

1. Findings of Fact

1.1 DOC's Attendance Policy

Kiner was terminated under AD-PR-08, Attendance, Timekeeping and Leave, a DOC policy that governs attendance expectations for all DOC institutions.¹ Provisions of the policy pertinent to Kiner's discipline state:

IV. PROCEDURES

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B. Leave Without Pay

1. Employees must have the applicable leave hours equal to or greater than an absence. Employees that do not have sufficient leave hours for an absence must request approval for leave without pay from the Warden/designee or Central Office supervisor. Leave without pay that is denied shall be considered unauthorized.

2. Instances of unauthorized leave without pay shall be subject to the following violation schedule:

1. 1st unauthorized leave – Written Reprimand.
2. 2nd unauthorized leave within one year – 1 day paper suspension.
3. 3rd unauthorized leave – 3 day paper suspension.
4. 4th unauthorized leave – 5 day paper suspension.
5. 5th unauthorized leave – Termination.

3. Each event shall be considered as one instance of unauthorized leave for the disciplinary track. For example, if an employee calls in sick for three days and does not have sufficient leave hours they shall be subject to one instance of unauthorized leave. Once the employee returns to work for any length of time, a new unauthorized leave shall be initiated if the employee is absent from work. For example, if an employee is sick for one day without proper leave balances to cover the time, then returns to work for four hours, then goes home sick for the final four hours, this would be considered two unauthorized leaves.

¹ The AD-PR-08 policy in the record was last revised in February 2021, which was after Kiner's termination. However, testimony at hearing established the provisions relevant to Kiner's termination were unchanged as part of the February 2021 revision.

1.2 Kiner's Employment and Discipline History

Kiner began her employment with IMCC in November 2007. IMCC is the inmate intake and medical institution for corrections. Kiner worked as a nursing unit coordinator in IMCC's health services department. At the time of her termination in July 2020, she worked the 6:00 a.m. to 2:00 p.m. shift.

Prior to her termination, Kiner was disciplined five times under the attendance policy. Between March 2018 and July 2018, Kiner received a written reprimand, a one-day suspension and a three-day suspension for being in unauthorized leave without pay status. In July 2019, she received another three-day suspension and a five-day suspension with final warning for taking unauthorized leave without pay. Most of the occurrences were due to the fact that Kiner did not have sufficient sick leave to cover her absences. Kiner requested the warden approve her absences as authorized leave without pay, but the requests were denied.

Kiner's employee performance evaluation from April 2019 is part of the record. The evaluation covered the April 20, 2018, to April 20, 2019, time period. Pertinent to her leave usage, the evaluation referenced the disciplines for unauthorized leave she received during the evaluation period, the written reprimand, one-day suspension and three-day suspension from July 2018. Kiner was also given a developmental plan to "make sure she is aware of accrued time prior to using it."

1.3 Kiner's Leave Accrual and Usage

During her approximately 13 years of employment at IMCC, Kiner accrued leave in accordance with the applicable accrual rates. Only Kiner's sick leave balance is relevant to this appeal. For the time period relevant to this appeal, Kiner could accrue up to 5.53 hours of sick leave per pay period. However, an employee only accrues leave when in paid status. As such, Kiner did not accrue leave during any leaves of absence without pay regardless of whether the unpaid leave was authorized, unauthorized, or FMLA-protected leave.

The record contains a copy of Kiner's time worked and leave usage for calendar years 2018, 2019 and 2020, up to July 23, the date of her termination. "KRONOS" is a system used by the State to track an employee's hours worked, leave usage and the type of leave used. Kiner's KRONOS records and testimony established that beginning in December 2017, Kiner took extensive leave to address personal health issues. Some of the leave was on an intermittent basis, while other absences spanned for several continuous months. Relevant to leave accrual, the vast majority of Kiner's absence were without pay and she did not accrue leave during those periods of time. In addition to her own health issues, Kiner took family care leave to assist and care for her mother after she was diagnosed with lung cancer. Kiner used accrued sick leave to cover her absences pertaining to her mother's care.

The record also contains Kiner's pay warrants leading up to the absences underlying the termination. KRONOS, the system that tracks an employee's leave usage and accrual, rolls into the State's payroll system and provides employees

with leave balance information on the employee's bi-weekly pay warrant. The leave balance contained on the pay warrant is the number of hours the employee has available to utilize.

