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STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

JEFFERY R. WESSLEY, Appellant, and STATE OF IOWA (DEPARTMENT OF TRANSPORTATION), Appellee.	CASE NO. 102434

PROPOSED DECISION AND ORDER

The Appellant, Jeffery Wessley, filed a State employee disciplinary action appeal with the Public Employment Relations Board (PERB or Board) pursuant to Iowa Code section 8A.415(2)(*b*) and PERB rule 621—11.2. Wessley asserts that the Iowa Department of Transportation did not have just cause to terminate his employment on February 6, 2020, for his alleged violations of the State of Iowa Violence-Free Workplace Policy.

Pursuant to notice, an evidentiary hearing on the merits of the appeal was held before the undersigned administrative law judge on December 17, 2020. The hearing was closed to the public in accordance with section 8A.415(2)(*b*). Attorney Anthea Hoth represented the State and AFSCME representative Robin White represented Wessley. Both parties filed post-hearing briefs on February 12, 2021.

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

FINDINGS OF FACT

Background

Jeffrey Wessley began employment as a Highway Technician Associate (HTA) for the Iowa Department of Transportation (IDOT) on May 22, 2015. For the first two years of his tenure, Wessley worked in the Wapello Maintenance Garage, but when it closed, transferred to the Maintenance Garage in Muscatine, Iowa. As an HTA, Wessley is responsible for operating equipment and performing physical labor activities to maintain roadways, roadsides, and bridges as well as performing routine bridge inspections, traffic control and snow/ice removal.

Wessley received copies of IDOT's work rules, policies and procedures and he received annual training on the duties and expectations of his position. Wessley signed receipts in 2015 and 2018 acknowledging he received and read the State of Iowa Employee Handbook, which includes the State's violence-free workplace policy.

Throughout Wessley's tenure, management has regarded Wessley as a satisfactory employee. Prior to his discharge, which precipitated the instant appeal, Wessley had not been the recipient of any workplace discipline. The annual performance evaluations offered into evidence, which cover the approximately three-year period from May 2015 through June 2018, consistently rate Wessley's performance as meeting expectations.

The termination at issue in this appeal arose from two remarks Wessley allegedly made threatening his coworker DR. The first involved an alleged threat Wessley made in the presence of his coworker DL in March 2018. The second

involved an alleged threat Wessley made in the presence of his coworker MH on November 15, 2019. DR was not present for either of the alleged threatening remarks.

Wessley's alleged remarks spawned an investigation that involved interviews of seven individuals. At the hearing, six individuals testified; however, neither DL, MH, nor DR were called to testify. As such, the following findings are based primarily on the hearsay accounts provided by DL, MH, and DR in their investigatory interviews and on Wessley's testimony at hearing. 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.

Events giving rise to Wessley's termination

On Wednesday, October 30, 2019, IDOT District Maintenance Manager Diana Upton and the Department of Administrative Services (DAS) received an email from Highway Technician DR detailing a confrontation he had with Wessley earlier that day. In addition to describing the confrontation, DR also alleged that Wessley had previously told another employee that he wanted to take a hammer to DR's head due to a conflict between DR and Wessley's son, JW.

On November 1, 2019, Upton interviewed DR as well as two other employees who had witnessed the confrontation, CK and MH, to determine whether Wessley posed an imminent threat. In the interviews, Upton learned that the alleged threatening remark attributed to Wessley had been made

approximately a year-and-a-half prior, in March 2018. In his interview, DR told Upton he had not previously reported the allegation because he had learned about it third-hand. Specifically, DR said that he heard from his coworker KB, who heard from his coworker DL, that Wessley had said he wanted to take a hammer to DR's head.

As Wessley had allegedly made the remark a year-and-a-half prior, Upton determined that Wessley did not pose an imminent threat. However, because the allegation involved a claim of threatened violence, pursuant to the State's Violence-Free Workplace Policy for Executive Branch Employees, Upton turned the investigation over to DAS. DAS assigned Employee Relations Specialist Andrea Macy to complete the State's investigation.

On Monday, November 18, 2019, Highway Technician Associate MH told DR that while he had been working with Wessley the previous Friday, Wessley had commented that he would like to take a hammer to DR's head. DR reported Wessley's alleged remark to his supervisor, Scott Fix, who emailed Upton the next day to inform her of the new allegation. Later that day, Upton called DR to confirm the allegation.

