

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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| NORM CASON,<br>Appellant,                 | ) | CASE NO. 102367                |
| and                                       | ) |                                |
| STATE OF IOWA (DEPARTMENT OF<br>REVENUE), | ) | PROPOSED DECISION<br>AND ORDER |
| Appellee.                                 | ) |                                |

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

Cason worked as a Revenue Agent 3 for the Iowa Department of Revenue (DOR). Cason alleges the State did not have just cause to terminate his employment on July 11, 2019. The State denies that Cason’s termination was not supported by just cause.

A closed evidentiary hearing was held on September 1 and 2, 2020. Melissa Speed represented Cason. Anthea Galbraith and Annie Myers represented the State. The parties submitted post-hearing briefs on December 1, 2020. After considering the evidence and the arguments of the parties, I propose the following:

## FINDINGS OF FACT

Norm Cason was a Revenue Agent 3 in the collections area of DOR. Cason comes from a big family, which shaped his interactions with others. He and his coworkers describe him as boisterous and loud, to the point that people may think he is yelling when he is merely talking. Prior to his position at DOR, Cason worked at Citi Group on the collections team. In that role he was a supervisor for a team of twenty-seven.

### *Employment with Department of Revenue*

Cason began his employment with the State as a Revenue Agent 1 with the DOR collections division in August 2003. The main responsibility of the collections department is to collect delinquent tax debt. After a year of working as a Revenue Agent 1, the department promotes the employee to Agent 2 as long as the agent meets the requirements. As Cason met the requirements, he was promoted to Agent 2 after his first year with DOR. Within a few years of beginning his position at DOR, the department promoted Cason to Revenue Agent 3.

A Revenue Agent 3 must be knowledgeable about the daily duties performed by himself or herself as well as the Agent's team. An Agent 3's team would consist of four to seven Agent 1's or Agent 2's. Cason felt it was important as a team leader to keep everyone's spirits up as working in the collections field can be a negative experience. Cason sought to share different approaches and strategies for debt collection with his team.

Cason teleworked for part of his tenure as Revenue Agent 3. He worked from home for approximately seven years. Some of that time he worked at home

every day, and sometimes he worked four days at home and one day in the office. The telework arrangement changed circa 2017 around the same time the department moved locations. At that time a department supervisor determined that Agent 3's needed more interaction with their team and should be in the office.

Thus, Cason began working from the office full time in 2017. The employees in the collections division worked in cubicles. Generally, an employee's back was to the opening of the cubicle and the employee sat at a desk. Working in this area, the employees were often on the phone or using headsets as they contacted taxpayers about collecting tax debts. Upon his return to full-time in the office, Cason's cubicle was somewhere in the middle of a block of cubicles.

Since 2015, Bill Watson was Cason's immediate supervisor.<sup>1</sup> Watson and Leann Boswell, Watson's supervisor, conducted evaluations of Cason's work. Generally, Cason's supervisors determined he met expectations throughout his career. In 2018, Cason's supervisors stated in his evaluation that "You do a really good job of communicating with the team(s) you lead." And "Norm, you do a great job of motivating your team. As a leader, remember you are a role model for your team and others." Management recognized Cason's role as a team lead, and the need to motivate his team.

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<sup>1</sup> Cason claims he and Bill Watson worked at Citi Group together around 2005 and Cason was Watson's supervisor. Watson testified he has no recollection of whether that occurred. For purposes of this case, I find this assertion immaterial.

### *Prior Investigations*

The evidence in the record demonstrates that prior to the investigation at issue in this case, DOR investigated complaints about Cason's behavior twice in the last five years. DOR internally conducted investigations concerning the previous two complaints and neither complaint resulted in any discipline. In the summer of 2017, a fellow coworker, MR, reported to Boswell and Watson that six months after MR started, Cason touched her side and made a comment that she looked like one of his ex-girlfriends.<sup>2</sup> MR also claimed that Cason was rude to her in emails. DOR conducted an investigation and determined it was inconclusive as to whether Cason's actions amounted to sexual harassment. The investigation also concluded that Cason's emails to MR were not rude. No discipline resulted from the investigation.

