

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

TOMMY COPELAND,)	
)	
Appellant,)	CASE NO. 102469
)	
and)	
)	
STATE OF IOWA)	
(DEPARTMENT OF PUBLIC DEFENSE),)	
)	
Appellee.)	

APPEAL DECISION AND ORDER

This matter comes before the Public Employment Relations Board (“PERB” or “Board”) from an Iowa Code section 8A.415(2) appeal. Appellant, Mr. Tommy Copeland (“Copeland”) was removed from payroll and discharged from his employment as an Air Base Security Officer (“ABSO”) with the Iowa Air National Guard (“State”). Oral Arguments were heard by the Board on April 7, 2023. Copeland was represented by Christopher Stewart and the State was represented by Nathan Reckman. Present for the Board were Members Cheryl Arnold and Erik Helland. Also present was Allison Steuterman, counsel for PERB.

Copeland was employed as an ABSO with the State from 2015 until August 2020. On August 1, 2020, the State discharged Copeland for failure to pass the Physical Agility Test (“PAT”) and removed him from the payroll. On August 7, 2020, Copeland appealed the discharge directly to the Iowa Department of Administrative Services (“DAS”) at the third step of the State employee grievance procedures. On August 21, 2020, DAS administratively closed Copeland’s

appeal. Following DAS's response, Copeland appealed the termination to PERB on September 20, 2020.

On October 15, 2020, the State filed a Motion to Dismiss Copeland's appeal to PERB contending that Copeland failed to exhaust the applicable grievance procedure steps prior to appealing the action to PERB. Oral arguments on the Motion to Dismiss were held on December 22, 2020 before Administrative Law Judge ("ALJ"), Jasmina Sarajlija. On June 30, 2021, ALJ Sarajlija denied the State's Motion to Dismiss and on July 7, 2021, the State filed a Petition for Review with PERB pursuant to Rule 621—11 (interlocutory review). PERB denied the State's Petition for interlocutory review of the ALJ Decision on August 25, 2021.

A closed evidentiary hearing on the merits of Copeland's Iowa Code section 8A.415(2) appeal was held on March 24, 2022, in Des Moines, Iowa before ALJ Sarajlija. Both parties submitted post-hearing briefs on May 12, 2022. On September 25, 2022, ALJ Sarajlija issued her Proposed Decision, attached as "Appendix A," finding the State had just cause to terminate Mr. Copeland and dismissed Mr. Copeland's disciplinary action. Copeland filed an appeal to the Board on September 29, 2022. Appellant and Appellee filed Briefs on March 31, 2023 and Oral Argument was heard on April 7, 2023.

The Board, having reviewed the Record, including the briefing filed by the Parties on March 31, 2023 and having heard the Oral Arguments of the Parties, adopts the factual findings set forth by the Administrative Law Judge. The Board further finds that the State has met its burden in establishing that there was

just cause for Mr. Copeland's discharge from employment as the PAT was and is a certificate or qualification necessary for the ABSO position and within the meaning of Iowa Code sections 8A.413(19)(a)(10) and 8A.415(2) and DAS rules 11—60.2, 60.2(5). *See e.g. Stein and State of Iowa (Iowa Workforce Dev.), 2020-PERB-102304* at 16. Mr. Copeland had appropriate and sufficient notice that he was required to pass the PAT and would be removed from payroll for failure to do so. Mr. Copeland failed to pass the PAT after several attempts. The State was consistent in its application of the PAT requirement and established it treated employees consistently in terms of their ability to meet essential requirements of the job. As noted by the ALJ, we too find that it is not within PERB's jurisdiction to consider Mr. Copeland's disability claims or reasonable accommodation claims other than to determine whether such arguments establish that Mr. Copeland was not treated in a consistent manner. The evidence does not support a finding that the State was not consistent in the application of the PAT and discharge for failure to meet an essential function of the ABSO position.