Beginning in April 2020, Kiner took time off for COVID-related reasons. Prior to this, Kiner was off on FMLA-protected leave for the majority of time beginning January 2020. The majority of this leave was in unpaid status, *i.e.* Kiner was not accruing leave, and she had used any accrued leave during her time off. In mid-April, Kiner reported that her mother was exhibiting COVID symptoms and was being tested. Kiner's mother lived with her at the time. Pursuant to federal guidelines the DOC was following at the time, Kiner had to isolate for a two-week period given that someone in her household was exhibiting COVID symptoms. Kiner could not report to work for concern of exposing others.

In response to the COVID pandemic, the State offered all employees without sufficient sick leave the option to borrow up to 80 hours of sick leave if they needed to take leave for COVID-related absences. Specifically, the leave was available if the employee was presenting symptoms or had been exposed to a person with symptoms or confirmed to have COVID. At the time she reported her mother's symptoms, Kiner had less than an hour of accrued sick leave. IMCC Human Resource Associate Lynn Knight informed Kiner that she had the option to borrow up to 80 hours of sick leave. Knight further informed Kiner the current guidance is that repayment of the borrowed sick leave will begin in January 2021, but that the repayment date was subject to change. Kiner asked to borrow the sick leave and used it from April 15 to April 28, 2020.

After exhausting the 80-hours of borrowed sick leave, Kiner reported that she was exhibiting COVID symptoms. She had a negative sick leave balance at the time. However, because of a concern that she had COVID, the DOC authorized her to be on leave without pay. KRONOS records show she was on leave without pay from April 29 to May 27, 2020. She did not accrue leave during this time because the leave was in unpaid status.

From her communication with Knight in April, Kiner understood the sick leave repayment would start in January 2021. Kiner testified she was not notified otherwise. However, the DOC began immediately recouping the advanced sick leave from all employees who had utilized that option. Knight testified that HR was informing employees of the change, but she did not have documentation to show that Kiner was specifically informed of the change in the repayment date. Kiner's warrant information reflected the DOC was recouping sick leave as she accrued it. Her pay warrants in the record reflect the following sick leave balances.

Pay Period (Year 2020)	Warrant Date	Work Status	Sick Leave Balance
4/3 to 4/16	4/21	<ul style="list-style-type: none"> • 16 hours paid time • 64 hours unpaid 	(-14.3384)
4/17 to 4/30	5/5	<ul style="list-style-type: none"> • ~66 hours paid time • ~14 hours unpaid 	(-73.9076)
5/1 to 5/14	5/19	<ul style="list-style-type: none"> • ~ 3 hours paid time • Remainder unpaid time 	(-73.7117)
5/15 to 5/28	6/2	<ul style="list-style-type: none"> • 16 hours paid time • 64 hours unpaid time 	(-73.1579)
5/29 to 6/11	6/15	<ul style="list-style-type: none"> • 80 hours paid time 	(-67.6540)
6/12 to 6/25	6/29	<ul style="list-style-type: none"> • 80 hours paid time 	(-62.1156)

Kiner was on paid time when she utilized the borrowed sick leave, so she accrued 5.53 hours of sick leave during that leave. Additionally, after her return to work on May 28, Kiner had two pay periods (05/29 to 06/11 and 06/12 to 6/25) of full paid time during which she accrued approximately 11 hours of sick leave. The rest of her time off was in unpaid status. Thus, in total since the April 3 pay period, Kiner accrued approximately 16 hours of sick leave. However, because the DOC was immediately recouping the borrowed sick leave, Kiner's actual sick leave balance, as reflected on her June 29 pay warrant, was a negative balance of approximately 62 hours. Testimony received at hearing established that Kiner was provided her sick leave balance on her pay warrants, and if she had reviewed those warrants, it showed the DOC was recouping the advanced sick leave as she accrued it. Kiner testified that she rarely ever reviewed her pay stubs, but was instead relying on information the DOC communicated to her directly regarding the repayment of borrowed sick leave.

