



Based upon the entirety of the record, and having reviewed and considered the parties' briefs, I conclude the State has established just cause existed to support its termination of Allen's employment.

## FINDINGS OF FACT

### Background

The Iowa State Penitentiary (ISP), part of the Iowa Department of Corrections (IDOC), is a maximum-security correctional institution located in Fort Madison, Iowa. The facility contains three primary inmate-housing units: Unit 1 is a restrictive housing unit and Units 2 and 3 house the general offender population. The facility also contains a fourth unit that houses inmates with special medical needs.

Bryan Allen began employment at ISP as a correctional officer in June 1986. In November 2018, ISP promoted Allen to senior correctional officer and Allen obtained the rank of sergeant. The duties of a senior correctional officer involve supervising other officers to ensure ISP safety and security operations, such as unit patrols, perimeter patrols, and inmate transportation are conducted safely and effectively. However, even before his promotion, Allen often worked in a lead worker capacity directing other correctional officers and training new staff. Throughout Allen's career with ISP, and at all times relevant to the events at issue in this appeal, Allen worked the 6:00 A.M. to 2:00 P.M. shift in Housing Unit 1.

Allen received copies of DOC's work rules, policies and procedures and he received annual training on the duties and expectations of his position. Allen

signed receipts in 2014, 2017, and 2018 acknowledging he received and read the State of Iowa Employee Handbook, which includes the State's policy prohibiting sexual harassment and violence-free workplace policy. Allen completed trainings on these policies in 2017, 2018, and 2019.

Throughout Allen's tenure at ISP, management has regarded Allen as a good, if not exceptional employee. Prior to his discharge, which precipitated the instant appeal, Allen had not been the recipient of any workplace discipline. The annual performance evaluations offered into evidence, which cover the three-year period from June 2016 through June 2019, rate Allen's performance as either meeting or exceeding expectations.

The termination at issue in this appeal arose from Allen's conduct towards two individuals over separate periods. The first involved Allen's alleged harassment of his coworker, LR, from November 2017 through July 2018. The second involved Allen's alleged harassment of the brother of a recently hired correctional officer, JH, in July 2019.

Although the alleged harassment of JH occurred later, it was those subsequent allegations that spawned IDOC's investigation. In the course of that investigation, the investigator learned of Allen's previous alleged harassment of LR and broadened the investigation to include that possible misconduct. Ultimately, the investigators reviewed more than 1,200 saved text messages between Allen and LR; Facebook messages between Allen and JH; and conducted twenty-seven investigatory interviews.

At the hearing, eight individuals testified. However, neither Allen, JH, nor LR were called or chose to testify. As such, the following findings are based primarily on the undisputed text and online messages submitted into evidence and the accounts provided by Allen, JH, and LR in their investigatory interviews. In making the following findings, I have attempted to reconcile perceived conflicts in the evidence. Where the evidence is not reasonably reconcilable, I have noted the discrepancies and credited that which is most reasonable and consistent with other credible evidence.

The following factual findings address in order: Allen's communications with, and conduct towards, LR from November 2017 to July 2018; Allen's communications with JH in July 2019; and IDOC and the Department of Administrative Services' (DAS) investigation into Allen's alleged misconduct.

#### Conduct concerning LR

The following material facts are based primarily on 1,205 saved text messages between Allen and LR from November 10, 2017, to June 4, 2018. At the hearing, the State acknowledged that some of the texts between Allen and LR during this period were automatically deleted from LR's phone due to lack of storage capacity before LR had the opportunity to save them. While Allen alleges some of the text conversations between himself and LR are incomplete, Allen does not otherwise dispute having sent the texts nor contest their authenticity.

As the text messages between Allen and LR during this period are voluminous, the undersigned has endeavored to quote only the messages and exchanges most probative and illustrative of Allen and LR's relationship, while

summarizing many of their other conversations to provide greater context to those exchanges. Nearly all of the messages discussed herein were sent outside of work while both Allen and LR were off duty.

LR began employment at ISP as a correctional officer in 1996. As a correctional officer, LR mostly worked the night shift in one of the facilities “towers.” In 2016, LR was promoted to sergeant and was subsequently reassigned to work the 6:00 A.M. to 2:00 P.M. shift in Housing Unit 1; the same shift and unit Allen worked as a correctional officer.

Allen had worked in Housing Unit 1 for many years and was highly knowledgeable of the unit’s operations and procedures when LR arrived on the unit. Moreover, Allen was familiar with the sergeants’ job duties because he often stepped-in to cover those duties when sergeants were absent. Because LR was unfamiliar with the unit when he arrived, Allen trained and mentored LR and the two became friends. Allen and LR began regularly texting outside of work.

In his investigatory interview, LR told the investigator that he and Allen had initially been friends at work. Although LR suspected Allen might have had some romantic feelings for him, LR viewed their friendship as completely platonic, but valued the friendship.

However, Allen’s behavior changed when LR began dating a nurse, NJ, who also worked at ISP. The record shows that in November 2017, Allen began sending LR messages criticizing NJ’s character as well as messages accusing LR

of doing poorly at work and telling LR that other employees were talking about him behind his back. For example:<sup>1</sup>

November 13, 2017:

Allen: Wouldn't expect anything more from you. Just really nice you wasn't distracted so much that you lost focus. Not bashing [NJ] at all but you was the old [LR] everyone misses. That's the truth. You have been missed. Please don't be pissed at me. It's the truth.

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Allen: Yes she really does effect your personality on a daily basis. I'm happy for you but [how] u treat people in hu1 when she is in there. It's not just staff. The convicts are saying a lot more now. They don't care for her.

