STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

SHERRIE MCCLANAHAN, Appellant,	)	
and	)	CASE NO. 102394
STATE OF IOWA (DEPARTMENT OF TRANSPORTATION, 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 Sherrie McClanahan's Iowa Code section 8A.415(2) State employee disciplinary action appeal. McClanahan filed her appeal challenging the State's termination of her employment as a design technician specialist for the Iowa Department of Transportation (IDOT). The State alleged McClanahan violated an IDOT work rule by allegedly falsifying her timesheets. The ALJ concluded the State had not established just cause supported its termination of McClanahan's employment, but just cause supported the imposition of a ten-day suspension.

Prior to oral arguments, the State elected to file a brief. AFSCME representative Adam Swihart presented oral argument to the Board on McClanahan's behalf and attorney Annie Hoth presented argument on the

State's behalf. McClanahan was also present at the oral arguments via Zoom.

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 McClanahan's employment, but that just cause supported the State's imposition of a ten-day suspension.

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 discussion:

In this case, the State terminated McClanahan's employment for violating an IDOT work rule by reporting hours on her timesheet that she

allegedly did not work. McClanahan asserts that she made up hours on the dates in question. To determine whether the State established just cause supported its disciplinary action, the ALJ applied the correct standard and considered the totality of circumstances. *See* ALJ Proposed Decision at 11 (quoting *Hoffman & State of Iowa (Dep't of Transp.)*, 93-MA-21 at 22.

Materially relevant here are "whether a sufficient and fair investigation was conducted by the employer;" and "whether sufficient evidence or proof of the employee's guilt of the offense is established." *See* Hoffman, 93-MA-21 at 22. These two determinations are inter-related; the investigation must be sufficient and fair to garner the necessary facts that establish sufficient evidence or proof of guilt.

McClanahan challenges the sufficiency of the investigation because the State investigator, Dana McKenna, did not interview McClanahan's immediate supervisor, Kevin Patel, or McClanahan's team lead, Alice Welch. Nor did McKenna attempt to identify and interview others who may have been in the building and had first-hand knowledge of McClanahan's presence or absence when reportedly working late.

Turning to an analysis of the investigation, the ALJ correctly stated, "The determination of whether the State established sufficient evidence of the allegations at issue requires evaluating the investigation into the States' allegations." ALJ Decision at 12. After outlining the deficiencies in the investigation, the ALJ determined the investigation "insufficient" "to

garner the facts necessary to make an informed decision about whether McClanahan" worked the hours she reported. *Id.* at 13-14.

For the same reasons, we agree the investigation was insufficient. Nonetheless, the ALJ reviewed other evidence in the record to determine "the State provided sufficient proof" that McClanahan provided false information in violation of the IDOT work rule. *Id.* at 15. This evidence included McClanahan's time of badging in and out on the dates in question as well as her lack of correspondence with Patel regarding making up time when, on other occasions, there was correspondence to that effect.

In assessing sufficiency of proof of guilt, we may not put the same weight on this indirect evidence, *i.e.*, correspondence, if similar facts were presented in another case. However, it is significant to note that at oral arguments, McClanahan agreed with all of the ALJ's determinations. Moreover, the ALJ's determination is supported by the direct evidence of McClanahan's badge times on the dates in question. While there is significant room for improvement on how the investigation was handled, it is for these aforementioned reasons that we concur with the ALJ's determination that the State established sufficient proof McClanahan violated the IDOT work rule.

Considering the totality of the circumstances, we agree with the ALJ's conclusion that the State failed to establish just cause supported its termination of McClanahan's employment, but that a ten-day suspension is proportionate to McClanahan's offense. Accordingly, we conclude the

State has established just cause to support the imposition of a ten-day suspension for McClanahan.

Accordingly, we enter the following:

ORDER

The State of Iowa, Department of Transportation, shall reinstate Sherrie McClanahan 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 ten-day suspension rather than having her employment terminated on September 5, 2019.