1.4 Occurrence of Unauthorized Leave Underlying Termination

The absence underlying Kiner's termination occurred on July 6 through July 8, 2020. She was scheduled to work 8-hour shifts on all three days. Kiner reported to the DOC that she could not report to work because of her mother's health condition.

Based on Kiner's own reports and corroborating information provided, the following facts are established. Kiner's mother has lung cancer and had a half of a lung already removed. She was undergoing chemotherapy and radiation treatment. Kiner's mother is immunocompromised and considered at higher risk for serious

or deadly complications if she were to contract COVID. The week before Kiner's July 6-8 absence, her mother had undergone treatment. On Sunday night, July 5, her mother had a severe and serious reaction to the treatment, causing nose bleeds and very low blood pressure that created a risk of falling.

Kiner is her mother's sole caretaker, she does not have any other family in town, and her mother did not qualify for a caretaker. During the work week, Kiner had arranged for a nearby friend to check in on her mother's condition and ensure she was taking her medication. This friend worked from home and Kiner generally did not have a concern of exposing her mother to COVID by allowing the friend into the house. Over the July 4 weekend, however, the friend had traveled out of state, and Kiner was concerned the friend could potentially expose her mother to COVID. Kiner called her mother's doctor, but was advised against taking her to the hospital and told to keep her at home until she recovered. As her mother's sole caretaker, Kiner had no other option but to stay with her mother to keep watch over her until she improved. Therefore, Kiner missed three days of work from July 6 through July 8.

At the time, Kiner had a negative sick leave balance. She spoke to human resources, who advised her to communicate her situation to the warden.

1.5 Request for Authorized Leave

Under the attendance policy, an employee may request authorized leave without pay and the decision is at the warden's discretion. An employee is not entitled to authorized leave without pay under any particular circumstances. The

policy is silent on authorized leave without pay except to give the employee the option to request it, and that the warden is to respond to such a request.

In practice, approvals for unauthorized leave without pay are rare. The decision whether to authorize leave without pay is a difficult one because it always presents an employee in a difficult and unfortunate situation. However, the institution is unable to manage its workforce if it continually provides leaves without pay, and as such, has to consider and balance the interests of the institution along with the employee's specific situation. IMCC Warden Mike Heinrich identified several factors that he considers when reviewing requests for authorized leave. First, the warden looks at the employee's length of service to determine whether the employee has had sufficient time to accrue enough leave in the event of an unfortunate event that requires them to take leave. Second, the warden considers the extent of an employee's leave usage in general, including previous authorizations for leave without pay. Finally, the warden seeks to ensure the employees working at the institution are treated consistently under the attendance policy, including with requests for leave without pay.

In Kiner's situation, she emailed the warden on July 9 and requested the warden authorize her July 6-8 absences.² She explained the situation with her mother and the events that led up to Kiner having to stay home with her on the days in question. The warden knew and understood the reason for Kiner's absence

² Kiner emailed the acting warden at the time, Randy Gibbs, with her request. However, warden Mike Heinrich was appointed as the warden on July 10, the day after her email, and thus the request for authorized leave was given to Heinrich to answer.

at the time he considered the request for authorized leave.³ Ultimately, the warden denied Kiner's request.

Warden Heinrich testified he was sympathetic to Kiner's situation. However, when applying the aforementioned factors, he could not grant the request. He considered that Kiner was a 13-year employee who had sufficient time to accrue and manage her leave. Furthermore, Kiner had used extensive amounts of leave in the years preceding this absence. The DOC had granted her all leaves she was entitled to, and had also granted her authorized leave without pay on multiple occasions. When the warden considered all this information, he ultimately concluded that she could not continue to be given authorized leave without pay because that aspect of the attendance policy is intended to be the exception, not a matter of course.

Additionally, the warden considered that the situation occurred during a pandemic. From the employee's perspective, Kiner was presented with a situation specifically caused by fear of COVID exposure that she would not have if there was no pandemic. From the institution's perspective, managing staffing was difficult during COVID and the DOC had a need for an "all-hands-on-deck" approach. The institution had other employees who were high risk or lived with high risk

³ Kiner presented documents from her unemployment proceeding for impeachment purposes. Specifically, the DOC's unemployment representative, Corporate Cost Control (CCC), gave a response to the unemployment judge that stated the DOC was unaware of the reason for her absence on July 6-8, and had Kiner informed them of it, the DOC would safeguard her position. HR associate Knight testified before me that CCC receives information from DOC, but CCC handles the unemployment proceeding. In this case, the CCC response is factually inaccurate. The DOC was aware of the specific circumstances that led to Kiner not reporting to her shifts, and the warden had this information when he responded to her request for authorized leave.

individuals. However, the DOC applied the attendance policy to other employees in the same manner as it did to Kiner.

