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PERB
102393

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

MARTIN FRANCIS, Appellant, and STATE OF IOWA (DEPARTMENT OF INSPECTIONS AND APPEALS), Appellee.	CASE NO. 102393

PROPOSED DECISION AND ORDER

Appellant Martin Francis filed this state employee disciplinary action appeal with the Public Employment Relations Board (PERB) on November 27, 2019, pursuant to Iowa Code subsection 8A.415(2)(*b*) and PERB subrule 621—11.2(2). Francis was employed as an administrative law judge (ALJ) by the Iowa Department of Inspections and Appeals (DIA). On September 27, 2019, Francis was disciplined with a five-day suspension and final warning after an internal investigation concluded he engaged in prohibited *ex parte* communication. Francis disputes DIA's conclusion and contends the discipline imposed is not supported by just cause.

Pursuant to notice, a closed evidentiary hearing on the merits of the appeal was held on September 15, 2020, in Des Moines, Iowa. Francis represented himself. Andrew Hayes and Annie Myers represented the State. Both parties submitted post-hearing briefs on October 16, 2020.

Based upon the entirety of the record, and having reviewed and considered the parties' arguments, I find the DIA did not have just cause to discipline Francis with a five-day suspension and final warning.

FINDINGS OF FACT

Francis began his employment as an ALJ in September 1980 with the Iowa Insurance Division and subsequently transferred to DIA in June 1999. He retired from State employment on September 30, 2019.

Francis was part of DIA's Administrative Hearings Division that employs about 16 ALJs. Francis was subject to DIA policies and work rules as contained in DIA's employee handbook. Division Administrator and Chief ALJ Denise Timmins was Francis' supervisor during the time relevant to the discipline at issue. Assistant Chief ALJ David Lindgren also had supervisory authority over Francis. Lindgren served as the interim chief ALJ for about a year until June 2019 and was Francis' immediate supervisor during that time.

As an ALJ, Francis' main task was to conduct contested case hearings for state agencies and boards in accordance with Iowa Code chapter 17A, *Iowa Administrative Procedure Act*, chapter 10A, *Department of Inspections and Appeals*, as well as DIA's and the participating state agency's administrative rules. The bulk of cases handled by the Administrative Hearings Division are about sanctions to driving privileges imposed by the Iowa Department of Transportation (DOT). The DOT cases are separated into two categories—license revocations as a result of operating while intoxicated (OWI) and license revocations for other non-OWI reasons, referred to as "discretionary" cases. For OWI license revocation appeals, the DOT subpoenas the arresting officer for the hearing and appears at the hearing through a DOT compliance officer or an assistant attorney general. For

discretionary cases, the DOT waives its right to a representative at the hearing but submits documentary evidence for the presiding officer to consider.

Francis' most recent employee performance evaluation was completed in March 2019, covering the period of February 2018 to February 2019. Lindgren was the interim chief ALJ at the time and completed Francis' evaluation. He rated Francis' performance as meeting expectations. Relevant to the issue here, Francis was given a developmental plan to avoid *ex parte* communications. The evaluation contains no other information regarding this comment but other evidence in record reveals the comment was prompted following a "discretionary" license revocation hearing Francis held in January 2019. The appellant driver in that hearing suffered from aphasia and was mostly unable to speak for himself. He was represented at the hearing by a healthcare worker. At the request of the worker, Francis contacted the Iowa Ombudsman's Office after the hearing to inquire if its office could assist the appellant with the California DOT regarding citations he received in California that were impacting his ability to get an Iowa license. When Lindgren became aware of Francis' communication to the Iowa Ombudsman, he told Francis the contact was inappropriate and constituted prohibited *ex parte* communication. The January 2019 incident was never formally investigated, but Francis contends the communication was allowed under Iowa Code section 17A.17(1)(*b*) that allows the presiding officer to "have the aid and advice of persons other than those with a personal interest" in the contested case. Lindgren chose not to pursue discipline for this incident because Francis was scheduled to retire in September 2019.

During his 20-year tenure with DIA, Francis was disciplined once. In April 2007, Francis received a seven-day suspension and final warning for violating three separate work rules, one of which pertained to *ex parte* communications in violation of DIA rule 481—10.23. The suspension notice stated, "In a recent DOT discretionary case you had an ex parte conversation on the merits of the case with a DOT staff person after the case had been submitted to you." This discipline was imposed more than 12 years prior to the five-day suspension on appeal in this proceeding.