The cost of reporting and of the agency-requested transcripts in the amount of $827.55 are assessed against the appellee, the State of Iowa, Department of Transportation, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9(20). PERB will issue a bill of costs to the State in accordance with PERB subrule 11.9(3).

This decision constitutes final agency action.

DATED at Des Moines, Iowa, this 20th day of July, 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

SHERRIE MCCLANAHAN, Appellant, and STATE OF IOWA (DEPARTMENT OF TRANSPORTATION), Appellee.	CASE NO. 102394

PROPOSED DECISION AND ORDER

The Appellant, Sherrie McClanahan, filed this state merit employee disciplinary action appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 8A.415(2) and PERB rule 621—11.2. McClanahan alleges her termination was not supported by just cause.

Pursuant to notice, a closed evidentiary hearing on the merits of the appeal was held before me on December 1, 2020, in Des Moines, Iowa. McClanahan was represented by Adam Swihart and attorney Anthea Galbraith represented the State. Both parties filed post-hearing briefs on January 8, 2021. After considering the evidence and arguments of the parties, I propose the following:

FINDINGS OF FACT

Sherrie McClanahan was hired by the State of Iowa in February 1999. At all relevant times, McClanahan was a Design Technician Specialist in the Department of Transportation's (DOT's) Office of Design Photogrammetry. During her tenure, she had no prior disciplines.

McClanahan's direct supervisor was Kevin Patel, an assistant design engineer in the road design office, and the team lead was Alice Welch, who also reported to Patel. There are five employees in the Design Photogrammetry office, including Welch and McClanahan. Employees in this office work a forty-hour workweek, but have varied schedules. McClanahan's schedule was a four ten-hour day workweek; Monday through Thursday. Prior to July 8, 2019, McClanahan's schedule was 7:30 a.m. to 6:00 p.m., and beginning July 8, her schedule was 7:00 a.m. to 5:30 p.m. Her lunch break was 30 minutes, unpaid, from 12:30 to 1:00 p.m. According to McClanahan, she normally ate in the cafeteria.

The building's hours were 6:00 a.m. to 6:00 p.m., and employees were not to work past 6:00 p.m. It is uncontested that McClanahan knew the office hours and the 6:00 p.m. deadline. In August 2018, when McClanahan requested to stay until 6:30 p.m., Patel reminded her that working hours needed to be kept between 6:00 a.m. and 6:00 p.m. Employees in this office may flex their schedule with supervisory approval. Upon approval, the time must be made up within the pay week which was Friday through Thursday. Employees are also responsible for keeping track of their time, and used the Outlook calendar to record appointments and vacations. McClanahan normally did not record her time, but tried to put it on her Outlook calendar or sometimes on her desk calendar. Employees are also responsible for submitting accurate bi-monthly timesheets.

On July 11, 2019, Welch notified Patel of her concerns that McClanahan was not coming to work on time. Patel discussed the situation with his supervisor who recommended that Patel speak to Dana McKenna, DOT's Lead Employee Relations Officer.

Shortly thereafter, McClanahan met with Patel and told him that she was having a hard time coming to work on time because she was tending to her horses and time got away from her. According to Patel, during the conversation, he told McClanahan that it was important that she come to work on time and that she should try to do a better job in the future. After this meeting, McClanahan would email Patel notifying him when she came in late and either informed him that she stayed until 6:00 p.m. to make up time or asked for permission to stay until then. In addition, she notified Patel of any leave used.

McKenna launched an investigation and requested several reports, a card access report for May 3 to July 11, 2019, and a logon and logoff report for four pay periods; May 20 to July 11.[1] The logon and logoff report captures when an employee, using the state-issued user ID, logs on and logs off the State's computer system. The card access report details when an employee, using their state identification badge, enters the building. There is no mechanism that captures when an employee leaves the building. Additionally, McKenna requested McClanahan's timesheets, Outlook calendar and McClanahan's

[1] The pay periods were May 17 through May 30, May 31 through June 13, June 14 through June 27, and June 28 through July 11, 2019.

emails sent to Patel regarding leave requests. McKenna compared McClanahan's timesheets with her Outlook calendar, the card access and logon and logoff reports, and determined that McClanahan was late every day during those four pay periods. Even so, the investigation focused on 12 dates: May 22, 23, 28, and 29; June 6, 17, 26 and 27; July 2, 3, 10 and 11.