1.6 Investigation

After the warden denied Kiner's request to authorize her absences, this placed her in unauthorized leave status. The DOC thus initiated an investigation into a potential violation of the attendance policy.

On July 21, a nursing supervisor and correctional supervisor interviewed Kiner. Kiner was advised the DOC was investigating her for a violation of the attendance policy for her unauthorized leave without pay on July 6-8, 2020. Kiner was provided a union representative during the interview.

Kiner provided the investigators with the same information as she had provided to HR and the warden regarding the reason for the absence. Kiner stated she did not know ahead of time that her friend would be traveling out of state. Her travel was over the weekend. She only looked after Kiner's mother during workdays. Kiner stated the night before her July 6 shift, her mother had a nose bleed, had very low blood pressure, and was stumbling. Her doctor advised Kiner that she was at risk of falling if left unattended. Her doctor also advised Kiner not to take her to the hospital because she might be placed on the floor with potential COVID patients since she generally runs a fever and is coughing from the lung cancer and treatments.

Kiner expressed disbelief that she was being investigated for this occurrence. She indicated that COVID created the situation, and if the world was not in a pandemic, Kiner could allow others to care for her mother when needed. However,

given that Kiner had to protect her mother from potential exposure, she had to be extremely cautious as to who she allowed in the house.

1.7 Discipline Decision

The warden made the final determination on discipline. He reviewed the investigatory interview. Ultimately, the warden considered that Kiner was aware of the attendance policy expectations regarding absences without applicable leave to cover them. She had been disciplined in the past for the same conduct. The policy does not entitle the employee to authorized leave without pay. In this instance, the warden had denied that request and Kiner was in unauthorized leave status for the July 6-8 absences.

The warden testified that the attendance policy is applied in the same manner to all employees who were in unauthorized leave status. The policy is clear in communicating the expectations to employees regarding taking leave without sufficient leave to cover the absences, and the penalty for going into unauthorized leave status. The warden applied the violation schedule contained in the policy. Kiner had previously been disciplined with a five-day suspension and final warning. This was the next occurrence within a year from the last discipline. Under a plain reading of the policy, the warden determined that termination was the next step. The warden considered that Kiner knew her attendance issues were problematic and needed to be corrected before this occurrence. The progressive nature of the violation schedule allowed her to correct the behavior. However, it became clear that she had not improved her attendance and the DOC was justified in terminating her employment.

Kiner was provided a *Loudermill* interview on July 23. She did not provide any new information that was not given as part of the investigatory interview. The DOC proceeded forward with the decision to terminate employment.

The DOC terminated Kiner's employment on July 23, 2020. The notice of discipline informed Kiner the DOC's investigation found she took leave on July 6, 7, and 8, 2020, without having sufficient sick leave to cover the absences. Her subsequent request for authorized leave without pay was denied by the warden, thus placing Kiner in an unauthorized leave status. The discipline letter further outlined her previous disciplines for unauthorized leave. Kiner was informed the termination was in accordance with the IDOC Policy AD-PR-08 Attendance, Timekeeping and Leave – Section B, quoted above, and that the fifth unauthorized leave occurrence results in termination.

1.8 Appeal

Kiner appealed the termination directly to Department of Administrative Services (DAS) on July 23, 2020, pursuant to Iowa Code subsection 8A.415(2). DAS denied her grievance on September 29, 2020, concluding the termination was supported by just cause given that Kiner's July 6-8, 2020, absence was her fifth instance of unauthorized leave without pay and the attendance policy directed that an employee's fifth violation results in termination. Kiner subsequently appealed her termination to PERB on October 12, 2020.