The second investigation occurred in August 2018. A third party reported that Cason touched a female coworker's hair over her objection, and had also given the same female coworker a pocket knife. DOR again conducted an internal investigation. The department determined, after checking with the interested party, that Cason stopped touching the person's hair when she requested him to stop. DOR further determined that providing the coworker with a pocket knife did not violate the gift policy. The investigation did not result in discipline.

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<sup>2</sup> The parties, out of concern for the employees involved, used aliases rather than the employees' names. The undersigned will seek to similarly use the pseudonyms when possible.

The record indicates that Cason was interviewed at least during the first investigation. Cason has little to no recollection about these investigations other than the conclusion that no discipline resulted.

After these two investigations, roughly in November 2018, Cason and Watson had two discussions about Cason's behavior. The first discussion was initiated by Watson in part to discuss Cason's lengthy "motivational" conversations with coworkers. The second discussion was initiated by Cason after he overheard some coworkers had concerns regarding his comment about a new female employee.

During these discussions, Watson told Cason that he should be thoughtful in his interactions with other employees. Watson claims he and Cason discussed the sexual harassment policy and Watson told Cason he could not use inappropriate language or engage in physical contact with other employees. Watson did not mention that Cason's failure to heed the State of Iowa's policy regarding sexual harassment could lead to discipline or discharge. Watson also stated that during these discussions Cason acted defensive and stated he understood the sexual harassment guidelines and that he did not touch people at work.

Cason, on the other hand, claims these discussions were about the volume of his voice, and not about concerns regarding sexual harassment.<sup>3</sup> Cason asserts DOR never coached and counseled him about his behavior.

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<sup>3</sup> The record reflects that during these conversations Watson and Cason did discuss the volume of Cason's voice and this led Cason to voluntarily move into a cubicle where his voice would not cause as much disruption to his coworkers.

I do not find Cason's characterization of events credible. Although Cason argues Watson did not coach him about sexual harassment, Cason also states that he told Watson he does not make inappropriate statements because he is not stupid, and he also claimed he was aware of the sexual harassment policy and that he had not been doing anything wrong. Clearly, Watson and Cason did have a discussion about the sexual harassment policy, but it is unclear how much of the conversation Cason actually absorbed.

Cason signed an acknowledgement concerning the DOR employee resource center policies for 2017-2018, in 2018, he acknowledged receipt of and understanding of the State of Iowa employee handbook which includes the policy prohibiting sexual harassment. Cason also completed the training regarding sexual harassment for employees in February 2019.

#### *Allegations by Cason's Coworkers*

The discipline at issue in this case arose after an investigation about Cason's behavior towards his coworkers in the workplace. Several of Cason's coworkers alleged that Cason inappropriately touched them in a way that made them feel uncomfortable and engaged in inappropriate conversations leading to a negative work environment. Cason asserts that he is an outgoing person who tries to engage with and encourage his coworkers. He further contends these allegations are a result of lunchroom gossip and the animosity of two coworkers. Cason also notes that none of these coworkers alerted him that he was making them uncomfortable.

Almost universally, Cason's coworkers stated that he is an outgoing and touchy-feely person. Cason testified that when working in the office he would get his workplace set up and then go greet everyone to make them feel more comfortable and appreciated. When greeting them, he testified that he would touch or tap them on the back, shoulder, or arm in greeting. Most people faced into the cubicle so they would not be able to see him unless he got their attention by touching them. Cason said after getting his coworker's attention he would have conversations about their nights or weekends or lives to motivate and encourage them. Cason asserts that no one told him it made them uncomfortable.<sup>4</sup>

At least five female coworkers<sup>5</sup> testified that this type of "greeting" made them uncomfortable. These employees claimed Cason touched them on their arm or shoulder and back, would try to hug them, touch their hair, and would massage their shoulders. These coworkers also testified that no one else in the office engaged in this type of physical conduct. At least one of the employees claimed Cason touched her shoulders all the time.<sup>6</sup> Another said Cason touched and rubbed her shoulders or arms every couple of weeks, but it used to be daily.<sup>7</sup> A third employee claimed Cason touched her on the arm, shoulders, or back three to four times per week.<sup>8</sup>

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<sup>4</sup> Cason did admit in testimony that one person did say not to touch them as it startled her, but not that it made her uncomfortable.