During the investigation, the State only interviewed one person, McClanahan. Patel and McKenna interviewed her on August 22. In the interview, the State confirmed McClanahan's workdays and hours, that she logged into her computer after arrival, and that her lunch period was normally 12:30 to 1:00 p.m. Additionally, McClanahan admitted she was aware of the building's hours and that she needed to send Patel an email for approval when she was going to flex her schedule. During the interview, she was asked about the twelve dates referenced above. Some of the documentation used in the investigatory interview are in the record and establish the following information.

For the first ten of the dates in question, McClanahan's hours were from 7:30 a.m. to 6:00 p.m.

> May 22, 2019: (Wednesday)
> McClanahan badged into the building at 8:05 a.m., logged into her computer at 8:07 a.m., and logged off at 4:44 p.m. McClanahan recorded 10 hours on her timesheet; 1 hour sick leave, 9 hours worked.
>
> May 23, 2019: (Thursday)
> McClanahan badged into the building at 8:14 a.m., logged into her computer at 8:16 a.m., and logged off at 5:53 p.m. McClanahan recorded 10 hours worked on her timesheet.

May 28, 2019: (Tuesday)
McClanahan badged into the building at 10:22 a.m., logged into her computer at 10:53 a.m., and logged off at 5:57 p.m. McClanahan recorded 10 hours on her timesheet; 2 hours vacation, 8 hours worked.

May 29, 2019: (Wednesday)
McClanahan badged into the building at 7:57 a.m., logged into her computer at 8:00 a.m., and logged off at 6:12 p.m. McClanahan recorded 10 hours worked on her timesheet.

June 6, 2019: (Thursday)
McClanahan badged into the building at 8:31 a.m., logged into her computer at 8:33 a.m., and logged off at 6:03 p.m. McClanahan recorded 10 hours worked on her timesheet.

June 17, 2019: (Monday)
McClanahan badged into the building at 7:57 a.m., logged into her computer at 8:00 a.m., and logged off at 3:52 p.m. McClanahan recorded 10 hours worked on her timesheet.

June 26, 2019: (Wednesday)
McClanahan badged into the building at 7:59 a.m. and 12:49 p.m., logged into her computer at 8:05 a.m., and logged off at 6:08 p.m. McClanahan recorded 10 hours worked on her timesheet.

June 27, 2019: (Thursday)
McClanahan badged into the building at 8:00 a.m., logged into her computer at 8:05 a.m., and logged off at 6:08 p.m. McClanahan recorded 10 hours worked on her timesheet.

July 2, 2019: (Tuesday)
McClanahan badged into the building at 1:15 p.m., logged into her computer at 1:18 p.m., and logged off at 4:47 p.m. McClanahan recorded 10 hours on her timesheet; 6 hours sick, 4 hours worked.

July 3, 2019: (Wednesday)
McClanahan badged into the building at 8:06 a.m., logged into her computer at 8:33 a.m., and logged off at 5:53 p.m. McClanahan recorded 10 hours worked on her timesheet.

On July 8, McClanahan's hours changed from 7:00 a.m. to 5:30 p.m.

> July 10, 2019: (Wednesday)
> It is unknown when McClanahan badged into the building. She logged into her computer at 7:19 a.m., and logged off at 5:26 p.m. McClanahan recorded 10 hours worked on her timesheet.
>
> July 11, 2019: (Thursday)
> McClanahan badged into the building at 7:25 a.m., logged into her computer at 7:37 a.m., and logged off at 5:30 p.m. McClanahan recorded 10 hours worked on her timesheet.

As to documentation regarding hours worked, McClanahan admitted that she normally did not record her time each day, but tried to put it on "the computer calendar" or "sometimes on my calendar at my desk." She could not explain why the recorded time did not match the data supplied by the reports. She testified that the entry was not correct or had to be an error, or that she thought she had worked those hours, and sometimes she stayed late until 6:30 p.m. or later to make up time. Throughout the interview, she kept reiterating "it wasn't intentional."