On November 20, 2019, Upton and Fix interviewed MH.[1] When Upton asked him whether on Friday, November 15, Wessley had said he wanted to take a hammer to DR's head, MH responded, "He worded it that way, but I took it jokingly, that he was just, you know—I didn't think he said it seriously." When

[1] Upton and Fix first attempted to interview MH on November 19, 2019. However, MH told them he did not want to discuss the situation without a union representative or an attorney, at which point Upton ended the interview and rescheduled it to the following day.

asked what he and Wessley had been talking about when Wessley made the remark, MH told them, "He was just saying how he doesn't get along with DR and doesn't want to work with him, and he brought that up, that he just causes trouble." MH told the investigators that no one else was present when Wessley made the comment and that he told DR about the comment because he felt DR "should have probably known about—I mean, known what was going on."

Upton submitted the information she received from the interview to IDOT's Employee Services Bureau and then turned the investigation over to DAS, who assigned Macy to investigate the subsequent allegation. IDOT placed Wessley on paid administrative leave pending investigation later that day.

After reviewing the investigative material, Macy began her investigation by interviewing the employees privy to Wessley's first alleged statement, KB and DL, on December 2 and 3, respectively. In his interview, KB explained that at some point in February or March of 2018, DR had angrily confronted Wessley's son, JW, in the staff breakroom, because DR was upset about text messages JW had sent. KB told Macy that a week or two after the confrontation, while KB was working with DL, DL told KB that the day after the breakroom confrontation Wessley angrily vented to him about the confrontation and, while doing so, told DL he wanted to take a hammer to DR's head. When Macy asked KB whether DL had thought Wessley was serious or joking, KB responded, "I don't think [DL] probably thought [Wessley] was joking about it, but if I remember right, I don't think he had been here that long, so, maybe just thought he was taunting or just saying that out of anger."

The next day, Macy interviewed DL about the alleged comment. During the interview, DL confirmed that a day or two after the breakroom confrontation between JW and DR, Wessley vented to him about the confrontation because he was upset that DR was mad at his son. DL told Macy that while Wessley was venting, Wessley made a comment along the lines of, "If [DR] would have got physical I would have hit him in the head with a hammer." DL said no one else was present when Wessley made the statement.

When Macy asked DL whether he had interpreted Wessley's comment in a serious or joking manner, DL responded, "I don't know, I don't think he would have followed through with it, I think he just said it out of anger." DL went on to say that he decided not to report the comment because, "I just figured [Wessley] just said it out of frustration, I couldn't actually see him physically grabbing a hammer and going and pounding a guy in the head, I just knew he was upset and I just listened and that was pretty much it." However, DL confirmed that he later told KB about Wessley's comment.

On December 5, 2019, Macy interviewed Wessley. Macy began the interview by asking Wessley to describe his working relationship with DR, which Wessley characterized as "we've generally tolerated each other," but that DR was "very gruff" and "not a very good team player." Wessley then discussed several occasions where he found DR to be rude and difficult to work with.

When Macy asked Wessley whether he had made any comments to any of his coworkers indicating that he would like to take a hammer to DR's head, Wessley replied "No, never." When Macy asked whether he might have said it

jokingly, Wessley reiterated that he had never made a comment to that effect, not even in a joking manner. Macy then asked whether Wessley could think of any reason why two separate coworkers would make up similar allegations, to which Wessley responded, "I do not know. We have a kind of divided shop down there…you've got some [employees] that buddy up together and others that just don't fit in their little group, I guess." Wessley said that the employees who tended to "buddy up together" were KB, DL, and DR along with two others.

Near the end of the interview, Wessley provided Macy copies of journal entries he wrote, which purportedly documented some of his workplace interactions in November 2019. In the entry dated November 1, Wessley alleged that he overheard DR tell KB that DR was trying to get rid of Wessley. In addition, Wessley's journal indicated that on November 20, MH told Wessley that DR had accused him of saying he would hit DR in the head with a hammer and, when MH was questioned about it, MH told the investigators that Wessley must have just been joking.

Lastly, Wessley provided Macy copies of recordings he had secretly made of MH.[2] In one recording, MH told Wessley that he had told the investigators that DR was nothing but a troublemaker. In the other recording, MH told Wessley that DR and KB are liars, that they might make up the same story, and that DR, KB, CK, and DL "are all together."

[22] The recordings themselves were not offered into evidence. However, the contents of the recordings are reflected in DAS' investigative report and Macy's hearing testimony.

