

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

PHILLIP SOUTH, Appellant,)	CASE NO. 102473
and)	DECISION AND ORDER
STATE OF IOWA (DEPARTMENT OF TRANSPORTATION),)	
Appellee.)	

Appellant, Phillip South, filed this state employee grievance appeal with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 8A.415(1)(b) following a third-step response by the Iowa Department of Administrative Services (DAS) denying his grievance. South contends the State failed to substantially comply with DAS rule 11—60.2. South claims the State lacked just cause, as required by DAS rule 11—60.2, to issue him a written reprimand.

The Board held an evidentiary hearing on February 10, 2021. Mark Hedberg represented South. Anthea Hoth represented the State, Iowa Department of Transportation (DOT). The Board set a deadline of March 29 for the parties to submit written briefs. The State submitted its brief on March 29. The Appellant did not submit a written brief.

Based upon the entirety of the record, and having reviewed and considered the parties' arguments, the Board concludes South has not established the State failed to substantially comply with DAS rule 11—60.2. South has not demonstrated the State lacked just cause to issue him a written reprimand for his conduct in March of 2020.

FINDINGS OF FACT

Phillip South works as an auditor for DOT's Office of Finance, Motor Carrier Audits division. He began employment with the State in August 2006. South electronically signed receipt of the DOT Work Rules on December 24, 2018.

Dan Ssozi directly supervises South. Cheryl Williams, the DOT Bureau Director for the Finance Bureau supervises Dan Ssozi. Richard Demuynck serves as South's team leader in the motor carrier audit section. The team leader is a non-supervisory position.

South audits carriers to ensure compliance with the International Fuel Tax Agreement (IFTA) and the International Registration Plan (IRP). Among other tasks, he ensures the customers' records correctly report mileage and fuel. He performs roughly fifty audits per year. During these audits, South explains IFTA requirements to the customers. This requires South to frequently communicate with the customers he is auditing by phone.

In his fourteen years with the State, South has received satisfactory evaluations. The State has not disciplined South for his conduct in the past. However, the State has emphasized to South the need for professional communication. In multiple emails from 2015 and 2016, the State gave South directives regarding his professional conduct. The directives included:

- Rick (Demuynck) is the team leader and will give you work directives. You are expected to follow work directives
- You are expected to treat others with dignity and respect at all times.

- You are expected to be courteous, professional, and respectful to customers, coworkers, team leader, supervisor and public. You need to keep emotions under control.
- Expectation is verbal and non-verbal conduct will be professional and contribute to a positive work environment.

During the 2015-2016 time frame, the State also required South to attend a Human Relations Skills class due to his interactions at work.

The written reprimand at issue in the instant appeal occurred after two interactions South had at work in March 2020, one interaction with a customer and another interaction with a vendor.

Incident with Customer Siefers Concrete Foundations

The first interaction occurred with JM from Siefers Concrete Foundations. Siefers Concrete was selected for a motor carrier audit and the DOT assigned South as the auditor. On January 15, 2020, the DOT sent the original audit notification to Siefers Concrete outlining the details of the audit.

After sending out the original audit notification and receiving requested documents, South held a telephonic opening conference with JM, a representative of Siefers. South took notes of the conversation. He began the call at 12:05 p.m. and it lasted just over nine minutes. South first introduced himself to JM and explained his role in the audit. South did not believe the conversation started out well as JM had been working with a different division at DOT regarding licensing a vehicle that day and was struggling with the process. He believed JM was mad at the DOT due to this other issue. South told her the issues she was having were not part of the work of his division.

South then began discussing the records he had received from Siefers. South told JM he had reviewed the materials and in at least one of the books, Siefer's records for mileage would not be compliant with the requirements of IFTA, as it did not include origins, destinations, routes of travel, etc.

JM was confused and told South she did not have the audit information in front of her. She also told him that another auditor had told her the records were sufficient. South checked his records before telling JM the DOT had not audited Siefers prior to the present audit. He then asked JM approximately four times whom she talked to at the DOT. JM initially did not provide a name, but eventually told South she tried to talk to Demuynck, but he was unavailable so she talked to Mitch, another auditor.

Throughout the phone call, South understood that JM was getting riled up and stated she was "being argumentative." JM said the conversation was confusing. She also said they just went back and forth and the conversation escalated. Finally, South told JM he would send her an audit handout with the rules and after she read it, they could talk again. JM claimed she did not respond and South then hung up.

JM told DOT representatives that South yelled at her during the phone call. She claims he was unprofessional and rude through the whole phone call. She told the DOT she could not remember the specific statement, but claims he said, "Look Lady, I'm just helping you out here." JM believed that South was "getting upset" with her during the phone call.