<sup>5</sup> AC, MR, CS, VD, J.

<sup>6</sup> VD.

<sup>7</sup> J.

<sup>8</sup> AC.

These five coworkers all claimed they would tense up when he touched them. Further, of these five employees, one claimed she did tell him to stop, but he merely laughed and walked away.<sup>9</sup> Another stated that she told Cason during Agent 3 meetings that going up behind people and touching people was not motivational.<sup>10</sup> At least two of these coworkers claimed they would leave their cubicle when Cason was nearby so as to avoid or evade further physical contact.<sup>11</sup>

At least six other employees,<sup>12</sup> both male and female, noted that although Cason did not make them feel uncomfortable, he had engaged in different types of physical conduct with them, *e.g.* hugging, chest pats, etc. One of those employees stated that Cason does not understand personal space, but did not believe Cason was touching people to sexually harass them.

I find that Cason did engage in physical contact that was unwanted with his coworkers. Even based on Cason's own testimony, he acknowledges touching his coworkers. During his testimony Cason acted out his morning greetings with his coworkers and, based on his actions, I conclude he was not merely touching or tapping his coworkers' arms or shoulders, but would give them one or two shoulder squeezes when greeting them.

Further, I find it credible that at least one of these five coworkers did tell Cason that this physical contact was unwanted, but he may not have understood

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<sup>9</sup> AC.

<sup>10</sup> MR.

<sup>11</sup> J and MR.

<sup>12</sup> AG, DH, AJ, LJ, MM, DN.

the message. Similar to his discussions with Watson in which he did not absorb the message about sexual harassment, Cason either did not accept or understand the seriousness of his coworkers' discomfort.

Additionally, coworkers alleged, and Cason admitted, that he pinched several male coworkers on the chest and shoulders. Cason claims that pinching each other on the chest or shoulder was just guys horsing around. However, at least one coworker, DB, was offended when Cason pinched him.

DB said Cason has touched him on the arms and chest and has grabbed or pinched his nipples for years, and that this physical contact was unwanted. DB stated this happened once or twice a week, but Cason used to pinch him daily when he was on Cason's team. DB testified he asked Cason to stop. At one point DB had surgery on his torso or chest area and told Cason to avoid touching him because of that, and even that did not cause Cason to refrain from pinching DB on the chest at or near his nipples.

Cason, however, claims he pinched DB less than 10 times. He also asserts he only pinched him to stop DB from teasing a fellow coworker in a way that upset her. This claim is refuted by both DB and MR who testified that Cason pinched DB when Cason was talking to MR and DB tried to leave the conversation. This incident occurred in June of 2019, a week or two before the investigation.

DB claims he did not report Cason's conduct because he had been told that Cason had gotten out of trouble before and believed Cason would find a way to make his life unpleasant.

Again, I find that Cason engaged in unwanted physical contact of DB when he pinched him at or near his nipples. Cason admits to this behavior. Regardless of the reason for Cason's actions, he engaged in this physical conduct that made the male coworker feel uncomfortable. Although Cason claims none of his coworkers ever told him they did not welcome his physical behavior toward them, I disagree. I find that DB did express that he did not want to be touched in such a manner and that Cason either purposely or unintentionally refused to acknowledge that his behavior toward DB was unwanted.

Cason's coworkers also alleged that Cason discussed matters that were of a sexual nature and inappropriate for the office. One of the prime examples of this type of conduct cited was Cason's "Question of the Day." On Wednesdays Cason would post a "Question of the Day" on Facebook. Prior to doing so, Cason would question several employees in the office about whether it was a good question to post. These questions sometimes had sexual overtones. For example, Cason asked a question that came from the movie *Indecent Proposal*. Cason asked, how much money would you need to receive in order to let someone sleep with your spouse or significant other. Cason also asked a question that he claims was essentially from the *Newlywed Game*: If a TV crew saw and rated your last sexual encounter would it be, the *Big Bang Theory*, *Ripley's Believe It or Not*, or *Gone in Sixty Seconds*. Cason claimed these questions often came from TV or movies and he did not think they could be deemed inappropriate. Many of his

coworkers, including some that were interviewed and had no other issue with Cason,<sup>13</sup> stated these questions were not always appropriate for the office.