Shortly after the interview concluded, McClanahan wrote Patel. The note stated:

> I am really sorry and I am not trying to cause problems. Until she read this I never realized any of this. I should have and I knew I was late. I always thought I made it up. I have and still have no intentions of stealing time.
>
> I will quit and give two weeks notice before I get you in trouble. Again I am sorry. Exhibit 22.

Patel testified that he "would like to believe" that McClanahan had "no intentions of stealing time."

On August 22, McClanahan was placed on administrative leave pending completion of an investigation involving possible violations of DOT rules and policies and the State of Iowa policies.

On September 5, 2019, the State conducted a *Loudermill* meeting. At this meeting, McClanahan reiterated that she did not intentionally falsify her timesheets because she thought she always made up her time. "So to say that it's intentional, it isn't intentional. Intentional means I knew what I was doing when I did it, and I did not."

When McKenna compared McClanahan's timesheets for the dates in question with the various documents, the discrepancies between the timesheets ranged from "conservatively short" at 18 minutes to a longer period of time, up to 2½ hours of work time. It appears that a majority of the discrepancies were "conservatively short" at around 20 minutes.

Although there is an absence of testimony as to who made the decision to terminate McClanahan, it appears that McKenna played a major role in that decision. According to McKenna, the DOT views the failure to record time accurately as time theft or stealing, and thus egregious enough to be a terminable offense. The record shows the DOT has historically discharged employees for falsification of timesheets. Although McKenna reviewed the disciplines of six DOT employees who had violated the same work rule, the only evidence in the record regarding these disciplines are the termination letters. Of these six employees, two employees had over 20 years' experience, two employees

had over 10 years' experience, one employee had been employed for eight years and the last employee had been employed for approximately one year. All six letters contained the same verbiage as McClanahan's letter, which stated: "[t]his rule was violated when you falsified your timesheet for hours reported on …." Three of the six employees were terminated when they falsified their timesheet in violation of rule 1, number 5, which is the same rule the DOT contends McClanahan violated. Of these three employees, one was alleged to have falsified their timesheet on seven occurrences while two other employees allegedly falsified their timesheet on ten occurrences. It is not clear as to the seniority of these three employees. The other three employees were alleged to have violated additional DOT rules or additional portions of work rule number 5. Of these three employees, one employee was terminated for violation of DOT work rule 1, both numbers 1 and 5; the second employee was terminated for violation of rule 1, number 5 for intentional falsification of timesheet and work report as well as being dishonest in the investigation, and the third employee was terminated for violation of rule 1, number 5 for falsification of their timesheet, dishonesty and giving false information during the investigation.

McKenna considered McClanahan's length of employment with the State. However, she did not believe that the length of her tenure negated termination since two of the previously described employees had more years of service than McClanahan. Additionally, McKenna did not find McClanahan's response that she always made up her time credible, nor did she believe that McClanahan's

behavior was accidental or mistaken. When asked if McKenna believed it was intentional, McKenna responded: "I believe it was negligent." Additionally, McKenna did not believe that McClanahan had accepted responsibility for the time card inaccuracies based upon McClanahan's note to Patel in which she stated she knew she was late.

McClanahan was terminated on September 5, 2019. The letter stated in part:

> …. This action is being taken as a result of your violation of the following Iowa Department of Transportation Work Rule.
>
> I. Work Performance, 5. Intentionally falsifying records, dishonesty, or giving false information.
>
> This rule was violated when you falsified your timesheet for hours reported on May 22, 23, 28, and 29; June 6, 17, 26, 27; and July 2, 3, 10 and 11." Exhibit 2.

McKenna testified that McClanahan was terminated for "giving false information on her timesheets."

McClanahan appealed her termination to DAS on September 6, 2019. The DAS director's designee denied this grievance on November 27, and McClanahan subsequently filed the instant appeal with PERB on December 2, 2019.

