

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

JENNIFER LEAVY-WESTPHAL,)	
Appellant,)	
)	
and)	CASE NO. 102387
)	
STATE OF IOWA (IOWA VETERANS HOME),)	
Appellee.)	
)	

DECISION AND ORDER

This case is before the Public Employment Relations Board (PERB or Board) on the State’s petition for review of a proposed decision and order issued by an administrative law judge (ALJ) following an evidentiary hearing on Jennifer Leavy-Westphal’s Iowa Code section 8A.415(2) State employee disciplinary action appeal. Leavy-Westphal filed her appeal challenging the State’s termination of her employment as a food service worker for the Iowa Veterans Home (IVH). The State alleged Leavy-Westphal violated work rules and policy when she used her personal mobile device to take a photo while on IVH grounds. In her proposed decision, the ALJ concluded the State had not established just cause supported its termination of Leavy-Westphal’s employment, but just cause supported the imposition of a written reprimand.

Neither party elected to file a voluntary brief prior to oral arguments. AFSCME representative Matthew Butler presented oral argument to the

Board on Leavy-Westphal's behalf and attorneys Annie Myers and Andrew Hayes presented argument on the State's behalf.

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' oral arguments, we adopt the ALJ's findings of fact and we adopt the ALJ's conclusions with additional discussion. We concur with the ALJ's determinations and conclusion that the State failed to establish just cause supported its termination of Leavy-Westphal's employment. However, for the reasons set out herein, we conclude just cause supported the imposition of a five-day suspension rather than the written reprimand as determined by the ALJ.

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.

CONCLUSIONS OF LAW

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

The ALJ's findings include the fact that Leavy-Westphal "took the picture with the purpose of showing the corn to upper management so they could decide whether the corn was fit to serve." However, Leavy-Westphal's concern is somewhat tempered by her acknowledgement that she could have taken her concerns to management during her break rather than waiting until after her job duties for the day were complete. These relevant facts we took into consideration in reaching our conclusion.

We agree with the ALJ's conclusion that "Leavy-Westphal was on notice of the [mobile device] rule and its importance." Despite some confusion about the parameters of the rule, we place weight on the State's demonstration that Leavy-Westphal was or should have been on notice of the expected conduct.

Additionally, we place greater weight than perhaps the ALJ on Leavy-Westphal's prior disciplinary actions. In the previous two and one-half years, the State disciplined Leavy-Westphal on four occasions. The last occurrence of insubordination had occurred only two years prior and resulted in a one-day suspension.

In our review, we agree with the ALJ's findings of fact, but place greater weight on Leavy-Westphal's notice of the expected conduct for

mobile device prohibitions and the effect of her prior disciplinary actions. After considering the totality of circumstances, we agree with the ALJ that the State failed to establish just cause supported its termination of Leavy-Westphal's employment. However, in considering relevant factors, we conclude the State has shown just cause supports the imposition just of a five-day suspension for Leavy-Westphal.

Accordingly, we enter the following:

ORDER

The State of Iowa, Iowa Veterans Home shall reinstate Jennifer Leavy-Westphal to her former position (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore her benefits accounts to reflect accumulation she would have received but for the discharge; make appropriate adjustments to her personnel records and take all other actions necessary to restore her to the position she would have been in had she been given a five-day suspension rather than having her employment terminated on August 9, 2019.

The cost of reporting and of the agency-requested transcripts in the amount of \$1,323.70 are assessed against the appellee, the State of Iowa, Iowa Veterans Home, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9(20). A bill of costs will be issued to the State in accordance with PERB subrule 11.9(3).

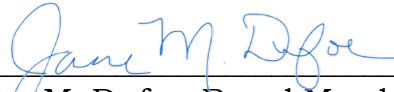
This decision constitutes final agency action.

DATED at Des Moines, Iowa, this 4th day of March, 2022.

PUBLIC EMPLOYMENT RELATIONS BOARD



Erik M. Helland, Chair



Jane M. Dufoe, Board Member

Original filed EDMS.

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

JENNIFER LEAVY-WESTPHAL, Appellant,)	CASE NO. 102387
)	
and)	PROPOSED DECISION
)	AND ORDER
STATE OF IOWA (IOWA VETERANS HOME),)	
Appellee.)	