South, however, claims he was trying to help JM understand the process. He did not feel he was demeaning or mean to her. He does not believe he yelled at JM, but stated he sometimes does talk louder due to hearing loss. South believed JM was upset due to her interactions with the DOT prior to his phone call that day. South also denies saying, “Look lady,” but instead believes he said that he was trying to help her understand the requirements of IFTA and IRP.

South spoke to a more senior auditor after this phone call as he felt it “was completely different than most calls [he’d] ever had.” That auditor told him the carrier was just upset.

Immediately after this South’s opening conference with JM, she called Demuynck and left a voicemail. In the message, JM was noticeably upset. She told Demuynck she needed someone else on her audit “because I will not deal with him.” She stated South was rude and obnoxious. She told Demuynck he needed to get this taken care of and to call her back.

At 12:31 p.m. that same day, Demuynck sent an email to South, copying Ssozi, regarding Siefers Concrete. Demuynck stated he was contacted by the carrier due to the conversation South had with them. Demuynck told South to stop work on this audit and not to contact this carrier until further notice. South had no further contact with the customer.

Incident with Vendor DB Software

Later that month, on March 25, South raised concerns with Demuynck and Ssozi regarding the process of the closing conference for an audit, and Demuynck’s review of the audit. Auditors hold a closing conference with a carrier

they audit and tell the carrier the approximate amount of any interest or penalties. The auditors use DB software to calculate that amount. This software calculates the type of penalty or tax liability a person has under IFTA and IRP, for thirty days out. After the closing conference, the auditor sends the audit to Demuynck for review.

South was annoyed with this process. He claimed he should tell the customer the exact amount the software calculated. He also believed that Demuynck “was not doing his job and reviewing [the audits]” in a timely manner, which thereby increased the interest and penalty amount above what the software calculated.

In the March 25 emails, Demuynck told South, and Ssozi agreed, South should only provide an estimate as the official calculation of the interest and penalty is not complete until Demuynck reviews the audit. Demuynck instructed South not to provide the exact amount the software listed, but to estimate a higher amount than the software calculated. South also called Ssozi about this issue and Ssozi reiterated this process.¹

The day after this email chain, South called DR, the developer of DB Software. South contacted DR due to his concerns about the audit and review process. He wanted to make sure he understood how the software worked and to confirm his concern that Demuynck’s delay in a review would result in

¹ Ssozi claimed that during that phone call South interrupted him, shouted at him, and hung up on him. In the investigatory interview, South implied that he may have yelled because of a bad phone connection or because he sometimes has a hard time hearing Ssozi. However, South also said, “I was trying to get my point across to him about these audits and stuff” and “I’m not going to say that [Ssozi]-what he considers yelling wasn’t what he perceived it as being.”

customers paying interest above what the calculation showed when South completed the audit.

South first confirmed with DR that the software calculated the amount based on thirty days out. South then told DR that Demuynck had not been truthful with him. South told DR that he believed “it was unethical for me to tell” taxpayers a different amount than what the software program calculated for the tax liability and penalties. South continued to explain his concerns with DR until DR interrupted South, told South to contact DOT’s management, and terminated the call.

On March 26, after the phone call, DR contacted Demuynck. He stated that he had a call from South that “was very disturbing.” He said that he preferred that South not contact him again. DR stated the “call was not appropriate.” DR claims that during the conversation South “started discussing management and [Demuynck] specifically. He said you were a liar and lazy. He said taxpayers were not being treated fairly. He said someone from the state maybe [*sic*] calling me about his complaints.”²

South contends he did not tell DR that Demuynck was lazy or a liar. However, South also said, “I don’t believe I would have used the word liar. I think that Rick has said things that aren’t necessarily truthful.” South also stated that he may possibly have told DR that taxpayers were not being treated fairly.

² South seemingly argued, prior to the appeal at PERB, that DOT disciplined him in retaliation for filing a complaint against Demuynck. However, South did not raise this issue at the hearing in front of PERB. To the extent South made the argument on his appeal form to PERB, we find there is not enough evidence in the record to support South’s claim the DOT retaliated against him for filing a complaint about Demuynck.

After receiving DR's complaint, Demuynck again emailed South, copying Ssozi. Demuynck stated the DOT had received a third complaint since the beginning of 2020 from an outside individual. Demuynck informed South that DR made it clear he would not talk to South again. Demuynck gave South a directive not to contact DR at DB Software unless directed by Demuynck or Ssozi. Demuynck stated the directive was necessary "to salvage the relationship the Iowa DOT has with DB Software and avoid the contract from being cancelled by the developer." Demuynck informed South he was forwarding the complaints to DOT's Employee Services Bureau.