CONCLUSIONS OF LAW

McClanahan filed this appeal pursuant to Iowa Code section 8A.415(2)(*b*) which provides in relevant part:

> 2. *Discipline Resolution*
>
> *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 rule 11—60.2 sets forth the specific 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.

In discipline cases, the State bears the burden of establishing that just cause supports the discipline imposed. *Krogman and State of Iowa (Dep't of Human Serv. — Woodward Resource Center),* 2021 PERB 102276, App. A at 13; *Krieger and State of Iowa (Dep't of Transp.),* 2020 PERB 102243, App. A at 10; *Gleiser and State of Iowa (Dep't of Transp.)*, 09-MA-01 at 18; *Illingworth and State of Iowa (Dep't of Transp.)*, 2021 ALJ 102361 at 20. The term "just cause" as used in section 8A.415(2)(*b*) and DAS rule 11-60.2 is not defined. *Krogman,* 2021 PERB 102276, App. A at 13; *Krieger*, 2020 PERB 102243, App. A at 10;

Illingworth, 2021 ALJ 102361 at 20. Determination of whether the employer had just cause to discipline an employee requires a case-by-case analysis. *Id.*

PERB has long held that just cause determinations "require an analysis of all of the relevant circumstances concerning the conduct which precipitated the disciplinary action and not a mechanical, inflexible application of fixed 'elements' which may or may not have any real applicability to the case under consideration." *Krogman,* 2021 PERB 102276, App. A at 13; *Krieger*, 2020 PERB 102243 at 7; *Gleiser*, 09-MA-01 at 17; *Hoffman and State of Iowa (Dep't of Transp.),* 93-MA-21 at 23; *Hunsaker and State of Iowa (Dep't of Emp't Serv.),* 90-MA-13 at 40; *Illingworth*, 2021 ALJ 102361 at 20. Instead, the Board looks to the totality of the circumstances, which may include:

> 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.

Krogman, 2021 PERB 102276, App. A at 14; *Krieger*, 2020 PERB 102243, App. A at 10-11; *Gleiser*, 09-MA-01 at 16-17; *Hoffman,* 93-MA-21 at 22; *Illingworth*, 2021 ALJ 102361 at 20-21. PERB has also considered how other similarly situated employees have been treated when determining whether just cause

exists. *Krogman,* 2021 PERB 102276, App. A at 14; *Krieger*, 2020 PERB 102243, App. A at 11; *Illingworth*, 2021 ALJ 102361 at 21.

PERB has consistently held the disciplinary letter must contain the reasons for the disciplinary action and that just cause must be determined upon the reasons stated in the disciplinary letter. *Krogman,* 2021 PERB 102276, App. A at 14; *Krieger*, 2020 PERB 102243, at 6; *Hoffman,* 93-MA-21 at 24; *Illingworth*, 2021 ALJ 102361 at 21.

In the instant case, the termination letter stated that McClanahan was being terminated because she had falsified her timesheet on 12 occasions in violation of DOT work rule l, Work Performance, number 5 that prohibits an employee from "intentionally falsifying records, dishonesty or giving false information." McKenna, in her testimony, provided further clarification regarding the termination; McClanahan was terminated because she provided false information on her timesheets. Therefore, the first inquiry to be addressed is whether the State has established sufficient evidence or proof that McClanahan falsified her timesheets by providing false information on her timesheet in violation of DOT's work rule 1, number 5. [2] The determination of whether the State established sufficient evidence of the allegations at issue requires evaluating the investigation into the State's allegations.

[2] The State did not allege, nor has it shown that McClanahan's actions resulted in intentional falsification of records. As discussed later in this decision, the evidence shows that McClanahan's actions, at worse, were the result of negligence.

McClanahan has challenged the sufficiency of the investigation. It is McClanahan's belief that the investigation was faulty because the DOT relied too heavily on both the card access and the logon and logoff reports, and did not attempt to ascertain whether she made up her hours. McClanahan contends that she worked late and that there were employees who could confirm this fact.

At the investigatory interview, the dates in question were reviewed and McClanahan was given an opportunity to look at the documents and explain why the timesheet did not accurately reflect the number of hours worked based upon her Outlook calendar and the reports when she entered the building, logged onto and off her computer.