For these reasons, the well-reasoned and supported September 25, 2022 Proposed Decision of the Administrative Law Judge Jasmina Sarajlija is hereby AFFIRMED. Additionally, the Board AFFIRMS the August 25, 2021 Ruling of the ALJ.

ORDER

Appellant Tommy Copeland's state employee grievance appeal is DISMISSED.

Pursuant to PERB rule 621-11.9, costs of the certified shorthand reporter are assessed to Appellant Tommy Copeland. Appellant shall pay the total of \$587.00 within thirty (30) days of service of the Bill of Costs by PERB upon Appellant Tommy Copeland via electronic filing through E-Flex.

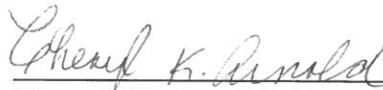
This constitutes final agency action.

DATED at Des Moines, Iowa, this 18th day of April, 2023.

PUBLIC EMPLOYMENT RELATIONS BOARD



Erik M. Helland, Board Member



Cheryl K. Arnold, Board Member

1. Findings of Fact

1.1 Copeland's Employment History

Copeland has a long military career spanning back to 1984, and has served in the U.S. Navy, Army National Guard and the Army Reserve. He has also worked as a police officer prior to his employment with the State.

In 2014, Copeland became employed by the Iowa Air National Guard as an Air Base Security Officer (ABSO). The basic purpose of the ABSO position is to provide physical security for personnel and property/resources at a base in Des Moines. He remained in this position until August 2020, when he was removed from payroll for failing to pass a physical agility test. Copeland was in the U.S. Army Reserve during his State employment and completed multiple military orders while he was employed as an ABSO. From his hire date to 2020, Copeland's supervisor was Chief Master Sergeant John Smith. From 2020 to his termination, his supervisor was Chief Master Sergeant Sean Augspurger.

During his tenure, Copeland met or exceeded performance expectations. In annual performance reviews, his supervisor noted Copeland was a team player and an asset to his shift. He further commended Copeland on providing an example of community policing and knowing individuals in his area of responsibility. With the exception of a written reprimand in November 2018, Copeland has not been subject to disciplinary action.

An ABSO can be assigned to control the access gate to the base or to patrol the base. Patrol includes 172 acres of area. An ABSO has a vehicle while on patrol, but is expected to walk when conducting building and facility checks.

1.2 PAT Requirements

Through a cooperative agreement, the ABSO position is fully funded by the federal government. To receive federal funding, all ABSOs have to meet certain standards, including a physical agility test (PAT). Appendix 23A of the Des Moines Air National Guard Security Master Cooperative Agreement (MCA), prescribes the terms, conditions, policies, and administrative procedures governing the federal contribution for the Air National Guard within the State. Security Forces Chief Sergeant Augspurger manages the Master Cooperative Agreement that funds the ABSO position.

Part of the required standards outlined in the MCA pertain to physical agility standards. Specifically, it directs the Air National Guard to establish “initial hire and annual physical agility certification requirements” intended to measure the individual’s ability to accomplish the essential functions of the position. Appendix 23A further directs that accepted standards must include anaerobic/aerobic endurance, agility, and strength. Finally, the MCA states the tests should be on a regular recurring basis (at least annually). Pursuant to the terms of the MCA, the DOPD considers the PAT a certification.

In compliance with the requirements outlined in Appendix 23A, the DOPD established and circulated the initial and annual PAT requirements to the ABSOs.

The initial memorandum announcing and making effective the requirements was circulated in December 2014, followed by an updated memorandum in November 2015. The memorandums advised ABSOs of the PAT requirements in detail. A number of provisions contained in the memorandum are relevant to highlight.

The memorandum informed ABSOs that passing the PAT will be a condition of initial and continuous employment, similar to weapons qualifications, and it is a minimum requirement of the ABSO position. ABSOs must successfully pass a PAT annually.