The incident underlying the five-day suspension and final warning at issue here occurred on September 18, 2019. Francis was assigned to conduct a contested case hearing in a DOT license revocation appeal filed by an Iowa driver ("Appellant") whose driving privileges were revoked after an OWI arrest. The initial appeal and request for a hearing was filed by an Iowa attorney on the Appellant's behalf. Francis issued a notice of hearing on August 19, 2019. The notice was properly served on the Iowa DOT and the Appellant's attorney. The hearing was scheduled to be held telephonically on September 18, 2019, at 11:00 a.m. The hearing notice directed the parties to call the provided telephone number at the scheduled hearing time in order to participate in the hearing.

Following the issuance of the hearing notice, the DOT subpoenad the arresting officer to appear at the scheduled time. On September 17, a day before the scheduled hearing, the DOT compliance officer assigned to this appeal learned from the arresting officer that the Appellant may have already pled guilty to OWI

in the criminal proceeding. The compliance officer subsequently emailed the Appellant's attorney to inquire whether the Appellant was still pursuing a hearing.

Francis was not involved and had no knowledge of the communications between the Appellant's attorney and the DOT compliance officer. Evidence in the record, however, reveals the Appellant's attorney informed the compliance officer that he never filed an appearance in Appellant's criminal case but it appeared from the case filings that he did in fact plead guilty to OWI. The attorney further stated that although he filed the initial license revocation appeal, the attorney would withdraw his representation because the Appellant never paid the agreed-upon retainer and never contacted the attorney again. The attorney concluded the email with, "I am not planning on a hearing." The DOT compliance officer mistakenly understood the attorney's communication to mean Appellant was withdrawing his appeal, instead of the attorney merely withdrawing his representation as the Appellant's attorney. The DOT compliance officer asked whether the attorney could let Francis know, to which the attorney agreed.

The attorney called Francis on September 17. As he had communicated to the DOT compliance officer, the attorney informed Francis that he would not appear on the Appellant's behalf at the hearing since the Appellant had not paid his retainer. He also informed Francis that the criminal filings reveal the Appellant pled guilty to OWI. Other than this information, Francis had no other direct communication from either party regarding the appeal and the scheduled hearing.

On September 18, about ten minutes before the scheduled 11:00 a.m. hearing, Francis reviewed the electronic case file to prepare for the hearing. In

reviewing the materials, Francis saw a notation in the form field for the police officer's contact information. The notation stated: "straight Wd. Attorney contacted ALJ. left officer Vm." The note was entered by the DOT compliance officer on September 17, at 12:56 p.m. Francis attempted to reach the DOT compliance officer by phone shortly before the hearing to inquire about the note, but was not able to reach him. Francis left the compliance officer a voice message informing him the Appellant had not withdrawn his appeal. Unknown to Francis, the compliance officer was out of the office that day.

At the scheduled time, Francis opened the conference call to allow case participants to join the scheduled hearing as outlined in the notice of hearing. The Appellant called in but the DOT compliance officer did not. A recording of the approximately 23-minute hearing is in evidence. Francis started the recorded proceeding by identifying himself as the presiding officer and listing the case docket number. He told the Appellant that his prior attorney let him know the Appellant did not retain him and that the Appellant pled guilty to the OWI charge. Francis further told the Appellant a notation in the DOT file mistakenly indicated his attorney requested a withdrawal of the revocation appeal. Francis suggested continuing the hearing but when he asked the Appellant whether he wanted to proceed, the Appellant indicated he did. The Appellant stated he was not withdrawing his appeal, and further expressed confusion why an individual who was not his attorney would be allowed to withdraw his appeal. Francis mentioned a continuance several more times, explaining to the Appellant that the arresting officer would not appear. He told the Appellant it was in his interest to continue

the hearing as the Appellant carried the burden of proof and he needed the arresting officer present to attack the implied consent procedures utilized during the OWI arrest. The Appellant stated he wanted to proceed as he has already taken time off work. About 10 minutes into the hearing, Francis placed the Appellant under oath to testify.