November 28, 2017:

Allen: With [NJ] the unit nurse tomorrow you will not help with nothing. We need your help in am and you are not doing it again. Wish you can see your not pulling your weight. I'm sick and will work my ass off. Just remember cameras don't lie and it will drag you down. That's the truth. Thanks for helping me out when I'm fucking sick. I get now...

On November 27, 2017, Allen confessed to having romantic feelings for LR for the first time, stating, "...You don't want to talk to me cause you know my feelings. And I think you have feelings for me that you won't admit. I have nothing but respect for you. Please be honest with yourself and me." To which LR responded, "I don't have feelings that I won't admit. I can't get any more honest than that," then added, "You don't have anything to be ashamed of. I promise you that."

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<sup>1</sup> The undersigned has lightly edited the text and online messages contained herein to correct clear typographical errors that affect the messages readability. Otherwise, all messages are as spelled and presented [SIC].

Despite LR having clearly told Allen that he did not have feelings for him, through the month of December, Allen continued to profess his feelings to LR and even told LR he loved him several times, for instance:

December 5, 2017:

Allen: But I want you to know my feelings will always be there. I can't help it and won't try to. Sorry for that.

December 17, 2017:

Allen: I wish we was in a relationship. Be easier to understand this hatred from you. Why I wish u knew.

December 18, 2017:

Allen: I love you [LR] with all my being and not ashamed of it one bit...

During this period, Allen also repeatedly pressed LR to hang out with him outside of work.<sup>2</sup> Each time Allen pressed LR to hang out, LR clearly, but politely, declined. In many of these conversations, Allen continued to criticize NJ as well as tell LR that employees were speaking badly about him behind his back. For instance, on December 13, Allen accused LR of not doing his job because... "All you care about is chasing all the tail...Everyone sees it but won't step up as I do."

By mid-December, LR's responses indicate that he was becoming frustrated and dispirited by Allen's criticism and that Allen's behavior was negatively affecting LR's outlook on work, as evidenced by the following:

December 15, 2017:

Allen: Sorry to piss you off cause I know you and your mad as hell at me. I could not do what you did to [C/O] and me. You are not caring for your staff. You are [too] distracted. You can't

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<sup>2</sup> Allen pushed LR to hangout outside of work on December 7, 10, 13, 15, 21, 23, and 30. See State Exhibit 34 pp. 67, 69, 70, 73, 77, 85, and 88.

concentrate on anything with work. The females are not gonna help you. That's all you think about. Your drive to be a captain ain't going to happen at this pace and that's sad sir. Just being honest with you cause I love you brother.

LR: I don't care about being a captain anymore. I'll be happy going back to a tower, or quitting altogether. I'm tired of dealing with people and their emotions.

Allen: That a jab at me. You care and we both know it so stop feeling sorry for yourself and man up. You are a great man and step up to the plate and help us and yourself. That's what I expect [ ] of you.

LR: I don't care. I wish that I never left the tower in the first place. I never hated going to work then.

December 22, 2017:

Allen: I'm pretty sure you are out with your [NJ] and hope you like her. I love you brother and I will let the chips fall on her own. Trust me on this one.

LR: Leave me alone with that. I'm tired of it.

Allen: Me [too] I know you hate me hating her but I know the bitch that she is and everyone else also. No one likes her cause she is freaking crazy.

On December 30, 2017, Allen admitted that he was jealous of NJ, told LR that he was sexually attracted to him, and asked LR to show him his penis in the following exchange:

Allen: Please let's get so over this. You know how I feel about you sexually and I'm being honest. That the truth and I'm actually jealous of your girlfriend. Are you happy [now] I told you the truth.

LR: I already figured that out. I don't feel the same way, but I still value your friendship, and don't want to lose it.

Allen: Well I knew you have known for a long time and I will never give up on us. I want you all the time and that's killing me inside. We are so the same and hope [sometime] we can try. Just think on it and let it flow. Please [LR] just think on it.

LR: It isn't going to happen. I feel like we've already had this exact conversation before.



Allen: Can I at least see your penis. Please. I need some closure on this. Will you help me please.

LR: Absolutely not. How would that give you any closure anyway?

Allen: It would help me to just see your privates I've been thinking about you for a long time and other things. I know you don't want to hear this [ ] but it's been on my brain for a long time. I think of you all the time I want your dick in my hand and mouth. I love you brother. I'm sorry but it's the truth.

LR: I will walk through the gates of hell with you without question because you're my brother. I'm not sexually attracted to men, and I don't judge you at all for it.

As the conversation continued, Allen told LR several more times that he had romantic feelings for him and, each time, LR clearly responded that he did not feel the same way. Nevertheless, Allen finished the conversation texting, "I just tried every way I could and I will stop. Sorry but I will never give up. I want [you] all the time and I can't stop. It's not a bad thing."

The following day, Allen apologized to LR and for the next several days Allen's messages to LR were apologetic and restrained. However, on January 4, Allen returned to his pattern of pressuring, criticizing, and blaming LR for not spending time with him outside of work, texting, in relevant part:

Allen: I didn't realize how much you are in love with [NJ] until today. Very very noticeable by all. Good luck with your relationship with her. I only wish you the best as long as you are happy, I'm happy for you.

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Allen: You know what I'm talking about and it's never going to happen. We will never be friends outside of work. That's killing me [LR]. You won't let it happen and I wish I [knew] why. Tell me please.

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Allen: It's been 17 months and we do have our moments. I'm just giving up and won't try anymore. We have been getting along very well lately and you won't try. I'm done trying. We are

friends at work and that's all. And that's sad. Ball is in your court and it's up to you.