Cason also admitted to discussing his dating life in the office, but claims these conversations were not sexual or inappropriate. When he found one of his coworkers on a dating website he brought that up to her at the office and proceeded to discuss his dating life with her.<sup>14</sup> She claimed Cason talked to her about whether he had a sexual relationship with the women he dated. Another female coworker also claimed Cason told her uncomfortable stories about women that wanted to have sex with him and uncomfortable stories about his ex-wife.<sup>15</sup>

Another female coworker with whom Cason had an admittedly and notably discordant working relationship testified that Cason discussed the movie *Monster* with her.<sup>16</sup> She stated that Cason talked about the woman being a prostitute, talked about some sexual acts in the movie, and made an obscene gesture during this conversation. Cason admitted to discussing the movie with MR, but claimed he did not make an obscene gesture, but instead was miming the shooting of a gun as the main character in the movie is a serial killer.

During testimony, Cason also admitted that he talked about things like movies and asked about his “Questions of the Day” that had sexual overtones, but claims he did not realize it offended anyone.

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<sup>13</sup> AG and LJ.

<sup>14</sup> CS.

<sup>15</sup> VD.

<sup>16</sup> MR.

Cason talked about inappropriate topics in the workplace. Although Cason does not feel he crossed the line and does not feel that he made anyone uncomfortable, he has admitted to discussing topics that were of a sexual nature in the workplace with many of his coworkers.

Additionally, Cason's behavior negatively affected his workplace. At least six coworkers testified that Cason's behavior made them uncomfortable. The testimony ranged from employees stating they were distracted by his discussions of inappropriate sexual topics, to employees leaving their work station to avoid inappropriate and uncomfortable physical contact from Cason. Cason's behavior negatively affected his coworkers in the workplace.

Cason claimrf that although he did touch people at work and he did talk about topics that had sexual overtones, the investigation and subsequent discipline at issue came about due to lunchroom gossip and the animosities of two coworkers, MR and CS. Cason and MR were both Agent 3's and had a contentious relationship, which was known to both other coworkers and management. The record reflects that Cason had filed two formal complaints against MR. Cason also alleges that CS and his relationship soured because he believed she had a crush on him, and he rejected her.

Despite the existence of cliques and lunchroom gossip, as well as any perceived or real animosities with certain coworkers, I still find the State demonstrated Cason engaged in physical contact that was unwanted with several female coworkers and at least one male coworker. Further, the facts as

provided by Cason demonstrate that Cason talked about topics that were inappropriate in the workplace.

*Collecting the group complaint*

As mentioned above, Cason's touchy-feely nature was known around the office. Laurie McCown, an assistant attorney general that worked with DOR since 2015, knew of this feeling in the office as she often worked with the collections teams. McCown testified that she had spoken to Cason's supervisors before, but no investigation had ever occurred.

In June 2019, McCown heard that one of the female Revenue Agents was upset because she had been placed on Cason's team, and he made her uncomfortable. Instead of going through DOR, as she claimed she had done in the past, McCown went to her supervisor, Adam Humes. Humes talked to Matt Bender, DOR's division administrator for Internal Services and the chief operating officer of DOR. Bender said there had been rumors about Cason, but Humes' information that he had received from McCown was not enough to start an investigation. At that point, McCown, with help from fellow assistant attorney general Brandon Gray, decided to have conversations with Cason's coworkers and report these discussions to Bender so he would open an investigation.

McCown and Gray talked to five of Cason's coworkers in one afternoon. McCown then talked to DOR Director Kraig Paulsen on June 20, 2019, to report her conversations. McCown told Director Paulsen that Cason grabbed the nipples of a coworker while in the cubicle of another coworker and said this type of behavior had gone on for a long period of time even though Cason was told

the contact was unwanted. McCown also told Director Paulsen there were other allegations. Director Paulsen communicated with Bender about his conversation with McCown. Bender contacted McCown and asked for a written summary of what she had heard as McCown had only told Paulsen pieces of the conversations.