Appellant, Jennifer Leavy-Westphal, 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. Leavy-Westphal appeals the third-step response of the director of the Iowa Department of Administrative Services (DAS) denying the appeal of her termination.

Leavy-Westphal worked as a food service worker for the Iowa Veterans Home (IVH). Leavy-Westphal alleges the State did not have just cause to terminate her employment on August 9, 2019. The State denies that Leavy-Westphal’s termination was not supported by just cause.

A closed evidentiary hearing was held on November 17 and November 20, 2020. Matthew Butler and Melissa Speed represented Leavy-Westphal. Annie Myers and Andrew Hayes represented the State. The parties submitted post-hearing briefs on or before January 15, 2021. After considering the evidence and the arguments of the parties, I propose the following:

FINDINGS OF FACT

Jennifer Leavy-Westphal worked as a food service worker for IVH for eleven years. As a food service worker, Leavy-Westphal assisted in quality control of

food products, monitoring freezer temperatures, refrigerator and food temperatures, and sanitizing the kitchen area. A food service worker has a variety of daily duties including washing dishes, preparing trays for individual residents, and prior to COVID-19 protocols, the food service workers carried trays and helped residents into the dining rooms.

While working at IVH Leavy-Westphal has served as union steward, vice president, and president of the local union. She has also served on the contract negotiations team. Leavy-Westphal's supervisors at the time of her termination were Brett Schutt, the assistant food service director, and Andrea Maher, the clinical dietitian for IVH. In Leavy-Westphal's evaluations her supervisors ranked her job performance as meeting expectations. Her supervisors also commented that Leavy-Westphal "is an advocate for the residents and her peers, and is active in community efforts for whatever may be needed." Both Schutt and Melissa Sienknecht, the former supervisor in the food and nutrition department that now serves as the human resources director, commented that Leavy-Westphal has come to them many times with concerns for both staff and residents.

Prior to the discipline at issue, Leavy-Westphal received other discipline. In June 2017, IVH issued Leavy-Westphal a written reprimand for failure to fulfill a mandate for the second time. In September 2017, IVH issued Leavy-Westphal a one-day suspension for being disrespectful and insubordinate in the workplace. In May 2018, IVH issued Leavy-Westphal a three-day suspension for being absent without prior authorization. Finally, in July 2018, IVH issued Leavy-Westphal a five-day suspension for being absent without proper

authorization. The five-day suspension letter stated that “this will be considered your final warning.” The letter also said, “Any further violation of Commission of Veterans Affairs Work Rules may result in further discipline up to and including discharge.”

As an employee at IVH, Leavy-Westphal underwent various training. Leavy-Westphal had a certificate of achievement from a ServSafe Food Handler Training from April 2019. She also completed other online and in-person training. However, the staff also communicated about policies and updates on a weekly basis. In the food service area, Maher and other supervisors would have “scoop” meetings Monday, Wednesday, and Friday at 8:45 a.m. for food service workers. The scoop meeting is a huddle where the employees take notes on important issues. These meetings last anywhere from five to fifteen minutes.

IVH policies are updated on an annual basis or as needed throughout the year. Administration notifies the kitchen staff when the policies have been updated by email. However, Maher noted that as the supervisor in the food service area, she felt that anything significant needed to be brought up by the bureau chief or leader in the department. That was the purpose behind the scoop meetings. Thus, kitchen staff would receive policy updates through email and verbalization of the policy from leaders at the scoop meetings.

As part of work time, staff are allowed to review the policies. The staff can use the computer lab in the facility to check email and review the policies. However, several employees noted the computer lab is often locked, and they must find a supervisor to get the key for the computer lab. Additionally,

employees commented that supervisors would tell the employees to get back to other duties rather than checking these policy updates in the computer lab during their work time. Some food service employees rarely check their emails.

In the past Leavy-Westphal has requested to receive a written copy of a policy. However, even upon request, it took a few days before she received a written copy of the requested policy.

Leavy-Westphal acknowledged receiving IVH policies on January 25, 2019. This acknowledgement stated that “it is my responsibility to read and be familiar with all State of Iowa Commission of Veterans Affairs, and Iowa Veterans Homes Policies and Work Rules.” The acknowledgement further added “I understand that failure to comply and/or any violation of the policies and work rules listed above will result in disciplinary action, up to and including discharge.” Leavy-Westphal also acknowledged that she received the State of Iowa Employee Handbook in November 2018.