Throughout January, Allen continued to press LR to hangout outside of work and LR's responses became more direct and less frequent. On January 14, 2018, Allen admitted that he intentionally sent melodramatic and argumentative texts in order to get LR's attention, writing:

Allen: Thanks for chatting with me forever this evening. Maybe this is a great sign for us to get along. Sorry for the drama [LR]. Trying to get your attention only. Just want to get there and get along.

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Allen: I understand and I go there to get you to pay attention to me. I don't like it but it gets us texting back and forth and arguing and that's what I need from you. It's a plus for me to keep you interested in talking to me. Sorry but it's the truth and it's not right but all I got. Understand brother.

That same day, on two separate occasions, Allen sent a series of texts insinuating that he would withhold from helping LR at work if LR did not acquiesce to the off-duty relationship Allen wanted. On the first occasion, Allen wrote, in relevant part:

Allen: I'm not saying nothing more about this. You are on your own and I'm done trying to help you and give you information I get, that will help you.

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Allen: Ok I agree all I ask from you is confide in me and talk. That too much to ask. I'm a very good friend to you and I just want you to return the same. If you can't do that than I will stop trying to help you move up. I got a lot of pull and will play that to my advantage to help you sir. Please stop being [pissed] at me.

On the second occasion, Allen sent a series of messages that LR interpreted as a veiled threat from Allen to potentially use his influence with

management to jeopardize LR's job or a future promotion. Allen wrote, in relevant part:

Allen: Man are you done killing me. I'm done helping you now. Watch how you conduct yourself. Just saying. You have had a couple of close calls with her in office since you started dating and by more than one c/o. Watch yourself. A lot of staff are watching. I'm not saying no more and you are all on your own.

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Allen: You know what I'm done bashing you. Let the chips fall where they may. Good luck with your relationship and your advancement. I'm done helping you. Won't try any more to help. You will not need me.

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Allen: I got proof but I'm keeping it to myself. Do you know how I feel now. It fucking hurts don't it. Sorry for all the hate I got in my heart right now. I'm hurting also.

Following this exchange, LR's responses became even less frequent, generally responding only to Allen's work-related texts. For instance, from January 15 through January 23, 2018, Allen texted LR 32 times, to which LR responded five times. As LR's responses became less frequent, Allen's texts to LR grew more antagonistic:

January 18, 2018:

Allen: Good cop out. Never will talk to me and keep avoiding the question. It's all you do so I'm used to it. You are the busiest man I know who hides in his house. Grow some nuts and tell me the truth someday. Good night asshole.

January 19, 2018:

Allen: Last thing I'm telling you [tonight]. You are losing a lot of respect from everyone at work. That's the truth cause I'm hearing it from every direction. You need to fix it and I'm not helping you no more. Have [NJ] get you back to reality cause you have dropped the ball again. This is the 3<sup>rd</sup> time and I'm done trying to help you.

January 21, 2018:

Allen: I'm going to bring [deer jerky] anyway and I will share with my real friends and coworkers. You can go fuck yourself. I'm done with you cause you are one hateful man.

January 27, 2018:

Allen: I have never said I was told the truth from everyone including you. You are my friend and I'm trying to be honest with you. A lot of hate coming at you from fellow staff. Being honest.

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Allen: Your biggest problem is nurses at work. Sorry to piss you off but it's the truth. They even say the same thing. And talk behind your back. That's all of them also.

In LR's investigatory interview, LR told the investigator that at some point he learned from another correctional officer that Allen was spreading rumors about him among the staff and was lying to LR about how the staff actually felt about him. On February 6, 2018, LR stopped responding to Allen's texts completely. Despite LR no longer responding, Allen continued texting LR for nearly four more months. Over this four-month period, Allen sent LR approximately 159 unreciprocated text messages.

Sometime in the spring of 2018, LR transferred from Housing Unit 1 to Housing Unit 3. LR later told his supervisor, "My only motivation for going to HU3 was because it was the only way that I could get away from [Allen]. At work he positions himself in ways that force me to spend time with him...Either on escorts, serving meals, or just staring at me." Despite transferring out of Housing Unit 1, LR continued to receive unsolicited and unreciprocated text messages from Allen.

Allen's messages to LR from February 6 to June 4, 2018, were similar in substance, pattern, and tone to many of his earlier messages. In some texts,

Allen professed his love and affection for LR, others were superficially apologetic—often deflecting blame and casting himself as a victim—but most messages were badgering, antagonistic, and, at times, implicitly threatening, as demonstrated by the following:

March 2, 2018 (Allen sent four total texts on this date):

Allen: Actually hang onto your hat. You will need it quicker than you think. Hope you take the offer and get the hell away from us. You lost all respect in hu1. Just being truthful.

Grow some nuts and talk to me. I already know that won't happen. You are a shame to all of us. Enjoy your hate. All you got for me and your staff is hate. Enjoy your new sgt. I hate you [LR]. I really do.

March 3, 2018 (18-texts on this date):

Allen: I think I'm heading to your house to talk. It's my last option. See you in a little bit.<sup>3</sup>

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Allen: I'm going to keep texting you all night. Till you talk to me.

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Allen: Are you sick of me yet.

Never mind I'm done trying to love you brother. I get you got nothing but hate for me. It's pretty sad

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Allen: Do yourself a favor keep your friends close and your enemies even closer you know what I'm talking about have a good night.

You need to watch out for your friends that you think are your friends. Trust me on that. Or maybe trust your better half first.

March 4, 2018 (10-texts on this date):

Allen: I miss you so can we get there. I think you want this as I do. Brother can we do this...

[LR] I love you with all my heart. That will never stop. Brother I do love you...

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<sup>3</sup> LR said in his investigatory interview that Allen never actually came to his house uninvited.

March 10, 2018 (five texts on this date):

Allen: You need to say something to me tonight give me something or I will see you at your house when you get off work tomorrow I will be there you're going to talk to me I'm not giving you a choice I need some freaking answers and you're going to tell me I need this.