While the hearing was in progress, Lindgren could hear Francis' side of the conversation. Lindgren and Francis worked in office cubicles in close proximity to each other. Lindgren's attention was drawn to the hearing because it appeared from Francis' statements that the DOT compliance officer was not present. This concerned Lindgren because holding an OWI license revocation hearing without a DOT representative is "highly unusual if not unprecedented" as a DOT representative always appears. Lindgren took several steps to determine whether his belief was correct and ultimately concluded that Francis was on the phone with only the Appellant present. Lindgren concluded Francis was conducting an *ex parte* hearing because the DOT was not present. If the DOT had not appeared, Lindgren asserted that Francis should have contacted the DOT to inquire about its absence or rescheduled the hearing. About 22 minutes into the hearing, Lindgren approached Francis and told him to place the Appellant on hold. Francis and Lindgren talked for about a minute but that discussion was not recorded. Francis confirmed to Lindgren the DOT compliance officer was not on the line. Lindgren told him "the hearing cannot continue in this manner and that [Francis] would have to stop it." Francis complied. He got back on the call with the Appellant, told

him he could not hold a hearing without a DOT representative and that the hearing had to be rescheduled.

Lindgren subsequently spoke to Francis in a private conference room immediately following the hearing. He questioned Francis about his actions and told Francis that he did not have the authority to hold a hearing without the DOT representative present. Lindgren told Francis he should know *ex parte* communications are prohibited by the ALJ Code of Conduct. Ultimately, Lindgren's concern and the reason he intervened is because Francis conducted an *ex parte* hearing even though Francis knew the DOT always appeared and he saw the DOT's note revealing the DOT's confusion regarding the withdrawal of the appeal. Lindgren believed Francis violated the Code of Ethics and that his conduct was a "departure from our common practices in the Division of such situations." Due to Lindgren's concern as to how Francis handled this appeal, he reassigned Francis' remaining seven DOT appeals he had pending prior to his scheduled retirement less than 2 weeks away. He advised Francis to spend his remaining time on issuing decisions on matters that he had already heard.

A day after the scheduled hearing, September 19, the compliance officer emailed Francis to inform him he must have misunderstood the attorney's response to mean the appeal was withdrawn and that the hearing was therefore cancelled. He believed the attorney called Francis to advise him of the same. The DOT compliance officer forwarded to Francis the email exchange he had with the attorney, which Francis had not previously seen or been copied on. Francis had no

further involvement in this appeal, but DIA continued the hearing to a different date and reassigned it to another ALJ.

Lindgren began to collect information regarding the September 18 hearing that same day. He confirmed with the Appellant's attorney that he spoke to Francis on September 17 to inform him he would not appear on Appellant's behalf at the hearing because the Appellant had not hired him. The Appellant's attorney further stated he informed Francis the Appellant pled guilty to the criminal charge based on the available filings information but the attorney did not represent the Appellant in the criminal case. The attorney apologized for any confusion, but added that he does not have the authority to withdraw the Appellant's appeal if he does not represent him.

Lindgren informed Timmins of the incident and DIA initiated a formal investigation on September 19. An investigator from DIA's Medicaid Fraud Control Unit investigated the incident. The investigation was conducted based on an alleged violation of Iowa Code 17A.17(1)(*a*) and Iowa Administrative Code 481—15.2(9)(*a*). Those provisions state:

> Iowa Code chapter 17A, Iowa Administrative Procedure Act.
>
> **17A.17. Ex parte communications and separation of functions**
> 1. *a.* Unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer in a contested case shall not communicate directly or indirectly with any person or party in connection with any issue of fact or law in that contested case, except upon notice and opportunity for all parties to participate as shall be provided for by agency rules.
>
> Chapter 15. Iowa Code of Administrative Judicial Conduct
>
> **15.2(9)** *Ex parte communications.*

> *a.* A presiding officer shall not initiate, permit, or consider ex parte communications, or consider other communications made to the presiding officer outside the presence of the parties or their lawyers, concerning a pending matter or impending matter, except as permitted by Iowa Code section 17A.17.

Lindgren was interviewed on September 24 as part of the investigation. His interview is not part of the record, but portions as summarized by the investigator are included in the investigative report. The majority of Lindgren's statements regarding the events of September 18 and his cause for concern have already been incorporated as part of the findings above. In addition, Lindgren acknowledged a previous conversation he had with Francis regarding *ex parte* conversations. Lindgren was able to provide very little detail during the investigation as to what necessitated this conversation, but stated it occurred sometime between January and June 2019.