At issue in this appeal is Policy 070B, regarding mobile devices in the facility. IVH implemented this policy in 2012 and updated the policy in October 2018. IVH emailed this mobile device policy to all staff on December 12, 2017, after updating the policy to clarify that employees shall not carry personal phones in work areas. The policy change that occurred around 2017 and 2018 was particularly significant as personal degradation had been added as a form of abuse, and the policy change attempted to encompass that. Maher believes the kitchen staff were made aware of the cell phone policy multiple times. First, staff received HIPAA training, which Leavy-Westphal completed on October 3,

2018, which referred to the Mobile Device Policy. Maher also discussed the cell phone policy in many scoop meetings because of its importance. At the scoop meetings Maher gave the highlights of the policy rather than reading it or providing a copy of the policy. Maher told the kitchen staff that staff cannot carry cellphones on them in the workplace. Although in the scoop meetings Maher told the staff not to have the cell phone on them at all, she also emphasized the purpose of the policy was to protect the residents. Leavy-Westphal claims that from these meetings she understood that staff could not take pictures in resident areas and could not carry cellphones on your person while working on the floor.

The instant appeal arose from an incident on August 6, 2019. IVH received corn to serve to the residents from a local farmer. Approximately five food service workers were in the veggie prep area in the basement of one of the IVH buildings preparing the corn. This area is generally a locked area of the facility. The workers were shucking and cleaning 500 servings of corn. When shucking the first bag or two, the workers noticed little black bugs or worms on the tips of the husks of corn. The staff alerted management to the situation. Management assessed the situation while the staff continued shucking the corn. When finding additional husks that contained worms, the workers removed the worms and cut off the ends that contained the worms. The food service workers collected the worms in one or multiple bowls.

Both Maher and Schutt assessed the corn. Management, including Maher and Schutt came to the veggie prep area three to four times while the staff was shucking the corn to evaluate the corn for potential contamination. Schutt even

took pictures of the corn on his cellphone. It is unclear from the record whether this cellphone was a personal phone or a work phone.

After reviewing the corn, consulting with other members of management, and conducting additional research, Maher determined the corn was acceptable to serve. Maher had spoken to the local grower who had told her that insecticides were not used out of concern for the residents' safety, thus the corn would contain some bugs. However, Maher ultimately determined the corn was safe to serve.

On August 6, Leavy-Westphal was working in the nourishment position. As part of her duties for that day she filled orders from all the units throughout the entire facility. Basically, she needed to get the groceries for the units, bag them up, and then after the last break at 12:30 p.m., she and the other workers in the nourishment position would disburse all the groceries to the different units. At approximately 12:15 p.m. she went downstairs to check on the ice cream that those in the nourishment position would take on the carts to the units. The freezer area is next to the veggie prep area where other food service workers were shucking corn. Leavy-Westphal went into the veggie prep area, saw the corn, and was disgusted. At least some of her coworkers told her to leave it be as they had convinced Schutt and Maher to serve the corn. A couple of the employees were discussing using the worms for fishing bait.

Leavy-Westphal went back upstairs and finished obtaining all the things she needed for her delivery. Then Leavy-Westphal took her fifteen minute break at 12:30 until 12:45.

During her break, Leavy-Westphal asked a coworker if she could borrow his cellphone as she always keeps her phone in her car. She explained to him that she intended to take a picture of the corn so that she could go “up the chain of command” and show management above Maher and Schutt. He agreed and told her what locker his phone was in. Leavy-Westphal retrieved the phone and went back downstairs to the veggie prep area. She took a picture of one of the bowls with grubs in it. As she took the picture, one of her coworkers, Dillon Horn, put his hand over the bowl. At the time of the investigatory interview, one of the workers claimed Leavy-Westphal said she was going to post the picture on Facebook. The other coworkers in the room stated that Leavy-Westphal did not say what she was going to use the picture for. Leavy-Westphal contends she stated, “It’s not like I’m going to put it on Facebook.” The staff in the room told Leavy-Westphal that management had seen the corn. It is unclear whether Leavy-Westphal knew at the time she took the picture that management had decided to serve the corn. While some of her coworkers in the room told her they had convinced their supervisors to serve the corn, others told her that management was still making the decision on whether to serve the corn.