McClanahan admitted that she really did not record her time, but if she did, it was on the computer calendar or sometimes on her desk calendar. As to the dates in question, McClanahan admitted that she made errors on her time sheets, but that it was not intentional. Additionally, McClanahan asserted that she made up her time as she stayed until 6:30 many evenings.

Because there are no records to confirm when McClanahan left for the day, the DOT's investigation should have attempted to obtain this information through other means. There is no indication that the DOT made any attempts to verify McClanahan's assertions that she had worked until 6:30 p.m. or that she had recorded her times on her desk calendar. Without looking into McClanahan's assertions, it is difficult to determine if McClanahan worked a ten-hour day. As a result, the investigation was incomplete. Accordingly, I cannot

conclude that the State conducted a sufficient investigation to garner the facts necessary to make an informed decision about whether McClanahan was working the hours she noted on her timesheets.

McClanahan alleges the State did not prove that she violated work rule 1, number 5 cited in the termination letter, which prohibits employees from "giving false information." Despite the deficiencies in the investigation, there is sufficient evidence in the record to conclude that McClanahan gave false information when she recorded her time on multiple timesheets.

Prior to July 8, 2019, McClanahan's schedule was from 7:30 a.m. to 6:00 p.m. and beginning July 8, her schedule was from 7:00 a.m. to 5:30 p.m. Additionally, employees were to work between 6:00 a.m. and 6:00 p.m. In the ten dates listed in the termination letter, when McClanahan's hours were from 7:30 a.m.to 6:00 p.m., McClanahan did not enter the building at 7:30, but instead badged into the building between 7:57 a.m. and 8:31 a.m., which resulted in her being between 27 and 61 minutes late.[3] Additionally, when her hours were from 7:00 a.m. to 5:30 p.m., McClanahan badged into the building at 7:25 a.m. that resulted in her being 25 minutes late.[4]

McClanahan generally believed that she made up all of her time; however, there is no evidence in the record that supports this generalization. Although it is possible that McClanahan may have made up her time on some of these dates,

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[3] In two instances, McClanahan took sick leave beginning at 7:30 a.m.
[4] The termination letter only listed two days when McClanahan's schedule began at 7:00 a.m. On the other day, McClanahan did not use her badge to enter the building.

based upon the evidence presented, I cannot conclude that McClanahan made up her time on all of the dates listed in her termination letter due to the amount of time she was short for some of the dates in question or the number of days she was short during a pay week. In order for McClanahan to have made up all of her time during the various pay weeks, she would have needed to flex her schedule. There is no evidence in the record that McClanahan contacted Patel on the dates in question asking permission to flex her schedule in order to make up the time so that she worked the requisite ten hours a day, nor is there any evidence that she flexed her schedule. As a result, the hours McClanahan recorded on her timesheets and submitted to the DOT do not reflect the amount of time McClanahan actually worked on the dates at issue. Consequently, I conclude that the State provided sufficient proof that McClanahan provided false information in violation of DOT work rule 1, number 5, when she improperly noted hours on her time sheets for the dates in question.

Having concluded that McClanahan's actions violated DOT work rule 1, number 5 by providing false information on her timesheets, the next inquiry in this 8A.415(2) appeal is whether the penalty imposed is proportionate to the offense. *Krieger*, 2020 PERB 102243, at 7; *Wilkerson-Moore and State of Iowa (Dep't of Human Serv. Fiscal Mgmt. Div)*, 18 PERB 100788, App. A at 20; *Hoffman,* 93-MA-21at 26.