On June 21, DOR, specifically Bender, contacted and spoke with DB, one of the employees in this group complaint that was collected by McCown and Gray. That employee confirmed that Cason twisted his nipples. Bender had also heard the allegation about Cason's "Question of the Day." Bender testified that he talked to an employee to confirm the complaint was legitimate before turning it over to the Department of Administrative Services-Human Resource Enterprise (DAS-HRE). Prior to the DAS-HRE investigation, Bender spoke to Director Paulsen, Humes, McCown, and DB.

On June 28, DOR received the written form of these group complaints from McCown and Gray. McCown's notes were a page and a half and discussed the conversations she had with four DOR employees. Gray's notes were also a page and a half and discussed the conversations with two DOR employees.<sup>17</sup>

#### *DAS-HRE Investigation*

On June 28, DOR placed Cason on administrative leave pending the "completion of an investigation concerning an allegation of sexual harassment."

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<sup>17</sup> Both Gray and McCown noted the conversation with MR. McCown also detailed her conversations with AC, JM, and DB. Gray discussed his conversations with MR and CS.

Bender contacted Chris Peden at DAS-HRE to start an investigation on June 30. Bender turned it over to DAS-HRE so an independent fact finding could be done.

During DAS-HRE's investigation, the investigator, Peden, interviewed 14 people. The interviews were done on July 1–2 and she interviewed Cason on July 8. During the investigation Cason denied violation of any policies in his treatment of his coworkers. Peden, in detail, confronted Cason with the allegations of his physical conduct as well as his discussions that may have had sexual overtones. Peden did not discuss when these incidents may have occurred or the coworker that made any of the allegations. Cason generally denied touching his coworkers, but did admit to giving a coworker a shoulder hug or giving a high five. Cason also admitted to his "Questions of the Day" and discussing the movie *Monster*. Generally, Cason denied the allegations.

DAS-HRE sent its investigation findings to Director Paulsen, Jen Wolver, the personnel officer, Nathan Reckman, Erin Reinders, and Matt Bender on July 10, 2019. DAS-HRE found sufficient evidence to conclude that Cason violated the State of Iowa's Policy Prohibiting Sexual Harassment. In the report, DAS-HRE detailed that Cason touched many coworkers and made them feel uncomfortable. The report further stated that some employees had asked Cason to stop touching them. Although Cason denied the allegations, the investigator stated that she did not find Cason to be credible. In the report, DAS-HRE further found Cason talked about inappropriate topics such as the "Questions of the Day." DAS-HRE detailed that four people stated Cason talked about sex and women and used inappropriate language, three employees expressed they did

not want to be on Cason's team, and three employees expressed concern about retaliation. DAS-HRE determined Cason's actions created a hostile work environment.

After receiving the report, Bender reviewed it before briefing the director and deputy director on the report. DOR management made the decision to terminate Cason's employment. Bender stated that DOR came to that decision after due process and based on the magnitude of facts at issue. Bender stated the agency proceeded to termination due to Cason's touching of employees, egregious language as well as the number of allegations, the frequency of allegations, and that these allegations occurred over a long period of time. DOR also acknowledged that Watson had previously had a conversation with Cason on the sexual harassment policy. DOR factored in that Cason was a long-term employee with no formal discipline. Bender stated that proceeding to termination rather than using progressive discipline is serious, but was necessary in this case based on the sheer "magnitude" of sexual harassment and how the environment impacted the other employees and their work. Bender testified that DOR's decision was based on the fact that this was not an isolated instance, the incidents happened repeatedly even after people told Cason to stop, and the incidents happened after Watson's supervisory direction to Cason regarding the sexual harassment policy. Bender also stated that DOR has terminated other employees for violation of this policy.

The afternoon after receiving the DAS-HRE report, on July 11, 2019, Justin Moorhead and Matt Bender conducted a *Loudermill* interview with Cason.

Cason seemed not to understand the reason for his termination except for the violation of the policy. Despite the detailed interview with Peden, Cason claimed not to know the allegations. Cason further reacted to this interview by stating that he was not stupid and would not sexually harass anyone. Bender gave Cason a few minutes alone to think. Cason did not add any new information; therefore, DOR proceeded with the decision to terminate Cason's employment.