March 12, 2018 (eight texts on this date):

Allen: Never mind you ain't got time for a low life like me. Stop the hate. I've done nothing wrong!!!!!!!!!!!!

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Allen: I really think you want to tell me something but can't bring yourself to confide in me. I've thought this for sometime. I think you are keeping a dark secret and want to tell me. I sensed it months ago when we was closer. If and when you want to talk let me know. I'm not sure you ever will. Just saying LR. Got a feeling on this.

March 22, 2018 (six texts on this date):

Allen: All I can say as a lot of other staff, we all think you're a coward. Grow up and man up. And watch your [NJ]. She's about done with you. Amen cause you are a fucking dick head all the time. A lot of hate towards you. I'm here to help you but you won't let me. Good day. You'll need all you can get.

May 4, 2018 (one text on this date):

Allen: A little advice my friend and I would take this very seriously, watch yourself at work. Trust this advice and use it very wisely. I'm not going to give you any more help. You don't deserve it from me anyway.

May 7, 2018 (four texts on this date):

Allen: I guess [it's] time to let you and your hate go. I'm so lost, thank you for being a man of your word. Oh your not a real man anymore. That's the truth. You can't be truthful. You have changed [for] the worst. Stop the hate you have built up. Your girlfriend has been changing you for [ ] some time. It's going to hurt you in time. It's on you and I will you. So it won't be long.

June 1, 2018 (three texts on this date):

Allen: Best of luck with your capt interview. You will need it. Just sayin.

I told you a while back what your downfall was gonna be. You [knew] it and didn't listen to me.

I really hope you make Captain I really do, you deserve it but I just don't think it's going to happen right now. Good luck my ex friend. Miss talking with you.

On July 19, 2018, Allen texted LR, "Thank you for saying happy birthday. You are a fucking asshole. Hate will wear you down sometime..." That night, LR forwarded a copy of Allen's text to his supervisor, Michelle Waddle, and told her that Allen had made sexual advances toward him and had been constantly harassing him through texts. LR told Waddle he had not reported Allen's behavior sooner because he did not want to "out" Allen on his sexuality. However, LR said the harassment had gotten to a point where it was difficult for him to work with Allen, and, if it continued, would affect LR's ability to perform his job.

The next day, Waddle met with her supervisor, Michael Schierbrock, and reported what LR had told her. Waddle and Schierbrock then met with ISP Warden Pattie Wachtendorf, who instructed Waddle to ask LR whether Allen's conduct had occurred in the workplace and if LR wanted something done about it. LR ultimately decided he would try once more on his own to get Allen to stop, but told Waddle if Allen did not, he would let her know.

In August 2018, LR was promoted to captain and transferred to Housing Unit 2. After LR's promotion and transfer, Allen stopped sending inappropriate texts and LR never filed a formal complaint nor reported any additional misconduct. Aside from Wachtendorf's inquiry about where Allen's conduct occurred, ISP conducted no investigation into LR's complaint at that time.

In September 2018, both LR and Waddle submitted letters recommending Allen for a senior correctional officer position. In November 2018, ISP promoted Allen to senior correctional officer and Allen obtained the rank of sergeant.

#### Allegations concerning JH and the State's investigation

On or about July 25, 2019, correctional officer EH reported to a superior officer that Allen had contacted his brother, JH, through Facebook and told JH that he would help him get a job at ISP in exchange for engaging in a sexual act. The superior officer reported the allegation up the chain of command and ISP assigned Investigator Randy VanWye to investigate the claim.

VanWye called and interviewed EH later that day. EH provided a detailed, but largely second-hand account of his brother's online interaction with Allen. The following afternoon, VanWye called and conducted the first of two interviews with JH. In the first interview, JH told VanWye that Allen messaged him on Facebook stating, "I work with your brother at the prison...your brother's told me a lot about you." Prior to receiving that message, JH had never met nor interacted with Allen. Allen then allegedly sent a second message stating that he wanted to help JH clean-up his record so that he could get a job at the prison. In the interview, JH vaguely suggested that Allen had offered some sort of financial support to assist him in clearing-up his record.

JH provided VanWye a screenshot of part of a conversation with Allen from later that day. In the exchange Allen wrote, "Are you into me man. I'm wanting you more than I should?" To which JH responded, "I am not into men...sorry." Allen then wrote, "I'm [ ] going to get you to want me. It's what you want and we



will.” In his first interview, JH told VanWye that this exchange was the extent of Allen’s sexual proposition. Moreover, JH denied that Allen ever asked him to engage in specific sexual acts.

In early-August 2019, after learning of ISP’s investigation of Allen, Michelle Waddle met with VanWye and told him she had heard rumors that LR had received sexual text messages from Allen. VanWye had not previously heard these allegations, so on August 6, 2019, VanWye interviewed LR. In the interview, LR presented his account of events. LR also provided VanWye copies of the 1,205 saved text messages between himself and Allen.

On August 8, 2019, VanWye called and interviewed JH for a second time. In the second interview, VanWye allowed EH to attend and participate. At the hearing, VanWye testified that he invited EH to attend the interview to make JH feel more comfortable. Throughout the second interview, VanWye repeatedly asked JH whether Allen had sent him a message to the effect of, “I’ll get you a job [at ISP] if you’ll have sex with me.”

The first four times VanWye asked variations of this question, JH denied Allen sent a message to that effect. The fifth time, JH said he “might have” told EH’s wife that, but he could not recall. It was only after EH interjected and told JH to tell the truth that JH’s account changed. JH admitted Allen had told him that he wanted to have sex with him and, in return, Allen could get him a job at the prison. When VanWye asked if he could provide a copy of this message, JH said he could not because Allen had deactivated his Facebook account and JH could not recover the message.