It is well established that the State's disciplinary policy clearly contemplates a system where penalties of increasing severity are applied to

repeated offenses until the behavior is either corrected or it becomes clear that the employee's behavior cannot be corrected. *Krogman,* 2021 PERB 102276, App. A at 18; *Stein and State of Iowa (Iowa Workforce Dev.),* 2020 PERB 102304 at 22; *Phillips and State of Iowa (Dep't of Human Res.),* 12-MA-05, App. A at 16; *Illingworth*, 2021 ALJ 102361 at 28-29. PERB has consistently held that when some form of discipline is required, the discipline should be progressive and proportional to the violation. *Wilkerson-Moore*, 18 PERB 100788, App. A at 20; *Phillips,* 12-MA-05, App. A at 16; *Hoffman,* 93-MA-21 at 26. The purpose of progressive discipline is not to punish, but instead to correct the unacceptable behavior while affording the employee the opportunity to improve. *Wilkerson-Moore*, 18 PERB 100788, App. A at 20; *Phillips;* 12-MA-05, App. A at 16; *Illingworth*, 2021 ALJ 102361 at 29. However, progressive discipline may be inapplicable when the conduct underlying the discipline was a serious offense. *Krogman,* 2021 PERB 102276, at 3; *Hoffman,* 93-MA-21 at 25; *Illingworth*, 2021 ALJ 102361 at 29.

The State argues that it considers falsification of timesheets as an egregious offense such that termination is warranted. Although the DOT knew McClanahan's employment history, it appears the State only evaluated this history in light of "the comparables." The State alleges that McClanahan's termination was appropriate based upon "the comparables." Specifically, six DOT employees who had been terminated for violating this same work rule, with two of these employees having longer tenure that McClanahan.

Just cause requires the employer to treat employees who are engaged in the same type of conduct in the same manner when enforcing policies or work rules unless a reasonable basis exists for a difference in the discipline imposed. *Stein,* 2020 PERB 102304 at 16. *Woods and State of Iowa (Dep't of Inspections and Appeals),* 03-MA-01 at 4. Due to the lack of specificity and evidence concerning these six employees, the record does not support the State's argument that these employees were similarly situated to McClanahan.

Of these six terminations, only three were based solely on violation of DOT work rule 1, number 5, intentionally falsifying records, dishonesty, or giving false information, similar to McClanahan.[5] Even though these three termination letters used the same verbiage: "[t]his rule was violated when you falsified your timesheet for hours reported," and the number of occurrences were similar to McClanahan's, there is insufficient evidence in the record to establish whether these three employees were similarly situated to McClanahan. In the instant case, McClanahan was terminated for giving false information; not intentionally falsifying records or dishonesty. It is not clear as to the specific reason these employees were terminated. Nor is there any evidence as to whether the DOT considered other aggravating or mitigating factors in determining the appropriate discipline, and whether the employment history of these employees was similar to McClanahan's. Due to the lack of evidence or persuasive testimony, it is

[5] The other three terminations were based on violations of multiple work rules, and thus are not as comparable or similarly situated to McClanahan.

unclear whether these three DOT employees were truly "comparable" to McClanahan.

Under the totality of the record presented before me, the State has not established that McClanahan's misconduct was so egregious that progressive discipline was rendered entirely inapplicable or that her behavior could not be corrected by imposing a penalty less severe than termination.

Although the State characterized McClanahan's actions as time theft or stealing, there is insufficient evidence to support this characterization. Black's Law Dictionary (7th ed. 1999) defines theft or stealing as the taking of property belonging to another, with the intent to keep. This topic was discussed in Norman Brand and Melissa Biren, *Discipline and Discharge in Arbitration,* 7-3 (Bloomberg BNA, 3rd ed. 2015).

> As used in the context of employee relations, 'intent to steal' is present when the employee, for personal gain, 'knowingly and willfully' takes something belonging to another without permission, either direct or implied. The terms 'knowingly and willful' serve to distinguish an act of theft from situations in which the employee exercised poor judgment, made an inadvertent error, was excusably ignorant, committed a good faith mistake, had implied permission, or intended to borrow and return.

By submitting inaccurate timesheets, McClanahan was paid wages she was not entitled to receive. However, this conduct does not rise to the level of time theft or stealing because the record does not contain any evidence that McClanahan intentionally recorded hours on her timesheets with the intent to receive wages not due to her.