Investigation and Discipline

Cheryl Williams, the DOT Bureau Director for the Finance Bureau, and Ssozi's supervisor, received the complaints about South's behavior.³ Ssozi informed Williams more than one complaint had come in, and Williams received the emails. Williams heard about the complaints by the end of March.

After notification of the complaints, Williams reviewed them and contacted the Office of Employee Services (DOT-OES). The DOT determined to pursue an investigation. DOT-OES helped Williams create an investigation plan.

As part of the investigation, Williams spoke with JM from Siefers Concrete on May 13, 2020. Williams then sent notes from the conversation and asked JM to provide edits or clarification to ensure the accuracy of the notes. JM responded and provided an additional written account of the incident.

³ Normally Ssozi would handle customer complaints about auditors, but Williams handled these complaints due to the incident that occurred between Ssozi and South on March 25.

The DOT also interviewed South. Cheryl Williams, Captain Dan Gohlinghorst, Joel Schlueter, and Phillip South were present during South's investigatory interview. This interview occurred on May 27, 2020, via Teams and it was recorded. Williams felt that South avoided questions during the interview. She also believed that South made a statement to DR that Demuynck was not truthful.

After the investigation, DOT management discussed the appropriate discipline. Williams and Janet Kout-Samson, an Employee Relations Officer in the Bureau of Employee Services, determined that a written reprimand, the lowest level of discipline, was appropriate. The DOT determined discipline was appropriate as management had discussed the importance of communication in the past with South. DOT management noted that communicating in an effective manner is important for auditors. The goal for auditors is to explain and help customers better prepare and succeed in meeting the required regulations.

In determining the discipline, DOT management also considered the effect of South's behavior on external customers. Both JM and DR complained almost immediately after South's phone calls with them. JM was clearly upset. The DOT was concerned that South's behavior may cause vendor DB Software to cancel its contract with the State. If DB Software cancelled the contract, it would require the DOT to rebid the contract and the DOT would incur additional costs.

Prior to issuing the written reprimand, DOT management evaluated whether South had received notice of work rules, whether the work rules were

reasonable, whether the investigation was fair, and whether South was treated equally with other employees.

On June 17, 2020, the State issued the written reprimand and South signed receipt on June 17. The letter provided that South violated DOT Work Rule I(1), which requires employees to follow written and oral instructions of supervisory authority, when he failed to comply with DOT policy 230.08 regarding the workplace environment. DOT claims he violated this work rule and DOT policy by his “inappropriate interaction during two phone calls with external customers on March 11, 2020 and March 26, 2020.” The letter further provided that South violated DOT Work Rule IV(7) when he “made malicious statements regarding your team lead to an external customer during a phone call on March 26, 2020.”

In issuing the discipline, the DOT did not consider South’s interaction with Ssozi on March 25. The DOT disciplined South based on his interaction with JM and DR on March 11 and March 26, respectively.

South grieved his written reprimand. The State issued its third step grievance response on September 2, 2020, denying the grievance. South filed the instant appeal with PERB on October 1, 2020.

CONCLUSIONS OF LAW

South filed this appeal pursuant to Iowa Code section 8A.415(1), which states, in part:

1. *Grievances*

a. An employee except an employee covered by a collective bargaining agreement which provides otherwise, who has exhausted the available agency steps in the uniform grievance procedure provided for in the department rules may, within seven calendar days following the date a decision was received or should have been received at the second step of the grievance procedure, file the grievance at the third step with the director. The director shall respond within thirty days following receipt of the third step grievance.

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. The hearing shall be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act, chapter 17A. Decisions rendered shall be based upon a standard of substantial compliance with this subchapter and the rules of the department. Decisions by the public employment relations board constitute final agency action.

Pursuant to Iowa Code section 8A.415(1), PERB's decision "shall be based upon a standard of substantial compliance with this subchapter [subchapter IV of chapter 8A] and the rules of the department [of administrative services]." For an employee to prevail in a grievance appeal before PERB under this statutory standard, the employee must establish the State failed to substantially comply with Iowa Code chapter 8A subchapter IV or DAS rules. *Stratton and State (Dep't of Human Servs.)*, 93-MA-13 at 8 (citing a previous version of the statute). Under this statutory framework, the grievant, in this case South, bears the burden to establish the State failed to substantially comply with the cited statute or rule. *Studer and State (Dep't of Human Servs.)*, 98-MA-12 at 9.

South claims the State did not substantially comply with DAS rule 11—60.2 because there was not just cause to support the issuance of a written reprimand. The relevant DAS rule provides:

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.