In addition to the interviews discussed above, from July 25 through August 9, 2019, VanWye interviewed fourteen other current and former officers in an effort to determine whether Allen had ever inappropriately communicated with them. Ten of the fourteen individuals indicated Allen had never reached out to them outside of work. The remaining four said Allen had contacted them outside of work, but said the communication was nonsexual in nature and nothing they considered inappropriate.

On August 12, 2019, DAS received an anonymous letter alleging Allen had sexually harassed an unnamed employment applicant as well as unnamed current and former employees. The letter also alleged that ISP management was aware of Allen's sexual harassment, but had minimized or ignored it due to a personal relationship between Allen and a member of ISP management.

DAS contacted the IDOC Central Office and ISP Warden Randy Gibbs to discuss the letter. Through this discussion, DAS learned of ISP's ongoing investigation into issues similar to those alleged in the anonymous letter. Because the allegations involved claims of sexual harassment, pursuant to the State's Policy Prohibiting Sexual Harassment for Executive Branch Employees, DAS took over the investigation from VanWye. DAS assigned Employee Relations Specialist Andrea Macy to complete the State's investigation.

On August 20, 2019, VanWye provided Macy copies of all interviews and records from his investigation up to that point. After reviewing the investigative materials, Macy interviewed Allen on September 9, 2019.

In the interview, Allen admitted that he initiated contact with JH on Facebook, but he denied telling JH he would help him clean up his record; rather, Allen said he merely told JH that he would need to work on cleaning up his record. Further, Allen denied he had offered JH money to help him clear up his record. Instead, Allen claimed JH had asked him for money to help pay off fines or tickets, but Allen ultimately decided against loaning JH any money.

When asked whether he had offered JH money for sexual favors, Allen did not recall doing so, but acknowledged the possibility. On several occasions, Allen pointed out that none of the communications occurred on work time, that he did not use any State resources, and that his conduct had nothing to do with ISP other than JH's expressed interest in a job at the prison.

When asked about his text messages with LR, Allen again did not deny having sent the messages. Rather, Allen emphasized his friendship with LR, claiming LR did not hold any grudges, that they got along at work, and noting that LR had recently written a letter recommending him for a promotion to senior correctional officer. When Macy asked Allen about several specific texts—in which Allen cussed at LR, criticized LR's girlfriend, and threatened to withhold his help at work—Allen characterized the texts as mere arguments between friends.

After interviewing Allen, Macy interviewed Michelle Waddle. Waddle provided her account of events as well as a copy of her July 2018 text exchange with LR. Before Macy concluded her investigation, she also interviewed several members of IDOC management who knew of LR's complaint in July 2018.

On October 14, 2019, Macy completed an investigative report, which summarized Allen's work history, the material evidence, the policies at issue, and her findings and analysis. The report did not include a recommendation as to discipline.

The report concluded there was sufficient evidence Allen violated both the State of Iowa Policy Prohibiting Sexual Harassment as well as the Violence-Free Workplace Policy. The report found that Allen had requested sexual favors in return for job benefits, made unwelcome sexual advances, and had engaged in degrading and offensive conduct intended to result in mental pain and intimidation.<sup>4</sup>

Macy sent the report to DAS Chief Operating Officer of Human Resources Christy Niehaus and DAS Director Jim Kurtenbach. Niehaus and Kurtenbach reviewed the report, Allen's employment history, and disciplinary history, as well as prior discipline of similarly situated employees. At the hearing, Niehaus testified that they found and reviewed three comparable cases, each involving employees with substantial lengths of service who violated the same policies. Niehaus testified that in all three cases, DAS recommended termination.

Niehaus and Kurtenbach reviewed the just cause factors, determined Allen's case was similar to the other cases resulting in summary discharge, and concluded termination was warranted. On November 4, 2019, Niehaus sent

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<sup>4</sup> Additionally, the report concluded the evidence was inconclusive with respect to whether or not ISP management exercised due diligence in July 2018 when LR initially reported Allen's harassment.

IDOC Director Beth Skinner and ISP Warden Randy Gibbs DAS' recommendation that IDOC terminate Allen's employment.

After receiving DAS' report and recommendation, ISP Security Director John Fedler conducted a *Loudermill* meeting with Allen. The record is absent of a recording or transcript of the *Loudermill* meeting. However, Fedler testified that during the meeting Allen emphasized his exemplary record over his more than 30-years at ISP, but provided no other additional evidence or mitigating circumstances.

After the *Loudermill* meeting, Director Fedler and Warden Gibbs reviewed DAS' investigatory report and recommendation and concurred that termination was warranted by just cause. On November 18, 2019, IDOC issued Allen a termination letter, which stated, in relevant part:

This letter is to inform you that effective immediately, you are being terminated from employment at Iowa State Penitentiary following an investigation by the Iowa Department of Administrative Services – Human Resources Enterprise into allegations that your conduct was in violation of the State of Iowa Policy Prohibiting Sexual Harassment and the State of Iowa's Violence in the Workplace Policy.

The investigation found that you violated the State of Iowa Policy Prohibiting Sexual Harassment and the State of Iowa Violence in the Workplace Policy, when you made inappropriate comments and sent inappropriate text messages to a staff member and in addition you made inappropriate comments and social media contacts of sexual nature to an outside citizen. Based on the egregious misconduct of those policy violations summary discharge is warranted.

On November 22, 2019, Allen appealed his termination to DAS contending he was "terminated on 11-18-2019 for unjust reasons." On December 26, 2019,

the DAS Director's designee denied Allen's appeal. On January 7, 2020, Allen filed the instant appeal with PERB.