2. Summary of Arguments and Issue Presented

The DOC contends it had just cause to terminate Kiner's employment. It argues the attendance policy is clear regarding attendance expectations, the

discipline schedule for unauthorized leave, and the discretionary nature of the requests for authorized leave without pay. The DOC contends Kiner was on notice regarding all these aspects of the attendance policy as she had previously been disciplined for unauthorized leave under that same policy. Additionally, the DOC argues Kiner knew at the time she called in for her shifts on July 6-8, 2020, that she did not have sufficient sick leave to cover her three-day absence, even if the DOC had not recouped any borrowed sick leave. Kiner's request for authorized leave was duly considered by the warden, compared to how other similarly situated employees were treated in their requests for authorized leave, and ultimately denied by the warden as allowed under the policy.

The DOC maintains Kiner had ample opportunity during her 13-year tenure with DOC to accrue and manage her sick leave. The DOC attempted to correct her unauthorized absences through progressive discipline. Ultimately, after her five-day suspension and final warning, Kiner received another occurrence of unauthorized leave and the DOC had just cause to terminate her employment in accordance with the discipline schedule in the policy.

Kiner argues the DOC did not consider or give appropriate weight to the reason for her absence on July 6-8, 2020. Specifically, Kiner argues she had extenuating circumstances created by the COVID-19 pandemic that prevented her from reporting to her shifts on those three days. Kiner provided corroborating documentation of the reason for her absence to the DOC, and argues this absence should have been granted as authorized leave. Additionally, Kiner claims she was not aware the DOC was immediately recouping the advanced sick leave she

borrowed because the HR associate informed her it would not be repaid until January 2021. Kiner contends she would have had more sick leave available had the DOC not recouped it immediately.

The issue in this case is whether the DOC has just cause to terminate Kiner's employment. The specific aspects of just cause in contention in this appeal is whether Kiner was on notice regarding her sick leave accruals, and whether her specific circumstances were considered and appropriately weighed when determining whether termination of her employment was appropriate.

3. Conclusion of Law and Analysis

Kiner filed the instant state employee disciplinary action appeal pursuant to Iowa Code section 8A.415(2), which states:

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.

The following DAS rules set forth specific discipline 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.

. . .
60.2(4) Discharge. An appointing authority may discharge an employee. Prior to the employee's being discharged, the appointing authority shall inform the employee during a face-to-face meeting of the impending discharge and the reasons for the discharge, and at that time the employee shall have the opportunity to respond. A written statement of the reasons for the discharge shall be sent to the employee within 24 hours after the effective date of the discharge, and a copy shall be sent to the director by the appointing authority at the same time.

The State bears the burden of establishing that just cause supports the discipline imposed. *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 that the following factors may be relevant to a just cause determination:

While there is no fixed test to be applied, examples of some of the types of factors which may be relevant to a just cause determination, depending on the circumstances, 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 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.

Id. PERB also considers how other similarly situated employees have been treated.

E.g. Kuhn and State of Iowa (Comm'n of Veterans Affairs), 04-MA-04 at 42.

The presence or absence of just cause rests on the reasons stated in the disciplinary letter provided to the employee. *Eaves and State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14. To establish just cause, the State must demonstrate the employee is guilty of violating the work rule, policy, or agreement cited in the disciplinary letter. *Gleiser and State of Iowa (Dep't of Transp.)*, 09-MA-01 at 17-18, 21. Kiner's discipline letter indicates she was terminated for taking unauthorized leave in violation of DOC Policy AD-PR-08 Attendance, Timekeeping and Leave.

3.1 Notice of Policy Expectations

The State has established the DOC's attendance policy is reasonable and clear. The DOC has a reasonable expectation that employees report to work for their scheduled shifts. It also has a reasonable expectation that if an employee must be absent from work, the employee will have accrued the applicable leave hours to cover the absence. The unauthorized leave portion of the policy plainly outlines that employees will be subject to discipline if they take leave without having sufficient applicable leave to cover the absence. Prior to her termination, Kiner had previously been disciplined five times under the attendance policy for being in unauthorized leave without pay status. As such, based on the plain policy

language and Kiner's prior discipline, the State has shown Kiner had notice that she would be subject to discipline for further occurrences of unauthorized leave without pay.