After interviewing Wessley, Macy interviewed DR. Macy asked DR what exactly MH had said about Wessley's comment, DR responded:

> Oh, he just sit there and just told me that—that [Wessley] had said that he'd like to take a hammer to my head. And that's pretty well about all it was.
>
> I mean it really wasn't—I can't remember really details. And I made sure 'Are you sure he said that?' And [MH] said yes.

When Macy asked why MH told DR about Wessley's comment, DR responded, "Really wasn't—really wasn't talking about anything, you know. I just think he felt that he needed to tell me. I don't know. I mean it wasn't no—I can't remember there being any kind of significant discussion anyway."

After interviewing DR, Macy conducted a second interview with MH. In the interview, MH denied that he told Wessley about his initial interview and denied telling Wessley that he should tell the investigators he was joking when he made the comment. During the interview, MH reiterated that he had taken Wessley's comment as a joke then explained, "I felt that [Wessley] was just upset, and he was just saying that, you know, out of his head, that he was mad…But I didn't feel that he was going to do that."

When Macy asked MH about his conversation with DR concerning Wessley's comment, MH provided two, somewhat conflicting accounts. MH first stated, "The only reason I warned [DR] is because I felt that he needed—he needed to know what, you know, the—know it because, you know, that's a threat." However, later in the interview MH stated, "I think I did kind of say some things to other people that they got the idea that it was a joking matter…Because

when I—when I talked to [DR], that's how I explained it, and that's the only person that I really said anything to."

Finally, Macy asked MH whether he had ever told Wessley that he had told the IDOT investigators that DR was nothing but a troublemaker and that he believed DR, KB, CK, and DL would make up a story about Wessley. DR denied ever making such statements to Wessley, despite recordings showing he had.

On January 22, 2020, Macy completed an investigative report, which summarized Wessley's work history, the interviews and material evidence, the policy at issue, and her findings and analysis. The report did not include a recommendation as to discipline.

The report concluded there was sufficient evidence Wessley violated the Violence-Free Workplace Policy for Executive Branch Employees. The report first concluded that neither Wessley nor DR's conduct during their confrontation on October 30 constituted violence as defined in the policy. However, the report found Wessley made both the March 2018 and the November 15, 2019, statements and that those statements constituted a threatened use of physical force in violation of the policy. Notably, the report found that MH was not a forthcoming, honest, or reliable witness. However, the report concluded that because MH was friendly with Wessley, there was no reason for him to lie about the allegation and, therefore, the allegation was likely credible.

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, Wessley's employment history, and disciplinary history. At

the hearing, Niehaus testified that they were unable to find any comparable disciplinary cases involving threats, but that they reviewed prior cases involving violations of the State's sexual harassment policy. Niehaus testified that in the sexual harassment cases she reviewed, DAS had recommended termination.

Niehaus and Kurtenbach reviewed the just cause factors, determined Wessley's case was similar in severity to the other cases resulting in summary discharge, and concluded termination was warranted. On January 22, 2020, Niehaus sent IDOT District Maintenance Manager Diana Upton and interim IDOT Director Stuart Anderson DAS' recommendation that IDOT terminate Wessley's employment.

After receiving DAS' report and recommendation, Upton conducted a *Loudermill* meeting with Wessley. The record is absent of a recording or transcript of the *Loudermill* meeting. However, Upton testified that during the meeting, Wessley stated that he wanted to go on record that he did not make the alleged threatening statements, but provided no other additional evidence or mitigating circumstances.

After the *Loudermill* meeting, Upton conferred with IDOT's Employee Services Bureau, reviewed DAS' investigation report and recommendation and concurred that termination was appropriate. On February 6, 2020, IDOT issued Wessley a termination letter, which stated, in relevant part:

> This letter will serve as notice of termination effective February 6, 2020. This action is being taken as a result of your violation of the State of Iowa Violence-Free Workplace Policy.

> This policy was violated by your statements in March 2018 and on November 15, 2019, as both statements constitute a threatened use of physical force towards a coworker.

Wessley timely appealed his termination to DAS contending he "was terminated without just cause." On April 7, 2020, the DAS Director's designee denied Wessley's appeal. Wessley subsequently filed the instant appeal with PERB.

At the hearing, Wessley testified on his own behalf and called one witness in his defense, Materials Fabricator and union steward Eugene Welter. In his testimony, Wessley reasserted that he never made any comment about wanting to hit DR with a hammer, not even as a joke. Wessley stated that the first time he heard anything about the alleged threat was on November 20, when Wessley said MH informed him that DR had filed a complaint asserting that Wessley had threated to hit him in the head with a hammer. Wessley testified that he told MH he never said it, not even jokingly. In his testimony, union steward Welter stated that, in his experience, a lot of gossip tends to go around maintenance shops and that allegations tend to intensify as they are passed from one person to the next.