The stated purpose of the PAT is to measure the ABSO's preparedness to successfully accomplish the essential functions of the position. The physical test consists of running 1.5 miles in 17:30 minutes, performing 21 push-ups in 2 minutes, and 29 sit-ups in 2 minutes. For the run component of the test, the standards state the ABSO should run the 1.5 miles as quickly as possible. The standards provide that walking part of the 1.5-mile run will not disqualify the participant as long as they meet the time standard.

Prior to the PAT, the ABSO must provide a medical examination report stating the ABSO is medically qualified to do the essential functions of the job and clearing them to complete all elements of the PAT. The ABSOs obtain the medical clearance form from a DOPD certified healthcare provider.

If an ABSO is temporarily medically restricted from performing the functions of their job, to include taking the PAT, the ABSO is exempt from taking the PAT for the duration of the temporary medical restriction. Once the temporary medical

restriction is lifted and a medical clearance received, the ABSO is required to pass the next regularly scheduled PAT.

If the ABSO fails the annual PAT, they are required to retest within six months. The ABSO is retested every six months until the officer fails a fourth retest. If the ABSO employee fails the fourth PAT, the security forces manager is notified and the appointing authority is contacted regarding the personnel who no longer meets the minimum PAT qualifications for an ABSO position. After the fourth failure of the PAT, the ABSO is removed from payroll for failure to meet the essential functions of the job.

The PAT was included as an essential function in Copeland's position description questionnaire (PDQ). Other essential functions included maintaining current weapon qualifications, acquiring and maintaining a favorable background check by DOPD standards. Copeland signed the PDQ in March 2015, indicating he read and received a copy of it. Specific to the PAT, the PDQ stated:

Personnel must be able to pass an initial hire and annual Physical Agility Test (PAT) that measures the individual's ability to accomplish the physical functions of the position for which hired IAW the Mater Cooperative Agreement, Appendix 23A. The events of the PAT are indicated in the 132 SFS Physical Agility Testing Policy. A completed Medical Evaluation Certificate clearing personnel for the PAT must be provided prior to taking the PAT IAW the 132 SFS Physical Agility Testing Policy.

Expressly outlined in the PDQ, the listed essential functions must be fulfilled by the incumbent with or without reasonable accommodations for disabilities. The DOPD does not have a "light duty" option for an ABSO who is unable to meet the

physical requirements of the PAT. No other ABSO has been given an accommodation pertaining to the required PAT.

1.3 Copeland's PAT Attempts

The record contains six scoresheets of Copeland's attempted PATs dated between May 1, 2017, and July 22, 2020. Of those six, Copeland had completed all three components of the test (run, sit-ups, push-ups) on four occasions: May 1, 2017, October 23, 2017, January 14, 2019, and July 22, 2020. He failed to meet the required time standard for the 1.5-mile run on all four occasions.

The remaining two scoresheets are for two PAT examinations that Copeland attempted, but for which he did not complete the run component of the test. On August 27, 2018, Copeland completed the sit-ups and push-ups components of the test, but the run portion was postponed due to high winds. The scorecard had no result for the run, and did not mark a passing or failing result.

Documentary evidence shows the DOPD attempted to reschedule the PAT numerous times. During one instance, Copeland called in sick; on another instance, Copeland informed the DOPD that he would be absent on military orders for 20 days. Following his return in November 2018, the DOPD rescheduled the PAT but was informed by Copeland on the date of the test that he had been under medical restriction from his doctor that advised him against performing push-ups. Copeland was placed on medical leave, and the PAT held off, until he provided documentation that he was able to fulfil the essential functions of his position. Chief Master Sergeant Smith provided a copy of the ABSO PDQ for Copeland to

provide to his physician and reminded Copeland that he would remain on sick leave status until his doctor released him for duty. Smith informed Copeland the ABSO position did not have a light-duty option. During this conversation in November 2018, Copeland revealed he had recently received notification from Veteran Affairs (VA) that he was found to be one-hundred percent disabled. Copeland did not provide documentation of his VA disability prior to or during his conversation with Smith.

Copeland was absent on military orders from March 2019 to May 2019, and again from June 2019 to July 2020.