After Leavy-Westphal took the picture of the corn, she went back upstairs, sent the picture from her coworker’s cellphone to her own personal cellphone and then deleted the picture off her coworker’s cellphone and put his phone back in the locker. Later, this coworker texted Leavy-Westphal back asking, “what [did] they say?”

After taking the picture Leavy-Westphal finished her break. She grabbed her cart and went to the Ulery building which has eight units. She dropped off groceries to all eight units. Generally, the employee on that run does not return until 2:00 p.m., and then the employee would clock out for the day.

Leavy-Westphal claims she took the picture on her break because she assumed that by the time she was done with her duties for the day the corn would be cleaned up and there would not be proof of the amount of worms and the condition of the corn. She intended to finish her job duties and then take the picture to Melissa Sienknecht, the human resources director that used to be her supervisor in the food and nutrition team or to take the picture to the administrator on duty. Leavy-Westphal did later acknowledge that during her break it may have been possible for her to go to management at that time rather than taking the picture and waiting until after her job duties for the day were complete before bringing her concerns to management.

Despite some testimony that Leavy-Westphal said she may post the picture on Facebook, I find Leavy-Westphal's testimony regarding her reasons for taking the picture credible. Supervisors agreed that Leavy-Westphal has taken concerns of both residents and staff to management before. A coworker that knew of Leavy-Westphal's plans to take the picture texted her asking what "they" had said seemingly implying that Leavy-Westphal was going to show the picture to management. The evidence demonstrates Leavy-Westphal took the picture with the purpose of showing the corn to upper management so they could decide whether the corn was fit to serve.

After Leavy-Westphal took the picture, Horn reported to Ashleigh Gummert that Leavy-Westphal had been in the veggie prep area and had taken a picture of the worms. On that day, Horn stated that he was not thinking about a potential rule violation, but yet still reported what occurred. This report went to Schutt and Maher. They contacted Melissa Sienknecht and reported one of the staff had used a cell phone. Sienknecht began an investigation that same day prior to Leavy-Westphal's return from her deliveries. Sienknecht and Schutt conducted the majority of the investigation.

Upon Leavy-Westphal's return from Ulery, her supervisor, Schutt saw her coming and retrieved her for an investigatory interview. During the questioning Leavy-Westphal admitted to using a cellphone in the veggie prep area while she was on break. She also stated she intended to bring the picture to Melissa or other management to show them what was going on. She admitted she did not have permission to use a cellphone in the veggie prep area. She did not want to go to Schutt as he already was aware what was going on and the staff had told her they talked Schutt and Maher into serving the corn. Leavy-Westphal expressed confusion about the cellphone policy. She claimed she was on her break and was in an area without any residents, so she did not think she was in violation of Policy 070B. She thought that policy applied only in resident areas or to pictures that may include residents. When asked whether she was intending on posting the picture on Facebook, Leavy-Westphal responded, "Come on. I'm sitting on a 5 day. Who would be silly enough to put something like that about the Iowa Veterans Home on Facebook?"

Schutt and Sienknecht not only interviewed Leavy-Westphal on August 6, but also interviewed three other employees that were in the veggie prep area shucking corn. Management conducted a follow-up interview with one of those employees again on August 8.

Schutt placed Leavy-Westphal on administrative leave on August 6, 2019. On August 9, Schutt and Sienknecht conducted a *Loudermill* interview with Leavy-Westphal. They told Leavy-Westphal that management had concluded the investigation and determined she had violated rules regarding insubordination and Policy 070B, the mobile device policy. Based on their findings, they determined termination was appropriate. When they asked Leavy-Westphal if she wanted to provide any other relevant information, Leavy-Westphal stated that she had nothing to say that would change the outcome.

IVH reached the decision to terminate after the investigation because Leavy-Westphal already had a five-day and final warning for violation of other work rules. Sienknecht and Maher were involved in the decision to terminate and they also talked to Penny Cutler-Bermudez and the personnel officer. Management stated they considered just cause factors. They considered the fact that other employees had been disciplined for committing this same infraction. One such employee posted a photo on snapchat, which was found to be resident abuse, and that employee was terminated for the egregiousness of the conduct. Ultimately, management found that Leavy-Westphal violated Policy 070B and proceeded to the next step of discipline, which was termination.