CONCLUSIONS OF LAW

Wessley 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.

The reasons for Wessley's discharge contained in the termination letter are that, in March 2018 and on November 15, 2019, Wessley made statements constituting a threatened use of physical force towards a coworker in violation of the State of Iowa Violence-Free Workplace policy. The State's violence-free workplace policy states, 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
>
> ***
>
> 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.

As such, the existence of just cause for Wessley's termination must be determined upon these grounds alone (*i.e.*, Wessley verbally threatened to use physical force towards a coworker in March 2018 and November 15, 2019), rather than upon other reasons suggested in the briefs or testimony elicited at hearing. For the reasons discussed below, I conclude the State has failed to

provide sufficient proof Wessley threatened to harm DR in violation of the State's violence-free workplace policy.

The State's evidence in this case is insufficient for two separate, but related reasons. The first reason concerns the overall reliability of the State's evidence. Specifically, the only direct evidence of Wessley's alleged misconduct in this case are the accounts provided by DL and MH in their investigative interviews, as they were the only witnesses to Wessley's alleged remarks. Wessley consistently denied DL and MH's accounts throughout the investigation and did so again at hearing, claiming DL and MH had been dishonest and had motive to lie during the investigation. Yet, despite DL and MH being the only witnesses to the alleged misconduct, the State chose not to ask DL or MH to testify, did not subpoena either employee, nor provide any explanation for its failure to do so.[3]

When confronted with similar disputed hearsay evidence, PERB has refused to give controlling weight to hearsay statements of absent, but available, witnesses. *See Harrison*, 05-MA-04 at 11, 13; *see also Illingworth and State of Iowa (Dep't of Transp.)*, 102361 ALJ 2021 at 7-8. In *Harrison*, the Board noted, "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 witness and find them to be insufficient to support the discharge." 05-MA-04 at 11. The Board further explained:

[3] To the extent the State argues that Wessley could have subpoenaed DL and MH had he wished to question them, this argument ignores the fact that the State, rather than Wessley, bears the burden of proof in this case. *See Harrison*, 05-MA-04 at 11.

> …the inherent problems with the evidence offered by absent witnesses concern its reliability. The…statements were not made under oath before a trier of fact, nor are they available for cross-examination to test for the presence of the problems of…perception, memory, veracity, and communication…[R]eliance on the…testimony would deprive the defendant-grievant of the chance to test whether the coworkers were lying, misremembering or just reporting ineptly.

Harrison, 05-MA-04 at 12 (quoting *Hill & Sinicropi, Evidence in Arbitration*, 2d Ed., BNA (1987), p. 135).

In this case, while DL and MH were interviewed by the DAS investigator, and thus, provided more than mere written statements, they none-the-less never provided their accounts under oath nor were subject to cross-examination. What is more, Wessley has consistently controverted DL and MH's accounts and raised concerns about their credibility; concerns made more convincing by the demonstrated lies MH told when interviewed and the investigative report's finding that MH was not a forthcoming, honest, or reliable witness.

As neither DL nor MH were present to testify or be cross-examined about their allegations, no one else witnessed Wessley's alleged behavior, and there are reasons to doubt MH's credibility and the veracity of his allegation, consistent with PERB's case law, I give DL and MH's hearsay accounts only limited weight. Consequently, as there is no testimony from any witness to Wessley's alleged misconduct, I conclude the evidence is insufficient to prove Wessley violated the State's violence-free workplace policy.

Although I have given greater weight to Wessley's testimony, which was given under oath and subject to cross-examination, I note that, even were I to accept DL and MH's accounts as true, their accounts fail to demonstrate

Wessley's alleged remarks amounted to a violation the State's policy. Specifically, the State's violence-free workplace policy prohibits "violence," which it defines as, "[T]he 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…". (Emphasis added).

Based on this definition, PERB has held that the policy does not require the State to demonstrate that an employee actually intended to carry out a threat to cause physical pain, injury, or intimidation, but only that the threat resulted or is likely to result in such consequence. *See Rick McCahen & State of Iowa (Dep't of Transportation)*, 102432 ALJ 2021 at 21. Although the State need not prove an employee's actual intent to carry out a threat, PERB has held that to show a threat was "likely to result in…injury to another person," the State must demonstrate that, under the circumstances, the threat was or could be interpreted seriously and was not merely a joke or idle talk. *See id.*, at 19-21 (Concluding State's evidence showing Grievant used a stern, serious, and raised voice while making a threatening remark and holding a hammer demonstrated the seriousness of the remark, which was likely to result in mental pain or injury).