Copeland's second incomplete PAT occurred on July 8, 2020. Copeland again completed the sit-up and push-up components of the test, but did not finish the run portion. During the run portion of the test, Copeland had a medical emergency, coughing and dry heaving as he stopped and bent over during one of his laps. Copeland waved to the test administrator in a manner to indicate he required assistance. Paramedics were called, and they evaluated Copeland. He was given the option to be released or be taken to the hospital. Copeland chose to be released. Given the medical event, DOPD determined to give Copeland another opportunity to pass the PAT, which was administered 14 days later, on July 22, 2020. This is the last PAT Copeland completed prior to his removal from payroll.

During his tenure, Copeland had injuries and surgeries that required treatment and resulted in temporary medical restrictions. Sometime in 2016, Copeland injured his shoulder and required treatment. Copeland had total knee

replacement surgeries in 2017 and 2018. Copeland had restrictions that temporarily advised him against running or allowing additional time to work up to the run. From the documentation in evidence, Copeland obtained and provided the DOPD a medical clearance report prior to each of the six PAT examinations discussed above.

Copeland contends he requested disability accommodation for the PAT. Specifically, he claims he asked for additional time for the run component of the PAT to accommodate his double knee replacement surgery. The Department denies Copeland ever requested accommodation. No documentary evidence was presented regarding the request for accommodation. The Department asserts that even if Copeland had requested accommodations, the Department does not have the option to change the physical requirements of the ABSO position. The only option would be to transfer Copeland to a different position. Copeland never asked for a transfer to a different position. Following his failed PAT in July 2020, Copeland initially indicated he would retire but subsequently informed the Department that he did not intend to retire from the DOPD.

1.4 Removal from Payroll

Pursuant to the written policy outlining the PAT requirements, the DOPD planned to remove Copeland from payroll for failure to meet essential duties of the ABSO position. Chief Master Sergeant Augspurger reviewed the cooperative agreement policy, the failed PATs, sought guidance from HR regarding proper procedures, and obtained final authority from his superiors prior to implementing

the removal from payroll. By letter dated July 30, 2020, Copeland was informed he would be removed from payroll effective August 1, 2020, for failing to pass an annual physical agility test required for his position. The letter stated, in pertinent part:

On July 22, 2020, you tested for and failed to pass the Physical Agility Test (PAT), this was your fourth failed attempt. Certification for the PAT is a job requirement for the Air Base Security Officer position. "Personnel must be able to pass an initial hire and annual Physical Agility Test (PAT) that measures the individual's ability to accomplish the physical functions of the position for which hired IAW the Master Cooperative Agreement, Appendix 23A.

The letter cited and included language from Iowa Administrative Code rule 11—60.2(5), termination for failure to meet job requirements. The DOPD is required to enforce the minimum physical requirements pursuant to Appendix 23A, as its funding for the ABSO positions are dependent on maintaining those standards. The Department maintains it was required to remove Copeland from the ABSO position. Copeland is eligible to apply for other State employment.

The record contains similar instances of employees being removed from payroll for failing to meet essential functions of the job. One instance involves an airport firefighter, a federally funded position, being removed from payroll following medical information confirming he was unable to perform the essential functions of the position. The removal letter stated no accommodation existed to enable the person to perform the duties and essential functions. The second example was an air base security guard who was removed from payroll after losing the ability to bear arms, which was an essential function of the position.

Testimony received indicates one prior instance of an ABSO who failed to pass the PAT. The employee chose to retire. Had the employee not retired, the DOPD would have removed the employee from payroll due to his failure to meet the essential functions of the ABSO position.

2. Summary of Arguments and Issue Presented

The issue in this case is whether the DOPD had just cause to remove Copeland from payroll for failing to fulfill an essential requirement of the ABSO position.

