she overslept on November 17 because Freidhof improperly restricted her breast pumping sessions at work, which caused her to have to pump late at night. ICIW considered the information Supino provided and decided to proceed with termination.

Supino was terminated on June 19, 2019. The notice of termination indicated she was terminated for violating AD-PR-08, DOC's Attendance, Timekeeping and Leave policy. The notice outlined Supino's tardiness incidents starting from the first incident on March 6, 2016, for which she was counseled. The letter indicated the June 1, 2019, incident was her seventh unexcused tardy.

Supino appealed her termination to the Iowa Department of Administrative Services (DAS) on June 25, 2019, claiming the discipline is not supported by just cause. DAS denied Supino's grievance on July 26, 2019. She filed the instant appeal to PERB on August 24, 2019.

At hearing, Supino put forth numerous arguments that she contends demonstrate ICIW did not have just cause to terminate her employment.

Supino claimed she did not know that tardy incidents did not fall off after a 12-month period without incident. Her purported understanding of the policy is that only incidents that occurred within the same 12 months would count toward discipline. She claims other employees also had this understanding. Supino admitted into evidence a text communication she had with a former ICIW employee on June 20, 2019, after her termination. Upon Supino telling the employee she was terminated for having seven tardy incidents within a three-year span, the employee commented, "I thought they fell off." Supino responded, "Nope, not anymore."

Supino also claimed she was improperly terminated for reasons related to breast pumping issues she had at ICIW in October 2018. She makes two separate arguments pertaining to the pumping issue.

First, Supino alleged that in October 2018 Freidhof engaged in harassing and discriminatory behavior related to her pumping at work. She claims this incident caused her to incur the November 17 tardy that lead to her five-day suspension.

Additionally, Supino claimed Freidhof improperly restricted her to pumping only during her two 15-minute breaks. She presented as evidence a string of emails she exchanged with Freidhof in October 2018. A review of the emails, as well as undisputed testimony presented, demonstrate that Freidhof had an initial conversation with Supino regarding the duration of her pumping sessions after other staff complained that Supino's pumping sessions were at

times taking over an hour. Freidhof initially told Supino that her understanding was the pumping sessions should be coordinated with her 15-minute breaks and set that as a parameter for Supino. Freidhof subsequently consulted with the ICIW executive team and informed Supino they told her about 20 minutes is the general standard, noting she understands it can take longer at times. Supino did not file a complaint or otherwise voice her concerns to another member of management. Supino testified she did not pursue the issue any further because Freidhof ended up telling her she could take longer than 15 minutes to pump.

The incident that precipitated Supino's five-day suspension was a tardy on November 17, 2018. During the investigation of the tardy Supino informed management that she overslept. This was the only reason Supino provided at the time for her tardy incident. Supino now contends that she overslept because she had to be up late to pump after Freidhof placed the pumping time restriction on her.

Supino also alleged that ICIW terminated her in retaliation for complaining in June 2019 that Freidhof improperly restricted her pumping rights in November 2018. On June 19, 2019, approximately four hours prior to her termination, Supino forwarded to Reicks the string of emails between her and Freidhof from October 2018. In these emails, Supino accused Freidhof of harassing her about her pumping at work and telling her she had to pump during her 15-minute breaks, which Supino claimed was illegal. She also claimed other employees in the security department were given longer to pump

and did not have to do it over their 15-minute breaks. As previously stated, any communication or discussion pertaining to this issue ended in October 2018. When forwarding the emails to Reicks in June 2019, Supino commented she was sure he already had the emails, but wanted to forward them to him just in case. Supino argues the fact that ICIW terminated her about four hours after she sent these emails demonstrate the decision to terminate was retaliatory.

Finally, Supino argued at hearing that the ICIW executive committee excused traffic violations in the past. She presented evidence of a traffic citation she received on November 6, 2017. Supino testified her tardy on this date was excused even though it was a traffic violation. She provided no documentary evidence corroborating the excused tardy, but testified that Freidhof had a prepared discipline letter when she called Supino into her office. When Supino informed Freidhof that she was tardy due to a traffic violation, Supino claimed Freidhof stated traffic violations are excused, told her to bring evidence of the violation, and threw away the discipline letter. Freidhof had no recollection of this event and testified that she has no authority to unilaterally decide not to issue discipline. All disciplinary decisions are decided by the DOC executive team.

Supino further claimed Freidhof made her believe the June 1, 2019, tardy would be excused. She claimed Freidhof made a statement in front of other nursing staff that traffic violations are excused. Freidhof categorically disputed Supino's assertion. Freidhof testified that she has never made such statement

and has no authority to make such a statement. All requests to excuse a tardy are made by the executive committee.

CONCLUSIONS OF LAW

Supino filed the instant state employee disciplinary action 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.

The following DAS rules set forth 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 or 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. *E.g., Phillips and State of Iowa (Dep't of Human Res.)*, 12-MA-05 at App. 11. The term "just cause" as employed in subsection 8A.415(2) and administrative rule 11—60.2 is not defined by statute or rule. *Stockbridge and State of Iowa (Dep't of Corr.)*, 06-MA-06 at 21 (internal citations omitted). Whether an employer has just cause to discipline an employee is made on a case-by-case basis. *Id.* at 20.

When determining the existence of just cause, PERB examines the totality of the circumstances. *Cooper and State of Iowa (Dep't of Human Rights)*, 97-MA-12 at 29. As previously stated by the Board,

. . . a [§ 8A.415(2)] just cause determination requires an analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical, inflexible application of fixed "elements" which may or may not have any real applicability to the case under consideration.

Hunsaker and State of Iowa (Dep't of Emp't Servs.), 90-MA-13 at 40. The Board has further instructed that an analysis of the following factors may be relevant:

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.), 93-MA-21 at 23. PERB also considers how other similarly situated employees have been treated. *E.g. Kuhn and State of Iowa (Comm'n of Veterans Affairs)*, 04-MA-04 at 42.