PERB's interpretation of the policy is generally consistent with the standard articulated by the Iowa Supreme Court, which has held, a "threat must be definite and understandable by a reasonable person of ordinary intelligence" and, when viewed in light of the surrounding circumstances, "a reasonable person of ordinary intelligence would interpret another's statement as a threat."

State v. Milner, 571 N.W.2d 7, 10 (Iowa 1997). The Court has explained that, in making this determination, "What is controlling is whether a recipient of the communication would interpret it as a threat of injury." *State v. McGinnis*, 243 N.W.2d 583, 589 (Iowa 1976).

In this case, if the undersigned is to credit DL and MH's accounts as proof Wessley made the alleged remarks, the undersigned must also credit the witnesses' descriptions of how the remarks were phrased, the tone and context in which the remarks were made, and their impressions of Wessley's intent. Based on DL and MH's descriptions of their interactions and their impressions of Wessley's intent, neither account demonstrates Wessley's alleged remarks amounted to threats of violence as defined in the State's policy.

As to the alleged March 2018 comment, DL told the investigator that, while sitting alone with Wessley in a truck, Wessley made a comment along the lines of, "If [DR] would have got physical [with my son] I would have hit him in the head with a hammer." Thus, on its face, Wessley's remark was a past tense, hypothetical response to a fight that never actually occurred; from its plain meaning, the remark conveys no present or future intent to harm DR.

What is more, DL himself did not interpret Wessley's comment seriously, as he told the investigator that he "just figured [Wessley] said it out of frustration" and did not believe Wessley would actually harm DR. The none-serious nature of Wessley's alleged remark is further supported by DL's decision to not report the comment and IDOT's initial determination that Wessley did not pose an imminent threat.

As such, while the remark, if true, was inappropriate and possibly a violation of other IDOT work rules, DL's description and interpretation of the remark fails demonstrate a "threatened use of physical force…which…[was] likely to result in…injury to another person" as defined in the State's policy. As such, the State has failed to prove Wessley's alleged March 2018 remark violated the State's violence-free workplace policy.

As to the alleged November 15, 2019, remark, in his interview, MH told the investigator that while Wessley was complaining to him about DR, Wessley remarked that he would like to take a hammer to DR's head. Although the alleged remark was in the present tense, stating you would *like* to do something is not equivalent to stating you *will* do it. Further, in making the remark while privately complaining to a friend, the context suggests Wessley was venting to a confidant that he did not believe would interpret the remark literally.

However, more important than the precise phrasing and context of the alleged remark is the fact that MH, the only witness to the alleged remark, told investigators several times that he did not take the remark seriously. Specifically, MH told the investigators that he believed Wessley was just venting out of frustration, that he had interpreted the comment jokingly and did not believe Wessley was serious, and he did not think Wessley would actually harm DR.

Thus, even if MH's hearsay account is to be believed—which is dubious in light of his questionable credibility—he described and understood Wessley's remark to be an unserious or joking comment made while privately blowing off steam. As such, MH's account, while demonstrating an inappropriate and

unprofessional remark, does not describe a "threatened use of physical force…which…[was] likely to result in…injury to another person" as defined in the State's policy. Consequently, the State has failed to prove Wessley threatened to harm DR in violation of the State's violence-free workplace policy.

As proof of an employee's guilt is a necessary factor to establish just cause, it is unnecessary to address other potentially relevant factors with regard to these alleged violations. Accordingly, I conclude the State has failed to establish just cause existed to support its termination of Wessley's employment. I consequently propose the following:

ORDER

The State of Iowa, Department of Transportation, shall reinstate Jeffery Wessley to his former position (if the position still exists, and if not, to a substantially equivalent position), with back pay and benefits, less interim earnings; restore his benefits accounts to reflect accumulation he would have received but for the discharge; make appropriate adjustments to his personnel records and take all other actions necessary to restore him to the position he would have been in had he not been terminated on February 6, 2020.

The costs of reporting and of the agency-requested transcript in the amount of $763.25 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 of Iowa in accordance with PERB subrule 621—11.9(3).

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

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

DATED at Des Moines, Iowa this 28th day of September, 2022.

Patrick B. Thomas
Administrative Law Judge

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