Copeland contends the DOPD failed to establish the PAT is a required certification within the meaning of DAS rule 11—60.2(5). Copeland further argues the DOPD failed to provide him notice that subsequent unsuccessful PAT attempts would result in his discharge. Copeland contends he is able to fulfill the essential duties of his position despite not passing the PAT, and the employer failed to utilize progressive discipline with each failed PAT attempt. Finally, Copeland contends the employer refused to provide a requested disability accommodation that would have enabled him to pass the PAT and remain in the ABSO position.

The State maintains it is not required to meet just cause for discharges implemented under DAS rule 11—60.2(5), failing to maintain a required certificate or qualification of the job.¹ Even if the employer is required to meet just cause,

¹ In a ruling dated June 30, 2021, the undersigned denied the State's motion to dismiss Copeland's appeal of his discharge under 8A.415(2). As fully discussed in the prior ruling, Copeland was a merit covered employee and has appeal rights when he is deprived of that employment. As such, the employer is required to demonstrate that just cause supports the discharge of a merit employee even if the employee was discharged for failing to maintain a required certification or qualification.

the State asserts it has met this standard. It contends Copeland was provided adequate notice that the PAT is an essential duty for continued employment, he was given the opportunity to obtain a passing PAT at least four times as prescribed in the written policy, and ultimately removed from payroll for failing to obtain the required PAT score in accordance with the written policy. The State asserts all ABSOs are under the same PAT standards, and all have been expected to maintain that certification as a condition of continued employment.

3. Conclusion of Law and Analysis

Copeland filed the instant state employee disciplinary action appeal pursuant to Iowa Code section 8A.415(2), which provides merit system employees with the right to appeal adverse employment actions including a discharge from employment. The ABSO position, which Copeland occupied prior to his removal from payroll, is a merit-covered position. The state merit system establishes a list of reasons constituting “good cause” for discharging a merit employee. The employer must establish the discharge was taken for just cause. Iowa Code §§ 8A.413, 8A.415(2); Iowa Admin. Code r. 11—60.2 (8A).

One statutorily established reason for discharging a merit-covered employee is the employee’s failure to maintain a license, certificate, or qualification necessary for a job classification or position. Iowa Code § 8A.413(19)(a)(10). When adopting rules to implement the provisions of section 8A.413, the Department of Administrative Services (DAS) describes this type of discharge as a removal from payroll. The DAS rules outline a separate procedure for this type of discharge,

failure to maintain a required certification, from other discharges that are based on work rule violations. The pertinent language of DAS rule 11—60.2 provides, in part:

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: ... or any other just cause.

60.2(5) Termination for failure to meet job requirements. When an employee occupies a position where a current qualification for appointment is based upon the required possession of a temporary work permit or on the basis of possession of a license or certificate, and that document expires, is revoked or is otherwise determined to be invalid, the employee shall either be removed from the payroll for failure to meet or maintain license or certificate requirements, or otherwise appointed to another position in accordance with these rules. This action shall be effective no later than the pay period following the failure to obtain, revocation of, or expiration of the permit, license, or certificate.

Copeland’s appeal presents an issue of first impression. While PERB has previously adjudicated state employee discipline appeals under Iowa Code section 8A.415(2), the prior discharge cases were based on an employee’s violation of policies and work rules. While Copeland has not engaged in misconduct or violated work rules, the previously enunciated just cause factors are still relevant and binding because the ultimate inquiry in 8A.415(2) appeals is whether the employee’s discharge was taken for just cause.

Consistent with prior PERB cases under 8A.415(2), the State bears the burden of establishing that just cause supports the discharge. *E.g., Stein and*

State of Iowa (Iowa Workforce Dev.), 2020-PERB-102304 at 16. 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. *Id.* at 15. In analyzing the totality of circumstances, the Board has instructed a number of factors may be relevant to a just cause determination, including notice of the employer’s rules and expected conduct, a fair and sufficient investigation prior to the imposition of the adverse employment action, whether sufficient evidence supports the imposed action, and how other similarly situated employees have been treated. *Id.*; *E.g. Kuhn and State of Iowa (Comm’n of Veterans Affairs)*, 04-MA-04 at 42. As previously noted, the outlined just cause factors may have varying or no applicability in some cases depending on the circumstances presented by the appeal. *Stein*, 2020-PERB-102304 at 16.