The presence or absence of just cause rests on the reasons stated in the disciplinary letter provided to the employee. *Eaves and State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14. To establish just cause, the State must demonstrate the employee is guilty of violating the work rule, policy, or agreement cited in the disciplinary letter. *Gleiser and State of Iowa (Dep't of Transp.)*, 09-MA-01 at 17-18, 21.

Supino's discipline notice indicates she was terminated for violating DOC's attendance policy when she reported late to work on June 1, 2019. Supino acknowledges she was tardy on this date. Under the record presented, the State

has demonstrated that prior to the June 1, 2019 incident, Supino had unexcused absences that resulted in progressive discipline up to a five-day suspension. The next step on the DOC's attendance policy discipline track is termination. Thus, management determined that Supino's tardiness on June 1, 2019, should result in termination.

The State has also demonstrated Supino had sufficient notice regarding ICIW's punctuality requirements under AD-PR-08 and the manner in which the policy was applied. Supino's claim that she believed tardy incidents fell off after a 12-month period is contradicted by Supino's own acknowledgements during the investigatory interview. Supino responded in the affirmative when asked if she knew her next tardy incident within a 12-month period of the five-day suspension could result in termination. Supino also testified before the undersigned that Freidhof specifically told the nursing staff in September 2016 that tardy incidents no longer fell off after a 12-month period.

Supino's prior disciplines further establish that she knew ICIW was not applying the attendance policy on a rolling 12-month basis. After Supino's three-day suspension on June 28, 2017, she went almost 15 months without a tardy incident. However, after her tardy in September 2018, Supino was again disciplined with a three-day suspension, in accordance with the attendance policy. Had Supino thought the policy operated on a 12-month rolling basis, she would have claimed that she should not be subject to any discipline since she had no other tardies in the previous 12 months. The record reveals that Supino never

appealed the grievance or otherwise voiced her disagreement with the interpretation or application of the policy.

Supino's claim that ICIW terminated her in retaliation for her earlier complaints about pumping at work is void of any support in this record. It is undisputed that Supino was terminated about four hours after she forwarded her October 2018 emails about pumping to Reicks. Without more evidence even suggesting retaliatory action, the timing of these two events is mere coincidence. As established by the record, disciplinary decisions are determined by an executive team, not unilaterally by Reicks or Freidhof. As such, the record as a whole establishes the decision to terminate Supino was made prior to the morning of June 19 when she forwarded these emails.

Supino's position that the five-day suspension should not be considered because the pumping restriction caused her to oversleep has no place in the instant appeal. Supino is essentially attempting to revive an appeal of the five-day suspension after the appeal deadline has long passed. Supino did not timely grieve it at the time and the five-day suspension is final. Supino is not able to now appeal the five-day suspension in the instant appeal. *See Alleman and State of Iowa (Dep't of Revenue and Finance), 97-MA-07 at 12* (finding Alleman could not revive unsuccessful challenges to previous disciplines when the challenges to those disciplines were unsuccessful and finalized).

Although Supino asserts ICIW excused traffic violations in the past, she has failed to provide any corroboration for this claim. She presented evidence of the

November 6, 2017 traffic violation, but provided no documentary evidence that showed she was scheduled to work on this date but that she was tardy. Furthermore, Supino's description of her encounter with Freidhof regarding this incident lacks credibility. Her claim of the event suggests that Freidhof had a discipline letter prepared even before interviewing Supino about the tardy incident. Nothing in this record suggests ICIW discipline procedures would allow Freidhof to issue discipline without an investigation, or allow her unilateral authority to decide not to discipline. Therefore, I find Supino's argument that traffic violations have been excused in the past unconvincing.

Further, Supino's failure to request that management excuse her June 1, 2019 tardy convincingly suggests that she did not think the incident would be excused. First, Supino did not present a request to management to have the incident excused after it occurred. The policy requires such requests to be submitted within 48 of the tardy. Supino provided a copy of the citation warning to ICIW on June 14, only after management began an investigation and requested it. Furthermore, Supino made no claims prior to termination that this incident should be excused, including at her *Loudermill* when she was given an opportunity to provide any information for management to consider whether the intended disciplinary decision was appropriate. Supino gave no indication at this point that this tardy incident should be excused because traffic violations have been excused in the past. The record as a whole demonstrates that ICIW does excuse traffic-related tardies, but only in instances that are beyond an employee's control, such

as a car accident. Violation of traffic laws, such as in this instance, was not outside of Supino's control.

The State demonstrated it followed its progressive discipline track in disciplining Supino for her tardiness. The State demonstrated it provided sufficient notice of its expectation for punctuality, and for the violation of such rule. The State has shown the need for such attendance policy rules due to the nature of the work at the institution. The State has also presented evidence on how violations of the attendance policy rules affects the institution. Despite Supino's work history and evaluations, the record demonstrates Supino has a history of attendance policy violations that can have a detrimental effect on the institution.

For all the reasons stated, the State has demonstrated that Supino's termination is supported by just cause. Consequently, I propose the following:

ORDER

Supino's state employee disciplinary action appeal is DISMISSED.

The cost of reporting and of the agency-requested transcript in the amount of \$686.70 is assessed against the Appellant, Courtney Supino, pursuant to Iowa Code subsection 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellant, Courtney Supino, in accordance with PERB subrule 621—11.9(3).

This proposed decision and order will become PERB's final agency action on the merits of Supino's appeal pursuant to PERB subrule 621—11.7(2) 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 8th day of January, 2021.

/s/ Jasmina Sarajlija
Administrative Law Judge

Electronically filed.
Parties served via eFlex.