Pursuant to the rule, just cause must exist to support the disciplinary action taken, a written reprimand. In the absence of a definition of just cause, PERB considers the totality of circumstances and rejects an inflexible application of fixed elements in its determination of whether just cause exists. Examining just cause requires an examination on a case-by-case basis. *Hunsaker and State of Iowa (Dep't of Emp't Servs.)*, 90-MA-13 at 40. While there is no fixed test, some factors that may be relevant include:

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

Stein and State of Iowa (Iowa Workforce Development), 2020 PERB 102304 at 15–16 (citing *Gleiser and State of Iowa (Dep't of Transp.)*, 09-MA-01 at 16–17). The Board also considers how similarly situated employees have been treated. *Stein*, 2020 PERB 102304 at 16.

PERB has determined the presence or absence of just cause rests on the reasons stated in the disciplinary letter. *Id.*

In the written reprimand, the State asserted South violated a DOT Work Rule and the Iowa DOT Policies and Procedures due to his “inappropriate interaction during two phone calls with external customers.” Iowa Work Rule I(1) states “Failure or refusal to follow the written or oral instructions of supervisory authority” is a violation. The letter provides that South failed to follow Iowa Policies and Procedures 230.08. Iowa Policy and Procedure 230.08 governs the workplace environment and the behavior of employees. It provides that an “employee’s own acts of inappropriate and/or offensive behavior in, or reasonably related to, the workplace” can be a violation of the policy. An example of a policy violation includes “Comments or behaviors that are derogatory, demeaning, insulting, intimidating, or mean-spirited.”

The State also contended that South violated DOT Work Rule IV(7) when he “made malicious statements regarding your team lead to an external customer during a phone call on March 26, 2020.” The DOT Work Rule cited prohibits State employees from: “Making false or malicious statements concerning employees, the Department, or representatives of other agencies.”

South has the burden to prove he did not violate the work rules. He has not met this burden. We find South violated the work rules cited in the written reprimand.

The evidence demonstrates South failed to follow written instructions when he made comments and acted unprofessionally and inappropriately on phone calls with a client and a vendor in March 2020.

South contends he did not violate any work rules, but instead was dealing with a disgruntled customer. We disagree.

The written reprimand occurred after management received two complaints about South's behavior. Only one of those complaints came from a customer. The DOT received both complaints almost immediately after the individuals spoke with South. Clearly, both individuals felt South's behavior was extreme enough that it needed to be addressed immediately.

In the complaints, JM and DR described the conversations they had with South as "disturbing," "confusing," and "rude." JM claims South yelled at her. While South denies this, even he admitted the conversation escalated. Regardless of the exact words South used during his conversation of JM, she felt he was "getting upset" with her. South admits he asked JM the same question four times, which explains why she might have felt that he was "getting upset" with her.

The evidence in the record demonstrates South violated work rules when he acted inappropriately and unprofessionally while speaking with a customer, JM, and a vendor, DR.

The evidence also demonstrates South made false or malicious statements about Demuynck to DR. South disputes the exact wording he used when talking to DR. However, South did talk to DR about Demuynck and said Demuynck "has said things that aren't necessarily truthful." South also talked to DR about the DOT's process and seemingly implied Demuynck was not reviewing audits quickly enough, which South felt was a disservice to the taxpayers. Based on the

evidence in the record, South violated DOT work rules when he made false or malicious statements while on the phone with DR.

South has the burden to prove the State's issuance of a written reprimand was not justified.⁴ He has failed to meet that burden.

We find the written reprimand was justified given the circumstances. Although South was a fourteen-year employee with no past discipline, South had received past warnings about his behavior and the need to communicate in a professional manner. Further, the discipline stemmed from not just one complaint, but from two outside complaints in a one-month period. Additionally, South's unprofessional behavior jeopardized the relationship the State had with both a customer and an outside vendor. Accordingly, we find a written reprimand, the lowest level of discipline, was justified in this case.

South has failed to prove the State was not justified when issuing him a written reprimand on June 16, 2020. Thus, South has failed to demonstrate the State did not substantially comply with DAS rule 11—60.2.

Accordingly, we order the following:

ORDER

South's state employee grievance appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of \$510.95 are assessed against the Appellant, Phillip South, pursuant

⁴ South did not allege the State failed to conduct a sufficient and fair investigation, that he lacked knowledge of the work rules, or the State failed to adequately communicate the discipline.

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 621—11.9(3).

DATED at Des Moines, Iowa this 16th day of September, 2021.

PUBLIC EMPLOYMENT RELATIONS BOARD

By: 
Erik M. Helland, Board Chair


Mary T. Gannon, Board Member

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