3.1 Notice of PAT Requirements

The State has demonstrated the PAT is a certificate or qualification necessary for the ABSO position. The ABSO position has physical demands and the PAT sets the minimum standard for measuring the ABSO’s physical agility. The ABSO must be retested under these standards at least annually. The PAT is directly related to the ABSO’s ability to perform the functions of the position. The PAT is also required under the Master Agreement that funds the ABSO positions. Under this record, the PAT is shown to be a certificate or qualification within the meaning of Iowa Code section 8A.413(19)(a)(10) and DAS rule 11—60.2(5).

Copeland's position that he can still fulfill the essential functions of his job without passing the PAT is unavailing. The PAT is an essential function of the ABSO position. Copeland highlights that he has been able to respond to every call or emergency, uses a vehicle during his shift, can speed-walk just as fast, and has never had to run 1.5 miles in under 17:30 minutes in his position. While all these claims are likely true, the argument is misplaced. The purpose of the PAT is to measure and confirm that an ABSO can meet, at a minimum, the physical demands tested by the PAT standard. The run component specifically measures the ABSO's cardio endurance. Thus, while Copeland has never had to specifically run 1.5 miles in under 17:30 minutes in the performance of his duties, the PAT is designed to measure his ability to endure that equivalent of cardio exertion to prepare for such possible response needed while on duty. Much like an ABSO may never have a need to discharge a weapon while on duty, it is still an essential duty for an ABSO to maintain weapons qualifications in the event that skill is needed.

The State has further demonstrated that Copeland had notice of the PAT requirements during his employment. When the PAT standards were first adopted in 2014, all ABSOs received a memorandum outlining the specific components of the PAT and the testing procedures. Copeland signed an updated PDQ in March 2015 acknowledging that the PAT was now an essential function of his position. Thus, under this record, Copeland had notice that his continued employment as an ABSO was contingent upon him passing a PAT.

3.2 Stated Reason for Copeland's Removal from Payroll

The State has established that Copeland was informed of the reason for his discharge. Specifically, the letter of removal dated August 1, 2020, notified Copeland that he would be removed from payroll pursuant to DAS rule 11—60.2(5), after failing to pass the required PAT.

Copeland's arguments regarding the deficiencies or errors in the letter of removal are unavailing under the record presented. Copeland contends the letter of removal erroneously stated the removal from payroll is being implemented following his fourth failed attempt on July 22, 2020, when in fact this would have been his sixth failed attempt, as Copeland counts the two PATs he did not complete as failed attempts. The Department did not treat the two incomplete PATs as legitimate failed attempts due to the extenuating circumstances, *i.e.* high winds and a medical event, that interfered with Copeland's ability to finish all components of the PAT. Thus, the Department provided him with additional opportunities to retake the PAT. Regardless of how one views the two incomplete tests, I find the reason for the removal from payroll was sufficiently communicated to Copeland.

PERB precedent holds that the employer's discipline must be based on the reasons stated in the notice of discipline. *Eaves and State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14. Copeland's letter informed him he was being removed from payroll for failing to pass the PAT. There is no ambiguity on what formed the basis for his discharge. The principle behind this specific just cause requirement is to

prevent the employer from changing or including additional violations, during the grievance process, that were never communicated to the employee at the time the adverse employment action was imposed. No such concern exists here.

Copeland also puts forth an argument that the DOPD's failure to remove him from payroll after his fourth attempt, including his incomplete PATs, deprived him of notice that he would be removed after this sixth attempt. Copeland's notice argument is without support. Nothing in the record even suggests that Copeland was somehow misinformed regarding his continued requirement to retest and pass the PAT. The two incomplete PATs, that Copeland counts as failed attempts, were not counted due to extenuating reasons, high winds during an outside run and his medical emergency. To Copeland's benefit, the Department allowed him additional opportunities to retest. Copeland was present during all these events and fully understood his testing requirements remained and he would need to pass the PAT as a condition of continued employment.