Francis was interviewed on September 24 by the assigned investigator and Timmins. The facts pertaining to the events of September 18 as relayed by Francis have been incorporated into the findings above. In terms of Francis' explanation for proceeding without the DOT compliance officer, Francis stated he was not aware of any statutory or rule provisions that prohibited him from going forward. He did not understand why the DOT would be treated any differently as a party to a contested case that had been notified of the scheduled hearing. Francis explained that he cannot enter a default judgment against the DOT for not appearing because the Appellant has the burden of proof to show why the license revocation should be rescinded. Francis also explained that he was trying to get the Appellant to see that it was in his best interest to continue when the arresting officer can testify,

but when the Appellant insisted that the hearing go forward as scheduled, Francis allowed him to testify because he did not think anything prevented him from proceeding since the DOT was provided notice of the hearing.

The investigation concluded on September 26, 2019. The investigator compiled a written investigation summary that concluded with the following:

> Based on the results of this investigation, Judge Francis permitted and considered communications made to him as the presiding officer of an OWI hearing outside the presence of Iowa Department of Transportation representation in violation of Iowa Administrative Code 481-15.2(9)(a). Additionally, Judge Francis communicated directly with a party in connection with issues of fact and law as the presiding officer of a contested case without opportunity for Iowa Department of Transportation representation to appear, which is also a violation of Iowa Code 17A.17(1)(a).

On September 27, 2019, DIA disciplined Francis with a five-day paper suspension and final warning. The letter stated, in pertinent part:

> This is to advise you that the investigation into your alleged violation of the department work rules has been concluded, and determined that your conduct violated the Department's work rules; specifically, engaging in conduct which adversely effects job performance of the department when you engaged in ex-parte communication while conducting a hearing.
>
> Because of this infraction, you are hereby subject to this written notice of alternative discipline and final warning in lieu of a **five (5)-day suspension without pay and final warning**. While this action does not reduce your pay, seniority, or other benefits, it does carry the same weight as if you had been subject to a five (5)-day suspension and final warning. It is imperative that you understand that the failure to follow the department's work rules and policies is a serious matter. This suspension should serve as a strong warning that your conduct will continue to be monitored and that another incident will result in more severe disciplinary action, up to and including discharge.

The work rule identified in the suspension letter is contained in DIA's employee handbook (September 2019 version). Under the Standards of Conduct section, the

handbook prohibits conduct which adversely affects the employee's job performance or the department.

Francis appealed his suspension to the Iowa Department of Administrative Services (DAS) on October 4, 2019. DAS concluded the discipline was supported by just cause and denied Francis' appeal on November 1, 2019. Francis appealed the suspension to PERB on November 27, 2019.

CONCLUSIONS OF LAW

Francis filed the instant state employee disciplinary action appeal pursuant to Iowa Code section 8A.415(2), which states:

> 2. *Discipline Resolution*
>
> *a.* A merit system employee . . . who is discharged, suspended, demoted, or otherwise receives a reduction in pay, except during the employee' s probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.
>
> *b.* If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. . . . If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

The following DAS rules set forth specific discipline measures and procedures for disciplining employees.

> **11—60.2(8A) Disciplinary actions.** Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when

> the action is based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge. . . . Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal of a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

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

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

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

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

> While there is no fixed test to be applied, examples of some of the types of factors which may be relevant to a just cause determination, depending on the circumstances, include, but are not limited to:

> whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether sufficient evidence or proof of the employee's guilt of the offense is established; whether progressive discipline was followed, or not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.

Hoffmann and State of Iowa (Dep't of Transp.), 93-MA-21 at 23. PERB also considers how other similarly situated employees have been treated. *E.g. Kuhn and State of Iowa (Comm'n of Veterans Affairs),* 04-MA-04 at 42.

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

Francis was disciplined for violating a DIA work rule prohibiting conduct which adversely affects job performance when he proceeded with a scheduled contested case hearing without the DOT present. The DIA concluded this conduct constituted prohibited *ex parte* communication under 17A and DIA rule 481—15.2(9). As such, the determinative issue is whether Francis engaged in *ex parte* communication as prohibited by those statutory and regulatory provisions.

Upon review of the applicable legal standards, Francis' decision to proceed forward with the hearing on September 18 even after the DOT representative did

not appear is not prohibited by Iowa Code chapter 17A or DIA rule 481—15.2(9). This conclusion is based on several considerations.

First, Francis' actions complied with the applicable notice of hearing requirements. Chapter 17A requires that all parties in a contested case "shall be afforded an opportunity for hearing after reasonable notice in writing" is served. Iowa Code §17A.12(1). The notice must include, among other requirements, when the hearing will be conducted. The August 19 notice of hearing delivered to the DOT and the Appellant's attorney fulfilled the notice and opportunity for hearing requirements imposed by chapter 17A. The DOT's actions in subpoenaing the arresting officer for the set hearing date establishes it had proper notice when the hearing would be held. Thus, the August 19 notice of hearing was sufficient to inform the parties of the opportunity for a hearing in this contested matter.