IVH issued a termination letter on August 9, 2019. In the letter the State provided that “On August 6, 2019 you used your personal mobile device to take a photo while on IVH grounds.” The State claims that Leavy-Westphal’s actions were in violation of the Commission of Veterans Affairs Work Rules B3, which states “Insubordination will not be tolerated. You are expected to follow all written and verbal instructions of supervisory staff or the designated person in charge.” The State also claims that Leavy-Westphal violated Policy 070B which states, “While mobile device use is permitted, under no circumstances should photos, recordings or other media be taken on personal mobile devices while conducting IVH business or on IVH grounds.”

Leavy-Westphal filed a grievance on August 12, 2019, claiming she was terminated without just cause. Leavy-Westphal filed the present appeal with PERB on October 30, 2019.

Throughout the grievance and the instant appeal, Leavy-Westphal claims that she did not have notice of the parameters of the cell phone policy and other people used their phones on IVH grounds without receiving discipline.

Other IVH food service workers were interviewed and testified as to their knowledge of the cell phone policy. At the time of his interview on August 6, both Lucas Vandenberg and Dillon Horn, when responding to a question from the investigators, said they understood the policy and it had been discussed with the staff. However, Dillon Horn also stated in his investigatory interviews that when he reported Leavy-Westphal, he was not thinking about a rule violation, but just thought she was going about expressing her concern the wrong way. In

December 2019, after Leavy-Westphal's termination, IVH sent out the cell phone policy again and required the employees to witness that they had received the policy. By the time of the hearing, it is clear the food service workers understood the mobile device policy.

I find it credible that at the time of the incident Leavy-Westphal did not understand the parameters of the mobile device policy. Leavy-Westphal maintained this claim throughout her investigation and this appeal. The testimony regarding the mobile device policy clarified management's emphasis on degradation of the resident. Hence, the main takeaway from the staff meetings was likely that employees cannot take pictures of residents or resident areas. Further, Leavy-Westphal did not have her phone in the facility, and thus likely did not see this rule as a potential concern for herself. Also, it is unclear from the record that her coworkers recognized at the time that her actions constituted a violation of this policy as her coworkers did not report her for that purpose. Although this rule was discussed by management, the credible evidence in the record shows that Leavy-Westphal did not understand the exact limits of such rule.

Leavy-Westphal also contends she was treated disparately as other employees used their cell phones in work areas and were not disciplined. At hearing, Leavy-Westphal provided pictures that had been posted on Facebook by coworkers. Some supervisors had even reacted to these posts. Some of these pictures were taken in break rooms. Other pictures were in work areas. The evidence in the record demonstrates that some of the pictures were taken on

State-issued phones. It is unclear the extent to which management knew about the pictures that were posted on Facebook that were taken in work areas. Leavy-Westphal also provided evidence that on special occasions, supervisors encouraged employees to take pictures while at work.

CONCLUSIONS OF LAW

Leavy-Westphal 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, 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, IVH cited two rule violations that justified terminating Leavy-Westphal's employment. The first rule cited was Iowa Commission of Veterans Affairs Code of Conduct and Work Rules B3, which states: "Insubordination will not be tolerated. You are expected to follow all written and verbal instructions of supervisory staff or the designated person in charge." IVH also claimed it terminated Leavy-Westphal's termination for a violation of Policy No. 070B. This policy, in relevant part, states the purpose of the policy is: "To establish criteria and guidelines for appropriate use of both state issued and personal mobile devices . . . by Iowa Veterans Home (IVH) employees" and "To ensure the highest level of safety and security for residents, staff and visitors. To maximize work productivity and limit distractions to the IVH workforce. To safeguard the privacy and confidentiality of our residents and staff." In the procedures of Policy 070B, the policy states that employees must: "Respect residents and staff in the area. Device usage should not disturb residents or interfere with the work of other staff members." Finally, the policy provides:

1. IVH limits the use of personal mobile devices while attending to IVH business and while on IVH grounds. Employees shall not carry personal cell phones on their person in work areas.
2. Employees may use personal mobile devices during lunch and break periods in areas away from residents, resident care and other forms of Protected Health Information (PHI) as described in Policy 088. Such areas where mobile device use is permitted include the main floors of the Dack, Malloy, Loftus, Sheeler and Heinz Hall buildings that are utilized for breaks, individual break rooms on the units, private offices, and common areas exterior to individual units in the Fox and Ulery buildings.
3. While mobile device use is permitted, under no circumstances should photos, recordings, or other media be taken on personal mobile devices while conducting IVH business or on IVH grounds.