McClanahan did not admit that she intentionally recorded incorrect times on her timesheets. Instead, throughout her investigatory interview and *Loudermill* meeting, she stressed they were errors or that she thought she had made up any shortages. Further, in a note to Patel, shortly after her investigatory interview, she wrote that she had "no intentions of stealing time." Nor did the State's witnesses testify that McClanahan's actions were intentional. When Patel was asked whether he believed McClanahan had "no intentions of stealing time," he testified that he would "like to believe it." Additionally, when asked if she believed that McClanahan's actions were intentional, McKenna replied: "I believe it was negligent behavior." The absence of any evidence or testimony that McClanahan's action were intentional is significant.

Additionally, the DOT argues that McClanahan's refusal to acknowledge and accept responsibility for her actions also supports the determination that termination was warranted.

I find that McClanahan was forthright in the investigation. In the investigatory interview when asked about the various dates at issue, she did not try to mislead McKenna and Patel. She stated that she had no explanation, it had to be an error or that it was not correct. Additionally, she asserted that she thought she had made up her time. Just after her investigatory interview, she wrote to Patel where she acknowledged that she had been late, apologized and noted that she always thought she made up her time, that she had no intentions of stealing time, and offered to resign. Due to the State's lack of investigation to

ascertain whether McClanahan's assertions that she made up her time were correct, I cannot conclude that McClanahan's responses indicate a refusal to acknowledge or accept responsibility.

Termination is the ultimate disciplinary sanction. On the record presented here, the termination of McClanahan's employment is not consistent with progressive discipline and is not proportionate to the proven misconduct. The State's incomplete investigation, McClanahan's employment history with the State, and the fact that McClanahan's actions were not intentional, but rather negligent, warrant a lesser discipline.

As previously discussed, PERB has recognized that there are instances when the State has been justified in skipping some of the disciplinary steps ordinarily imposed due to the serious nature of the violation. Providing false information within the meaning of DOT work rule 1, number 5 is a serious rule violation and thus DOT was justified in skipping some steps of progression to communicate to McClanahan the seriousness or her actions.

However, determining the appropriate penalty requires balancing any mitigating circumstances against the decision to terminate. *Cole and State of Iowa (Dep't of Human Serv.),* 2020 PERB 102113 at App. 27; *Stockbridge and State of Iowa (Dep't of Corr.*), 06-MA-06 at 27.

Although the State considered McClanahan's years of service, there is a lack of evidence showing that the State gave due consideration to her employment record. The record shows that McClanahan had been employed at

the DOT since 1999, and during that time frame had had never been disciplined. Although McClanahan was negligent in the preparation of her timesheets, I do not believe her conduct warrants termination based upon McClanahan's employment history.

Additionally, I find that McClanahan's actions are remedial. Following a meeting with Patel in which he stressed the importance of coming in to work on time and trying to do a better job in the future, the record contains emails that McClanahan did a better job. She would notify Patel that she came in late and would ask either if she could stay until 6:00 p.m. or inform him that she had stayed late. Based upon these emails, it appears that McClanahan's unacceptable behavior was being remediated.

Viewing the record as a whole, I conclude that the factors used in determining just cause do not support termination. Although providing false information on her timesheets is a serious offense which warrants skipping steps in the State's disciplinary process, I conclude that a ten-day suspension for violation of DOT work rule 1, number 5 is warranted.

Consequently, I propose the following:

ORDER:

The State of Iowa, Department of Transportation, shall reinstate Sherrie McClanahan 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 benefit accounts to reflect accumulations she would have

received but for the discharge; make appropriate adjustments to her personnel records and take all other necessary actions to restore her to the position she would have been in had she not been terminated on September 5, 2019, but instead received an unpaid ten-day suspension.

The costs of reporting and of the agency-requested transcript in the amount of $702.60 are assessed against the State of Iowa, Department of Transportation, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the State in accordance with PERB subrule 621—11.9(3).

This proposed decision and order will become PERB's final agency action on the merits of McClanahan'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.

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

DATED at Des Moines, Iowa, this 6th day of May 2021.

/s/ Susan M. Bolte

Susan M. Bolte
Administrative Law Judge

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