## CONCLUSIONS OF LAW

Allen filed this appeal pursuant to Iowa Code section 8A.415(2), which provides:

### *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 disciplinary 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.

Just cause must exist to support the disciplinary action taken. The State bears the burden of establishing that just cause supports the discipline imposed. *Harrison & State of Iowa (Dep't of Human Servs.)*, 05-MA-04 at 9.

In the absence of a definition of just cause, PERB has long considered the totality of circumstances and rejected a mechanical, inflexible application of fixed elements in its determination of whether just cause exists. *Wiarda & State of Iowa (Dep't of Human Servs.)*, 01-MA-03 at 13-14. In analyzing the totality of circumstances, examples of factors that may be relevant to a just cause determination 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 there is sufficient proof of the employee's guilt of the offense; whether progressive discipline was followed, or is 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.

*Gleiser & State of Iowa (Dep't of Transp.)*, 09-MA-01 at 16-17.

PERB also considers the treatment afforded other, similarly situated employees relevant to a just cause determination. See *Woods & State of Iowa (Dep't of Inspects. and Appeals)*, 03-MA-01 at 2. All employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for a difference in the penalty imposed. *Id.*

Iowa Code section 8A.413(19)(b) and DAS subrule 60.2(1)(b) require the State to provide the employee being disciplined with a written statement of the reasons for the discipline. PERB has long held the presence or absence of just cause must be determined upon the stated reasons in the disciplinary letter alone. See *Eaves & State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14; see also *Hunsaker & 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. See *Gleiser*, 09-MA-01 at 17-18.

In the termination letter, IDOC claimed it terminated Allen for violations of the State of Iowa Policy Prohibiting Sexual Harassment and the State of Iowa Violence-Free Workplace Policy. The State of Iowa Policy Prohibiting Sexual Harassment states, in relevant part:

## **II. SEXUAL HARASSMENT DEFINED**

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

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Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

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

The State policy prohibiting sexual harassment asserts the State's commitment to providing a workplace free from sexual harassment. The policy avows that allegations of sexual harassment will be taken seriously. The State's Violence-Free Workplace Policy for Executive Branch Employees provides, in relevant part:

#### POLICY STATEMENT

The State of Iowa is committed to providing a work environment free from threats, intimidation, harassment, and acts of violence against the public, vendors, clients, customers, and employees. The State of Iowa further establishes, as its vision, all of its officials and employees will treat each other and those they serve with courtesy, dignity, and respect.

#### PROHIBITIONS

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- C. Employees are prohibited from engaging in violence towards the public, vendors, clients, customers, and employees. Violence is defined as the actual or threatened use of physical force, actions, or verbal or written statements which either results in or is likely to result in physical or mental pain or injury to another person, group of persons, or damage to property. Violence may be a single occurrence or it may be a pattern of behavior which intimidates, degrades, or offends another person or a group of persons.

Allen advances several arguments asserting just cause does not support the State's termination of his employment. Allen's primary contention is that the

State has failed to show his conduct violated either State policy. Additionally and alternatively, Allen challenges the adequacy of notice provided by the policies, the fairness of the State's investigation, the sufficiency of the State's proof, and the consistency and proportionality of the discipline imposed. Allen's arguments will be addressed independently and in succession.

#### Notice of work rules

Allen asserts that the State's sexual harassment policy is so vague and/or broad that it fails to notify employees of what conduct is prohibited. Additionally, Allen argues that the policies, as written, do not apply to conduct that occurs off-duty or, alternatively, that the policies fail to notify employees that off-duty conduct can be violative of the policies. For these reasons, Allen contends IDOC failed to provide sufficient notice his conduct could result in discipline. The undersigned disagrees.

As to Allen's first contention, PERB has previously determined, "Although the [State sexual harassment] policy encompasses many different types of conduct, the policy...is not so broad as to be meaningless." *Illingworth & State of Iowa (Dep't of Transp.)*, 102361 ALJ 2021 at 23. Similar to other state and federal laws, "Sexual harassment that would violate the policy does not encompass isolated, minor incidents or comments;" however, persistent or repetitive inappropriate behavior can amount to a hostile environment that would be violative of the policy. *See State v. Watkins*, 914 N.W.2d 827, 843 (Iowa 2018). Although the policy may not specify every minute prohibition, it nonetheless

establishes standards sufficient to inform employees of the type of conduct that is prohibited.

As to Allen's second argument, although there are limits on the State's power to discipline employees for conduct that occurs off-duty, arbitrators generally hold that employers may discipline off-duty misconduct if there is a sufficient "nexus to the workplace." See Norman Brand, *Discipline and Discharge in Arbitration*, BNA Books 2016, pp. 8-39, 9-2. This standard is consistent with PERB's case law and in *Eaves & State of Iowa (Dep't of Corr.)*, PERB held the State's violence-free workplace policy employs precisely such a standard. See 03-MA-04 at 18 (Holding Grievant's threatening and intimidating off-duty behavior towards a coworker was "sufficiently work-related" to violate State's violence-free workplace policy).

Similar to the violence-free workplace policy, the State's policy prohibiting sexual harassment is not restricted only to misconduct occurring within the workplace. Rather, the policy prohibits—along with other forms of sexual harassment—all sexual harassment "[which] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." As such, an employee's off-duty harassment of a coworker can violate the policy if that harassment interferes with the coworker's work performance or creates an intimidating or hostile working environment. I conclude the State's policies are sufficiently clear to forewarn employees that off-duty threatening or harassing behavior that

interferes with another's work can be violative of the policies and result in discipline.