The termination letter stated DOR terminated Cason's employment due to the investigation in which a violation of the State of Iowa Policy Prohibiting Sexual Harassment was determined to have been founded. The letter detailed, "[t]he investigation concluded that your actions violated the State of Iowa Policy Prohibiting Sexual Harassment. The violation occurred when you engaged in unwelcome and offensive conduct in the work environment."

Cason filed a grievance on July 12, 2019, claiming he was terminated without just cause. After a Step 3 meeting, the DAS director's designee denied Cason's grievance on September 5, 2019, concluding that termination was warranted and supported by just cause.

Cason filed the present appeal with PERB on September 25, 2019.

## CONCLUSIONS OF LAW

Cason filed this 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. Those rules are as follows:

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.)*, 12-MA-05 at App. 11. The term “just cause” when used in section 8A.415(2) and in administrative rule is undefined. *Stockbridge and State of Iowa (Dep't of Corr.)*, 06-MA-06 at 21 (internal citations omitted). Determination of whether management has just cause to discipline an employee requires case-by-case analysis. *Id.* at 20.

When determining the existence of just cause, PERB examines the totality of the circumstances. *Cooper and State of Iowa (Dep't of Human Rights)*, 97-MA-12 at 29. The Board has stated the just cause determination “requires an analysis of all relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical, inflexible application of fixed ‘elements’ which may or may not have any real applicability to the case under consideration.” *Hunsaker and State of Iowa (Dep't of Emp't Servs.)*, 90-MA-13 at 40. Although just cause requires examination on a case-by-case basis to determine just cause, the Board has declared 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.)*, 93-MA-21 at 23. The Board has also considered how other similarly situated employees have been treated. *Kuhn and State of Iowa (Comm'n of Veterans Affairs)*, 04-MA-04 at 42.

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

In the termination letter, DOR claimed it terminated Cason's employment for violations of the State of Iowa Policy Prohibiting Sexual Harassment. That policy states in relevant part:

Iowa Code section 19B.12 defines sexual harassment as "persistent, repetitive, or highly egregious conduct directed at a specific individual or group of individuals that a reasonable person would interpret as intentional harassment of a sexual nature, taking into consideration the full context in which the conduct occurs, which conduct threatens to impair the ability of a person to perform the duties of employment. . . ."

. . . .  
Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of

unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

....

Although unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature are examples of unacceptable conduct in the workplace, unlawful sexual harassment is not dependent on whether offensive acts or comments were sexual in nature, but whether the acts or comments are directed at a person because of his or her sex. Sexual harassment can be committed by both men and women. And, it may occur between members of the opposite sex, or between members of the same sex.

Examples of sexual harassment, include, but are not limited to:

- Unwelcome sexual advances
- ....
- Actions such as cornering, patting, pinching, touching or brushing against another person's body that are sexual in nature.
- Open speculation or inquiries about another person's sex life.
- Jokes, remarks, or innuendos that are sexual in nature or based on real or perceived sexual orientation or gender identity about another person, or about men or women in general.

The State claims it has established with sufficient evidence that Cason violated the policy prohibiting sexual harassment. Cason argues the allegations were merely lunchroom gossip, which stemmed from his personal issues with two coworkers. Cason also claims none of the complainants had dates or times of his misconduct. Further, Cason argues that no one used the complaint procedure established in the policy.

Despite Cason's arguments, I find the State proved with sufficient evidence that Cason violated the policy. Cason engaged in persistent, repetitive, and highly egregious conduct toward multiple coworkers that a reasonable person would interpret as intentional harassment of a sexual nature. Cason did not view

his treatment of these coworkers as sexual harassment, but admitted to many of the allegations at issue.

Cason admitted to repeatedly touching his coworkers in the office, and a reasonable person could view his actions as intentional harassment of a sexual nature. Cason repeatedly squeezed or touched the shoulders and arms of his female coworkers as a way of greeting people. Although he may not have realized it, these actions made some of his coworkers uncomfortable. Not all of Cason's coworkers viewed his actions as sexual harassment; however, several coworkers were uncomfortable and did view his behavior as harassment of a sexual nature. Further, Cason repeatedly, and against at least one person's stated wishes, pinched male coworkers on the chest and nipple area. Cason claims he was horsing around, but a reasonable person could also view this conduct as harassment of a sexual nature.