Under this record, Copeland had notice that he was required to pass the PAT and had sufficient notice that the Department would remove him from payroll after his fourth failure to pass the PAT.

3.3 Proof of Failure to Meet Requirements

The State has shown Copeland was given at least four opportunities to pass the PAT before it removed him from payroll. This action complied with the requirements set in policy. The Department has provided documentation plainly

showing Copeland tested on at least four occasions and failed to meet the 1.5-mile run in under the required 17:30 minutes.

As such, the Department has shown Copeland was given the minimum required number of opportunities to pass the PAT and he was unsuccessful on all attempts.

3.4 Consistent Application of PAT Requirement

The State demonstrated the PAT requirement is consistently applied to all ABSO positions. No employee has been allowed to remain in the ABSO position after failing to pass the PAT after at least four attempts. The record shows one ABSO elected to retire after failing to pass the PAT. The Department allowed him to do so, and did not move forward with removing him from payroll because of his retirement. Copeland was afforded the same option, but he chose not to retire. The record also shows the Department has removed other employees from payroll for failing to meet the essential functions of the job. The DOPD removed one ABSO from payroll for losing his ability to bear arms. While the certification at issue is different between that employee and Copeland's situation, the commonality is that both requirements are listed as essential functions of the ABSO position. Under this record, the State has shown employees are treated consistently in terms of their ability to meet the essential requirements of the job.

Copeland's position that progressive discipline should have been utilized is unpersuasive. Although progressive discipline is a just cause factor generally considered, it is plainly inapplicable in this instance. The PAT is a minimum

standard that an employee is either able to meet, or not. Unlike discharges for work rule violations, the basis underlying Copeland's discharge does not require an examination of whether Copeland would have succeeded in passing the PAT if the Department progressively disciplined him after each failed attempt. The purpose of the PAT was to give Copeland a chance to demonstrate he is physically capable of fulfilling the functions of his job; it was not to punish him each time he failed a PAT that he was required to take and pass under the policy. Thus, given the basis for Copeland's removal from payroll, progressive discipline is plainly inapplicable.

3.5 Disability Discrimination and Request for Accommodation

Part of Copeland's contention in this appeal is that the State failed to account for his disability, and did not provide him with a requested reasonable accommodation that would enable him to pass the PAT. Discrimination claims are outside of PERB's jurisdiction to adjudicate. *Nimry and State of Iowa (Dep't of Nat. Res.)*, 08-MA-09, 08-MA-18; *Cooper and State of Iowa (Dep't of Human Rights)*, 97-MA-12 (noting that discrimination claims are within the exclusive jurisdiction of the Iowa Civil Rights Commission). As such, I have not considered the validity of Copeland's disability claims or the State's obligation to provide reasonable accommodations in this instance. The undersigned's consideration of Copeland's accommodations arguments has been limited to determining whether the State has treated all ABSOs in a consistent manner in this regard. Under this record, the State has shown that it has not changed the PAT requirements or

measurement standards of the test's components as an accommodation for other ABSOs.

3.6 Conclusion

Under the record presented, and following consideration of the parties' arguments, the State has established it had just cause to remove Copeland from payroll for failing to maintain a required certification or qualification for his ABSO position. Consequently, I propose the following:

ORDER

The state employee disciplinary action appeal filed by Tommy Copeland is hereby DISMISSED.

The cost of reporting and of the agency-requested transcript in the amount of \$587.00 are assessed against Appellant Tommy Copeland pursuant to Iowa Code subsection 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellant in accordance with PERB subrule 621—11.9(3).

This proposed decision and order will become PERB's final agency action on the merits of Copeland's appeal pursuant to PERB rule 621—11.7 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 26th day of September, 2022.

/s/ Jasmina Sarajlija
Administrative Law Judge

Electronically filed.
Parties served via eFlex.