Next, the 17A prohibition against *ex parte* communications only applies if a party did not receive notice and opportunity to participate in the hearing. Section 17A.17(1)(*a*) prohibits a presiding officer from communicating with a party in a contested case "except upon notice and opportunity for all parties to participate as shall be provided for by agency rules." The DIA acknowledges the DOT had notice of the scheduled hearing, but asserts its notice was subsequently compromised and the DOT no longer had "effective notice" based on its misunderstanding that the appeal was withdrawn. This position is without legal authority. The State has not provided any case law regarding the notice and opportunity for hearing requirements under 17A supporting its position that a properly delivered hearing notice can become "compromised" due to one party's

mistake. Additionally, the language of the applicable 17A provisions regarding notice and opportunity for hearing do not contemplate that a properly delivered notice can become "compromised" based on the sole mistake or confusion of one of the parties in the appeal. While a party may unintentionally fail to appear at a hearing due to a litany of reasons, nothing in chapter 17A requires the presiding officer to investigate the party's absence prior to proceeding or to automatically adjourn the hearing due to one party's absence.

Furthermore, 17A specifically allows a presiding officer to procced even without one of the parties present. Section 17A.12(3) directs that if a party fails to appear "after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party." This language unequivocally grants the presiding officer discretion either to proceed with the hearing in the absence of the party or to adjourn the hearing. Francis chose to proceed forward, and while DIA contends this was an improper decision, this is an option allowed under the statute.

Finally, DIA's concern that the DOT was deprived of an opportunity to participate in the hearing is misplaced in this instance. Francis did not deprive the DOT of an opportunity to participate and present evidence. Instead, the DOT's own mistake led to its failure to appear when required. However, chapter 17A contemplates that a party may fail to appear for "good cause" such as the mistake the DOT made in this instance. Section 17A.12(3), the same provision that allows a presiding officer to proceed in the absence of a party who received

proper notice, allows a party to request for a decision to be vacated if the party had "good cause" for failing to appear at the hearing. This provision places the burden on the party that failed to appear to demonstrate that its absence was for "good cause." As such, even if Francis had been allowed to conclude the hearing and rendered a decision against the DOT, the DOT had a statutory procedure in place to seek for the decision to be vacated.

In addition to being found violative of Iowa Code section17A.17(1)(*a*), Francis' conduct was also found impermissible under DIA rule 481—15.2(9), which states a presiding officer "shall not initiate, permit, or consider ex parte communications … except as permitted by Iowa Code section 17A.17." Section 15.2(9) essentially incorporates the requirements and prohibitions of section 17A.17. Having found that Francis' conduct did not violate section 17A.17, I conclude Francis did not violate DIA rule 481—15.2(9) for the reasons previously discussed.

Based upon the consideration of the evidence and the applicable legal standards, DIA has not established that Francis engaged in *ex parte* communication as prohibited by Iowa Code section 17A.17(1) or DIA rule 481—15.2(9), and thus has failed to demonstrate that his conduct violated the DIA work rule prohibiting conduct which adversely affects job performance. Having failed to establish proof of the alleged work rule violation, DIA has not demonstrated that its imposition of a five-day suspension and final warning is supported by just cause.

Consequently, I propose the following:

ORDER

The State shall rescind and remove the original and all copies of the September 27, 2019, notification of Martin Francis' five-day suspension and final warning, as well as any other documentation of the suspension, from all personnel files maintained concerning Francis. The State shall also take all other actions necessary to place Francis in the position he would have been had the State not disciplined him with a five-day suspension and final warning on September 27, 2019.

The cost of reporting and of the agency-requested transcript in the amount of $471.70 are assessed against the State of Iowa, Department of Inspections and Appeals, pursuant to Iowa Code subsection 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the State of Iowa, Department of Inspections and Appeals, in accordance with PERB subrule 621—11.9(3).

This proposed decision and order will become PERB's final agency action on the merit of Francis' appeal pursuant to PERB subrule 621—11.7(2) unless, within 20 days of the date below, a party files a petition for review with the Public Employment Relations Board or the Board determines to review the proposed decision on its own motion.

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

/s/ Jasmina Sarajlija
Administrative Law Judge

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