Additionally, Cason admitted to certain topics of conversation in the office that he believed were inoffensive; however, some of his remarks were sexual in nature. Cason's conversations regarding his "Questions of the Day," certain discussions of movies, such as *Monster*, and his conversations about his own dating life were personal and sexual in nature. Even those in the office that did not have any animosity or any issue with Cason commented that the "Questions of the Day" were inappropriate for the office.

Cason further argues that none of his coworkers reported his behavior according to the complaint procedure laid out in the policy prohibiting sexual harassment. Regardless of how the investigation started, the State has

demonstrated Cason's physical touching of coworkers and many conversations with coworkers were inappropriate and violative of the policy.

Cason also alleges that although he was aware of the policy prohibiting sexual harassment, he had no forewarning or knowledge of the possible consequences of his conduct. I disagree.

The State provided ample evidence that Cason was aware, or should have been aware, that his actions could lead to discipline including termination. Not only had Cason received the sexual harassment policy and had training on the policy, but less than a year before the investigation began, Cason also had a discussion about the sexual harassment policy with his supervisor in which they specifically talked about his morning routine of greeting coworkers and his topics of conversation. The policy, the training, and the conversation with his supervisor should have alerted him to the potential consequences of a violation of the sexual harassment policy.

Although Cason had prior investigations in which the State did not administer discipline, and Cason also had evaluations praising his motivational efforts, neither of these prior acts by management should have led Cason to believe his actions toward his coworkers were not subject to discipline. Cason was well briefed on the sexual harassment policy. Whether he chose to reflect on whether his own actions violated the policy is inconsequential. Cason received the sexual harassment training, Cason reviewed the policy, and Cason's supervisor discussed the sexual harassment policy with him. The evidence reflects that Cason was on notice of the policy, and therefore should have been

aware that he could be subject to discipline in light of his treatment of his coworkers.

Cason additionally argues the State's investigation was unfairly prejudicial and management relied on the allegations of the group complaint rather than the DAS-HRE investigation. Cason also claims he was not made aware of the allegations against him and therefore could not defend himself properly during the investigation.

Although the events leading to the investigation may have been irregular, I do not find that in this case the State relied on a preconceived conclusion as Cason suggests.

The onset of the DAS-HRE investigation was unusual in this case. Rather than one complaint, a non-complainant, the assistant attorney general McCown, amassed and delivered a group complaint to DOR management. Prior to turning the investigation over to DAS-HRE, DOR then confirmed one of the allegations in the group complaint with that employee.

Nonetheless, this onset of the investigation does not render the investigation unfair in this case. Management did have knowledge of some of the allegations before the DAS-HRE investigation. However, that would be true of many disciplinary investigations as employees may report complaints to their human resource departments. In lots of scenarios, the agency management would have some of the facts prior to the formal investigation. This in itself, does not cause an investigation to be unfair.

In this particular case, the testimony from DOR management provides further evidence that DOR relied on the DAS-HRE investigation and not any preconceived notion that evolved from McCown's group complaint. Bender credibly testified that DOR terminated Cason's employment for the "magnitude" of the allegations and violations at issue. The group complaint that Bender knew about prior to the DAS-HRE investigation was not nearly as robust. The assistant attorneys general conversed with five employees and then submitted three pages of notes about the conversations, some of which overlapped.

The DAS-HRE investigation, on the other hand, included statements from fourteen coworkers and was far more detailed. Additionally, during the DAS-HRE investigation, DAS-HRE interviewed Cason. At that time, DAS-HRE confronted Cason with the types of complaints made against him. Although the investigator did not list names of the complainants, Cason heard the types of facts that were at issue, and in some cases was able to determine which person made the allegation.

DOR management's reliance on the magnitude and scope of the allegations leads me to believe DOR relied on the DAS-HRE report, not any preconceived notion. Further, although Cason questions the DAS-HRE investigation, I find the investigator gave Cason a chance to adequately respond to the allegations against him. As such, the State has demonstrated that it conducted a full and sufficient investigation prior to DOR's determination of discipline.