In this case, the record shows Allen received multiple copies of the State's policy prohibiting sexual harassment and the State's violence-free workplace policy as well as received annual training on both policies. As Allen was familiar with these policies, Allen knew, or should have known, that inappropriate off-duty conduct could subject him to discipline. Consequently, the State has established Allen had sufficient notice of the State's policies and expectations.

#### Sufficient and fair investigation

Allen challenges the sufficiency and fairness of the State's investigation on two grounds. Allen first asserts that the State's investigation was unfair because, during JH's second interview, Investigator VanWye allowed JH's brother, EH, to attend and participate. Allen argues that it was inappropriate for EH to attend because his presence may have influenced JH's responses rendering the interview unreliable. Second, Allen alleges VanWye spoke with several interviewees before he began recording their interviews. Allen argues these off-the-record conversations render the interviews unreliable. Together, Allen contends these errors led to an unfair and insufficient investigation.

As to Allen's first contention, the undersigned agrees that EH's participation in JH's second interview was unusual and inappropriate. Although I find credible VanWye's testimony that he invited EH to join in order to make JH feel more comfortable, that does not change the fact that investigative interviews are confidential and EH was a witness in the investigation. As such,

there are a number of ways EH's presence in the interview could have unintentionally influenced JH's responses. Due to this error, along with the fact that JH changed his account from his first interview, did not testify at the hearing, nor—unlike LR—provide messages corroborating key aspects of his revised account, I give JH's second interview little weight. *See Harrison and State of Iowa (Dep't of Human Servs.)*, 05-MA-04 at 11 (Explaining “where a discharge case turns on the credibility of witnesses to alleged misconduct who are not present to testify at the hearing, arbitrators generally refuse to credit hearsay written statements by the absent witnesses and find them to be insufficient to support the discharge.”).

As to Allen's second argument, although VanWye may have had a few, limited discussions with interviewees prior to recording, in all but a few interviews, a peer or union representative was present and there is no evidence VanWye discussed information off-the-record that affected the interviewees' on-record responses. Moreover, of the twenty investigatory interviews VanWye conducted with eighteen different current and former correctional officers, only JH and LR provided first-hand information supporting the allegations, which LR corroborated with more than 1,200 saved text messages. As the other interviews ultimately provided little information relevant to the State's case, I conclude any limited, off-the-record conversations VanWye may have had with the interviewees prior to recording did not materially affect the accuracy or outcome of the State's investigation and were therefore harmless.

As to the sufficiency of the State's investigation, aside from the error discussed above, the State otherwise conducted a fair and thorough investigation. Prior to interviewing Allen, the State interviewed twenty current and former correctional officers and reviewed Facebook and text messages from JH, EH, and LR (and later from Waddle). At Allen's investigatory interview, the State provided Allen a peer representative and read Allen his Officer Bill of Rights. During the interview, Allen had the opportunity to respond to management's questions and explain his interactions with JH and LR. Accordingly, the State conducted an investigation that was fair to Allen and, as will be discussed below, sufficiently garnered the facts to determine whether Allen violated the State's sexual harassment and violence-free workplace policies.

#### Sufficient proof of employee's guilt

As discussed above, the State provided two grounds for Allen's termination: (1) for sending inappropriate Facebook messages to JH in violation of the State Policy Prohibiting Sexual Harassment and (2) for sending inappropriate texts to LR in violation of the State Policy Prohibiting Sexual Harassment and State Violence-Free Workplace Policy. Allen challenges the sufficiency of the State's proof on both grounds.

Concerning his alleged harassment of JH, Allen argues JH's interview responses were not credible and that the Facebook messages alone fail to show a violation of the sexual harassment policy. As to his alleged violations concerning LR, Allen asserts that some of their texts were deleted before LR saved

them and that without those messages their conversations are incomplete and misleading. As such, on both of the State's grounds, Allen argues the messages are insufficient to establish a violation of either State policy.

As to the State's first ground for termination, I conclude the State has failed to provide sufficient proof Allen sexually harassed JH or that Allen's off-duty conduct had any reasonable relation to the workplace. As discussed above, although JH eventually stated that Allen offered to help him get a job in exchange for sex, this statement was uncorroborated, inconsistent with JH's prior account, and potentially influenced by his brother's presence during the interview. Due to the investigative error and the statement's unreliability, I have afforded the statement little weight.

Absent JH's unreliable statement, the State's evidence consists of a few Facebook messages, wherein Allen asked JH if he was interested in him and then later said, "I'm [ ] going to get you to want me." In JH's first investigatory interview, JH told VanWye that this exchange was the extent of Allen's sexual proposition.

Taken together, this evidence fails to demonstrate any "persistent, repetitive, or highly egregious conduct" committed by Allen towards JH "that a reasonable person would interpret is as intentional harassment of a sexual nature." Moreover, as the messages contain no offer of help or assistance to JH, they fail to demonstrate a "requesting or offering [of] sexual favors in return for job benefits." Finally, because the messages are between an off-duty employee and a private citizen and do not refer to ISP, the undersigned can discern no

reasonable connection between Allen's messages and ISP's operations or interests. Consequently, the State has failed to provide sufficient proof Allen's messages to JH violated the State Policy Prohibiting Sexual Harassment.

However, as to the State's second ground for termination, I conclude the State has provided sufficient proof Allen's conduct towards LR violated both the State Policy Prohibiting Sexual Harassment and the Violence-Free Workplace Policy. As reflected in the Findings of Fact, the record shows Allen's actions towards LR transformed from a friendship to a romantic/sexual pursuit. Despite LR having told Allen several times that he did not feel the same way, Allen continued to profess his feelings and, on December 30, 2017, told LR he wanted to have sexual relations and asked to see LR's private parts.