Other policy provisions of note include IVH Policy 009, which is part of IVH's Compliance and Ethics program. This policy states that if an employee in their daily work encounters a situation they believe is prohibited, the employee must report the issue to a supervisor.

Leavy-Westphal does not dispute that she took a picture with a cell phone in the veggie prep area. Policy 070B prohibits such conduct. The State has shown Leavy-Westphal violated the rule as provided in the letter of termination. The other rule cited, the rule regarding insubordination, is derivative of the primary violation of Policy 070B. The State cites no conduct which would warrant a violation of this rule, other than the underlying offense of Leavy-Westphal's violation of Policy 070B, the mobile device policy. As the State has shown Leavy-Westphal violated Policy 070B, the State has shown the derivative violation of Iowa Commission of Veterans Affairs Code of Conduct and Work Rules B3. The State, however, has shown no independent basis for a violation of Work Rule B3.

Throughout the investigation and the hearing, Leavy-Westphal repeatedly contends that she did not have notice of the parameters of the mobile device policy. The State claims it provided Leavy-Westphal with adequate notice.

Based on the evidence in the record, the State has shown it provided Leavy-Westphal with notice about the mobile device policy. IVH emailed all staff the policy in December 2017. IVH further mentioned the policy at a training in 2018, which Leavy-Westphal attended. Finally, Leavy-Westphal's supervisors discussed this policy many times at scoop meetings with food service staff. Although the specific details of the rules may not have been discussed and the

State did not read the text of the policy to staff, the State provided its staff notice of the policy as well as the importance of such policy, and did provide a copy of the full policy via email in December 2017. I cannot find the State has a duty to verbally instruct all food service workers at IVH on every facet of the mobile device policy. Leavy-Westphal was on notice of the rule and its importance, and she had the means of reviewing it in its entirety. The State has demonstrated that Leavy-Westphal was or should have been on notice of the expected conduct.

Leavy-Westphal further argues that IVH's investigation into the matter was not fair or sufficient. She claims there was nothing the investigation could have yielded that would have changed the outcome. She also contends that her supervisor Brett Schutt should not have been involved as an investigator as he was involved in making the decision to serve the corn and that decision led to the incident at issue. The State argues the investigation was fair and sufficient.

During the investigation, the human resources director and the assistant food service director both were involved in conducting the interviews. They interviewed Leavy-Westphal as well as the other food service workers that were in the room when Leavy-Westphal took the picture. Leavy-Westphal was given a chance to respond to the allegations during the course of the investigation. Although Schutt testified that Leavy-Westphal was terminated because she violated the policy and already had a final warning this does not in itself demonstrate the conclusion was determined prior to the investigation.

However, Schutt's involvement in the investigation is concerning. During her investigatory interview Leavy-Westphal admitted that she was told Schutt

and Maher had already made the decision to serve the corn, and she did not believe that decision was appropriate. Leavy-Westphal alleged she took the picture, and thereby violated the rule, to show Maher and Schutt's superiors because she disagreed with the decision that Maher and Schutt, now one of the investigators, made. Although Leavy-Westphal's statement did not concern the central question of whether she violated the rule, it did provide her motivation for violation of the rule, which could be considered as a mitigating factor. This statement placed Schutt in a position where he had a conflict of interest. He needed to stay a neutral party during the investigation, but the primary witness had now singled him out as the reason for her need to violate the rules and take the picture of the corn. Despite Leavy-Westphal's statements, Schutt continued to be part of the investigation team and interviewed subsequent employees. His continuation as an investigator jeopardized the fairness of the investigation.