I also find the record is absent of disparate treatment of employees. Cason claims that other people in the office engaged in horseplay and the State neither

investigated nor disciplined those individuals. Management testified the State has discharged other employees at DOR for violation of the policy at issue. Further, Cason's claim that other employees engaged in similar behavior was refuted by nearly all employees interviewed during the investigation and testifying at the hearing. Cason's coworkers, even those who had no complaints against him, described him as touchy-feely and stated he conversed about inappropriate topics at the office. Many coworkers also stated that no one else in the office behaved in a similar manner. Thus, I find the State has demonstrated the State did not treat Cason disparately.

Cason additionally contends the State should have utilized progressive discipline as Cason was not given an opportunity to correct his behavior. The State argues that termination was appropriate because Cason was in a position of authority, more than a dozen employees had allegations of misconduct, Cason's misconduct was egregious, Cason's actions prevented employees from accomplishing their work tasks, Cason did not accept responsibility for his actions, and DOR lost trust in his ability to accomplish his job. I find the State's actions in proceeding straight to termination rather than utilizing progressive discipline justified given the totality of the circumstances of the case.

The State's policy of discipline is one of progressive discipline in which measures of increasing severity are applied to repeat offenses until behavior is corrected or it becomes clear that it cannot be corrected. *Stein and State of Iowa (Iowa Workforce Development)*, 2020-PERB-102304, at 22 (quoting *Phillips and State of Iowa (Dep't of Corrections)*, 98-MA-09 at 14). PERB has recognized that

progressive discipline is used because the purpose of employee discipline is to correct an employee's behavior rather than simply to punish the employee. *Stein*, 2020-PERB-102304, at 21. The system of progressive discipline, then appropriately fulfills this purpose by addressing employee behavior over time, through escalating penalties. *Id.* at 21-22 (quoting Norman Brand, *Discipline and Discharge in Arbitration* at 57 (BNA Books 1998)). Employers impose some penalty less than termination to convey the seriousness of the employee's behavior, but yet to afford the employee an opportunity to improve. *Id.*

When determining the appropriate discipline and the use or absence of progressive discipline, PERB considers the circumstances of the case. *Hoffmann and State of Iowa (Dep't of Transp.)*, 93-MA-21, at 26. Progressive discipline may be inapplicable when the conduct underlying the discipline was a serious offense. *Phillips and State of Iowa (Dep't of Human Servs.)*, 12-MA-05 at App. 1, 13, 16-18. When determining the appropriate type of discipline given the circumstances, PERB examines the severity and extent of violations, position of responsibility held by the employee, 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 Corr.)*, 98 H.O. 09 at 15; *Estate of Salier and State of Iowa (Dep't of Corr.)*, 95-HO-05 at 17.

Cason's behavior towards his coworkers was severe and extreme. Cason repeatedly pinched one of his male coworkers over a period of years and over his

expressed wishes. This type of physical conduct and sexual harassment is extreme. Further, Cason physically touched at least five female coworkers in a way that made them uncomfortable over a period of time until the employees sought to avoid him altogether. Additionally, Cason had multiple conversations of a sexual nature in the office, which almost universally in this record, his coworkers found inappropriate. Cason's violation of the policy prohibiting sexual harassment was severe and extreme.

Cason also was in a position of authority in the office. Cason was a team lead, and he claimed that he wanted to build his team up, and yet his actions had the opposite effect on multiple employees. Although Cason generally had good evaluations and did not have discipline in his record, his supervisor and DOR developed a lack of confidence and trust in his ability to do his job because of the "magnitude" of the violation of the policy. Cason's supervisor had previously had conversations warning Cason about violations of the sexual harassment policy. Yet, this reminder still did not cause Cason to reevaluate and change his behavior. Understandably, DOR did not find that Cason could be returned to his position.

I find the State demonstrated that just cause existed to skip progressive discipline and proceed to termination in this case. Although Cason is a long-term employee, the extent of the violations at issue and the number of people affected is overwhelming. The conduct at issue was not an isolated incident, Cason was properly warned, and DOR reasonably felt progressive discipline would not effectuate its goal and cause Cason to correct his behavior.

I consequently propose the following:

ORDER

Cason's state employee merit appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of \$2,272.75 are assessed against the Appellant, Norm Cason, 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 Cason'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 merits.

DATED at Des Moines, Iowa this 17th day of December, 2020.

/s/ Amber DeSmet

Administrative Law Judge

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