The record further demonstrates that after LR declined Allen's sexual advance and sought to establish personal boundaries outside of work, Allen's texts became more frequently hostile, badgering, and, at times, threatening. On multiple occasions, Allen threatened to stop helping LR at work or with advancing in his career and, on one occasion, appeared to threaten LR's job by implying he could initiate a disciplinary investigation. For more than five-months, Allen frequently criticized and denigrated LR's girlfriend and used offensive and aggressive language towards LR, such as telling LR to "grow some nuts," "to go fuck himself," and calling LR an asshole, prick, fucking dick, and coward. What is more, after LR stopped responding to Allen's texts on February 6, 2018, Allen sent LR another 159 unanswered text messages, twice threatening to come to LR's home.



In all, Allen's text messages demonstrate a pattern of persistent, repetitive, egregious conduct directed at LR, which was motivated by Allen's desire for a relationship, such that a reasonable person would interpret Allen's conduct as intentional harassment of a sexual nature. Moreover, as many of Allen's messages were degrading, offensive, and intended to result in mental pain and intimidation, Allen's conduct meets the definition of violence under the State's Violence-Free Workplace Policy.

Finally, although Allen's harassment occurred off-duty and outside of the workplace, the record shows: (1) Allen specifically threatened to stop helping LR at work and with career advancements; (2) LR was concerned Allen could jeopardize a future promotion and reported it was difficult to work with Allen; and (3) LR transferred housing units in order to get away from Allen. This evidence supports the conclusion that Allen's off-duty harassment interfered with LR at work and was sufficiently work-related to warrant disciplinary action. As such, the State has provided sufficient proof Allen's persistent, inappropriate text messages to LR violated both the State Policy Prohibiting Sexual Harassment and the State Violence-Free Workplace Policy.

Progressive discipline/punishment proportionate to offense

Having concluded Allen's actions violated both the State Policy Prohibiting Sexual Harassment and the State Violence-Free Workplace Policy, the next inquiry is whether the penalty imposed is proportionate to the offense. See *McClanahan & State of Iowa (Dep't of Transp.)*, 2021 ALJ 102394 at 15; see also *Krieger & State of Iowa (Dep't of Transp.)*, 2020 PERB 102243, App. A at 7.

It is well established that the State's disciplinary policy contemplates a system where penalties of increasing severity are applied to repeated offenses until the behavior is either corrected or it becomes clear the behavior cannot be corrected. *See Nimry & State of Iowa (Dep't of Nat. Res.)*, 08-MA-09, 08-MA-18 at App. 30. PERB has held that when discipline is required, the discipline should be progressive and proportional to the violation. *See Wilkerson-Moore & State of Iowa (Dep't of Human Serv. Fiscal Mgmt. Div.)*, 2018 PERB 100788, App. A at 20; *See also Phillips & State of Iowa (Dep't of Human Servs.)*, 12-MA-05, App. A at 16. The purpose of progressive discipline is to convey the seriousness of the behavior while affording an employee the opportunity to improve and take corrective responsibility. *See Phillips*, 12-MA-05, App. A at 16.

However, progressive discipline may be inapplicable when the conduct underlying the discipline was a serious offense. *See id.*, App. A at 13, 16-18. When determining the appropriate discipline and the use or absence of progressive discipline, PERB considers the circumstances of the case. *See Hoffmann & State of Iowa (Dep't of Transp.)*, 93-MA-21 at 26. These circumstances include, but are not limited to, the severity and extent of the violation; the position of responsibility held by the employee; the employee's prior work record; and whether the violation has resulted in the employer's loss of trust and confidence in the employee's ability to continue in their position. *See Phillips & State of Iowa (Dep't of Corr.)*, 98-HO-09 at 15; *see also Estate of Salier & State of Iowa (Dep't of Corr.)*, 95-HO-05 at 17.

The State acknowledges that it did not follow progressive discipline. However, the State contends Allen's conduct was so egregious and violative of IDOC's trust and confidence that progressive discipline was inapplicable and termination was appropriate. The undersigned agrees.

As discussed above, the State has established Allen made an unwelcome sexual advance and request to LR then texted LR harassing and occasionally threatening messages for more than five-months. Even a single instance of harassment can be a serious offense. *See Flippin & State of Iowa (Dep't of Nat. Res.)*, 14-MA-13 at 3-4 (Holding single incident of misconduct related to sex warranted five-day suspension). In this case, Allen's behavior was not an isolated mistake; rather, it was repetitive, persistent, intentional harassment, designed to inflict mental pain and intimidation, which Allen engaged in for more than five-months.

By persistently harassing LR over a five-month period, Allen repeatedly committed serious violations of State policy. Allen's actions not only interfered with LR's work performance, but also breached the bond of trust with his employer and eroded IDOC's faith in Allen's ability to continue as a senior correctional officer. Under these circumstances, IDOC's loss of trust in Allen is reasonable and progressive discipline is inapplicable.

Finally, the record shows IDOC properly considered Allen's employment record prior to its final decision to terminate his employment. Although Allen was a mostly exemplary employee for more than thirty years, his employment record is not enough to outweigh the gravity of his actions in this case.

Accordingly, the State has established just cause existed to terminate Allen's employment. Consequently, I propose the following:

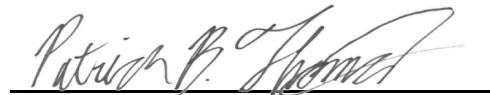
ORDER

Allen's State employee disciplinary action appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of \$1,500.75 are assessed against the Appellant, Bryan Allen, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellant in accordance with PERB subrule 11.9(3).

The proposed decision and order will become PERB's final agency action on the merits of Allen'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 motion.

DATED at Des Moines, Iowa this 13th day of July, 2022.



Patrick B. Thomas  
Administrative Law Judge

Filed electronically.  
Parties served via eFlex.