Leavy-Westphal also argues that she was treated disparately as other personnel at IVH took pictures while at the facility and were not disciplined. The State denies that it treated Leavy-Westphal disparately from other similarly situated employees.

Although, the mobile device policy prohibits employees from taking pictures in work areas of the facility, this prohibition was not absolute. It is clear from the record that employees could take pictures throughout the facility with permission from a supervisor. Employees could take pictures in break rooms while on break. Employees also could take pictures on state-issued cell phones when permitted by management.

Leavy-Westphal provided documentation that other employees have taken pictures throughout the facility. This documentation is not enough to show the State treated Leavy-Westphal disparately from other employees. The pictures provided may have been taken pursuant to authorization from supervisors, may have been taken on a State-issued phone with authorization from management, or may have been taken in break areas. The record is absent of evidence that other employees engaged in an action similar to Leavy-Westphal, that action was known to management, and management failed to take disciplinary action against the employee.

Further, testimony indicates other employees have been disciplined for violation of the mobile device policy. The State has shown with sufficient evidence that it did not treat Leavy-Westphal disparately.

Finally, Leavy-Westphal argues the discipline imposed was not proportionate to the offense. Leavy-Westphal contends the State's use of previous discipline as justification for imposing termination is not appropriate given that adequate warning of the rule could correct Leavy-Westphal's behavior. Leavy-Westphal also asserts her actions were not serious enough to justify the punishment imposed. The State contends it used progressive discipline when determining to terminate Leavy-Westphal's employment.

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 Nat. Res.)*, 08-MA-09, 08-MA-18, at App. 30. The purpose of progressive discipline is to correct

an employee's behavior, rather than merely to punish the employee. *Stein and State of Iowa (Iowa Workforce Dev.)*, 2020 PERB 102304. Progressive discipline addresses employee's behavior over time through escalating penalties. When using progressive discipline, the discipline imposed should correct the unacceptable behavior of an employee and convey the seriousness of the behavior while still affording the employee an opportunity to improve. *Phillips and State of Iowa (Dep't of Human Servs.)*, 12-MA-05 at App. 16 (citing Norman Brand, *Discipline and Discharge in Arbitration* at 57 (BNA Books 1998)). Progressive discipline may be inapplicable when the conduct underlying the discipline was a serious offense. *See Phillips and State of Iowa (Dep't of Human Servs.)*, 12-MA-05 at App. 1, 13, 16-18. When determining the appropriate discipline and use of progressive discipline, PERB considers the circumstances of the case. *Hoffmann and State of Iowa (Dep't of Transp.)*, 93-MA-21, at 26.

The State contends it used progressive discipline appropriately in this case. I disagree. The State points to Leavy-Westphal's prior disciplines as proof that her behavior cannot be corrected. Leavy-Westphal received a written reprimand for an insubordination rule violation in June 2017 for her failure to fulfill a mandate for a second time. She received a one-day suspension for insubordination in September 2017 when she acted disrespectfully in the workplace. She received a three-day suspension in May 2018 and a five-day suspension in July 2018 when she was absent without proper authorization. The five-day suspension stated "this will be considered your final warning" and "[a]ny

further violation of Commission of Veterans Affairs Work Rules may result in further discipline up to and including discharge.”

As stated above, the purpose of progressive discipline is to correct an employee’s behavior, rather than to punish the employee. Thus, increasing the severity of penalties for repeated rule violations only serves that purpose when the prior actions that lead to discipline were sufficiently related to serve as notice, which allows the employee to correct their behavior. The prior disciplines must be sufficiently related to establish that more severe discipline is needed to correct the employee’s conduct. *See generally* Discipline and Discharge in Arbitration 2-90 (Norman Brand and Melissa H. Biren, eds. 3rd ed. 2015) (asserting arbitrators can and do look at whether the previous disciplines were sufficiently related to justify escalation of the penalty); *see also* *Wise and State of Iowa (Dep’t of Human Servs.)*, 2016 PERB 10005, at App. 24–26 (finding termination too severe a discipline when Wise was not given the opportunity to correct his behavior). The prior actions that led to the previous disciplines do not need to be identical to the instant action nor do the rules the employee allegedly violated need to be identical. However, to fulfill the purpose of progressive discipline, *i.e.*, to correct the employee’s behavior and convey the seriousness of the behavior, the prior discipline needs to be sufficiently related to demonstrate the employee had the opportunity to correct the behavior, and failed to do so, thus justifying the escalated penalty.

In this case, the prior disciplines are not sufficiently related to establish that discipline cannot be used as a corrective recourse. Leavy-Westphal was

previously disciplined for insubordination issues and absence policy issues. Her actions that led to the previous disciplines have no relation to the actions for which she is being disciplined in the instant appeal. Although the present appeal cites an insubordination violation, the State has not shown this violation is anything more than a derivative violation of the cell phone policy violation unlike the previous disciplines from two years prior in which Leavy-Westphal's attitude demonstrated that she was insubordinate. Leavy-Westphal did not receive any discipline related to insubordination for two years prior to the discipline at issue and her last discipline for a violation of the absence policy occurred in August 2019. The length after such discipline perhaps demonstrates that she had corrected the absence policy and insubordination issues that led to the prior disciplines. This further demonstrates that Leavy-Westphal is able to correct her behavior. The State has not shown the prior disciplines establish that Leavy-Westphal cannot correct the behavior at issue here, using a cell phone in a work area.

Further, the State has not shown that Leavy-Westphal's behavior in using the cell phone in a work area and violating the policy was willful, and therefore might demonstrate that she would not seek to correct her behavior. *See Barnard and State of Iowa (Dep't of Human Servs.)*, 2017 ALJ 100758 (stating the asserted basis for discipline was not some willful act of misconduct, but was instead a brief departure from the employee's usual behavior, which the State had not suggested could not be corrected, changed or avoided in the future by the application of a much milder form of discipline than the five-day suspension that

was imposed). In this case, Leavy-Westphal used a cell phone without realizing she had violated IVH rules. The State has not shown that Leavy-Westphal's conduct and attitude demonstrate that she can or will not correct her behavior.

Finally, the State has not demonstrated that Leavy-Westphal's actions were so egregious that termination is the proportionate discipline to the offense at issue. Leavy-Westphal, in an attempt to remedy a situation that she felt put the residents of IVH in jeopardy, used her cell phone in a work area when she was on her break to take a picture of food she felt was not fit to serve. She did not take the picture of residents or staff. In fact, the residents were nowhere nearby when she took the picture. The record reflects that management, unbeknownst to Leavy-Westphal, had also taken a picture of the same corn. Unlike another employee who was terminated for a violation of the mobile device policy, Leavy-Westphal's picture was not degrading toward residents. Leavy-Westphal also did nothing more with the picture than text it to her own cell phone. She took the picture to report the matter to management. There is nothing so egregious in these circumstances that justify the State's termination of Leavy-Westphal's employment.

The State has not shown that Leavy-Westphal's prior disciplines were sufficiently related to the present discipline to employ escalating penalties. The State has also not demonstrated that Leavy-Westphal's action cannot be corrected with appropriate discipline. Finally, the State has not established that Leavy-Westphal's behavior was so egregious that termination of her employment was proportionate to the violation at issue.

Thus, I find the State has not shown just cause for Leavy-Westphal's termination, but rather has shown just cause to issue a written reprimand.

I consequently propose the following:

ORDER

The State of Iowa, Iowa Veterans Home shall reinstate Jennifer Leavy-Westphal to her former position (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore her benefits accounts to reflect accumulation she would have received but for the discharge; make appropriate adjustments to her personnel records and take all other actions necessary to restore her to the position she would have been in had she been given a written reprimand rather than having her employment terminated on August 9, 2019.

The costs of reporting and of the agency-requested transcript in the amount of \$1,146.75 are assessed against the State of Iowa, Iowa Veterans Home, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the State of Iowa 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 Leavy-Westphal'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.

The ALJ retains jurisdiction of this matter to address any remedy-related matters that may arise and to specify the precise terms of the remedy. In order to prevent further delay in the resolution of this matter, a hearing to receive evidence and arguments on the precise terms of the remedy, should the parties fail to reach agreement, will be scheduled and held within 45 days of the date this proposed decision becomes PERB's final action on the merits of Leavy-Westphal's appeal.

DATED at Des Moines, Iowa this 8th day of April, 2021.

/s/ Amber DeSmet

Administrative Law Judge

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