The violation schedule contained in the attendance policy recognizes that employees may have unforeseen and unplanned events that force them to be absent from work without having applicable leave hours accrued. Thus, while communicating that being in unauthorized leave status is unacceptable, the policy gives the employee the opportunity to correct the behavior through progressive discipline. If an employee goes a year without an occurrence, she does not progress on the violation schedule. As such, the employee has the opportunity to maintain employment even after multiple instances of unauthorized leave. The State has established that after the five-day suspension and final warning, Kiner was on notice that an additional occurrence of unauthorized leave would result in termination. She was advised of this consequence by the policy language and the five-day suspension letter she received prior to the termination.

The State has also established the attendance policy does not require the DOC to authorize leaves without pay, but rather leaves that decision to the warden's discretion. The employee's request may be denied under the policy. The language plainly informs the employee that any leave without pay that is denied by the warden is considered unauthorized leave subject to discipline. In her previous unauthorized absences, Kiner had requested the warden to authorize them without pay. While some were granted, some of her previous requests have been denied and it resulted in her discipline under the policy. As such, the record

establishes that Kiner knew the request for authorized leave without pay was discretionary by policy and could be denied.

3.2 Proof of Violation

The DOC obtained sufficient information as part of its investigation that Kiner was in unauthorized leave without pay status during her July 6-8, 2020, absence. As shown by her pay warrant immediately preceding the absence, Kiner had a negative balance of approximately 62 hours of sick leave. As such, she did not have sufficient leave to cover the three-day absence. Kiner requested the warden to authorize the absences but the warden denied this request as allowed under the policy. By policy, the warden's denial placed her in unauthorized leave status subject to further discipline.

This result is not altered by Kiner's argument that the DOC immediately started recouping the borrowed sick leave without notifying her. The evidence shows Kiner was initially notified the repayment would start in January 2021. The DOC did not directly notify Kiner of a change to this repayment schedule. However, the adjustment to her sick leave was shown on her pay warrants. Therefore, Kiner had notice through her pay warrants that the borrowed sick leave was being recouped.

However, even if Kiner successfully argues that she did not receive notice through her pay warrants, she still could not have accrued sufficient sick leave to cover a three-day absence. After she used the advanced 80 hours of sick leave in April 2020, most of her time off following that was in unpaid status. She could not accrue time for non-paid leave. Thus, upon review of the sick leave time she

actually accrued starting in April, the evidence shows she accrued just under 16 hours of sick leave. As such, even if Kiner had the benefit of all the sick leave she actually accrued, it would still be insufficient to cover the three-day absence and would have resulted in an unauthorized leave without pay status.

3.3. Consideration of Mitigating Circumstances

The DOC has established that it considered the particular circumstances for Kiner's absence prior to the imposition of discipline. In considering Kiner's request to have the absence authorized, the warden knew the reason for her absence, considered it along with the staffing interests of the institution and consistent application of the policy. Ultimately, based on consideration of all these factors, the warden denied her request. The record therefore fully supports that the warden considered Kiner's mitigating circumstances.

It appears Kiner's actual argument in terms of mitigating circumstances is that the warden should have authorized the leave because of her circumstances. Resolving this argument requires reviewing the policy language. As previously discussed, the policy allows the warden to deny a request. The policy language is clear on this aspect. The policy does not provide any particular set of circumstances under which an employee's absence must be excused. It is entirely silent on this aspect. Kiner was aware of the discretionary nature of this decision. She had been denied such requests in the past. By her own testimony, Kiner acknowledged that employees do not know whether a request for authorized leave will be granted until after the absence occurs. As such, regardless of the reason for the absence, she was aware that taking leave without having sufficient leave

accrued was a risk that could subject her to discipline. Thus, based on a plain reading of the policy in question, Kiner's argument that her absence should have been authorized by the warden is unavailing.

In terms of just cause analysis, however, the employer does need to show that the application of the policy in question is consistent and evenly applied to all similarly situated employees. Under the record presented, the DOC has shown consistent application of the attendance policy. While Kiner faced a difficult caretaker situation that was created by the COVID pandemic, evidence received shows other employees were in similar situations. The warden testified that other employees were high risk or living with people at high risk. However, in terms of applying the attendance policy, the DOC did not authorize leave without pay for those employees either. As such, Kiner was treated the same as other employees in similar situations.

3.4 Conclusion

Under the record presented, and following consideration of the parties' arguments, the State has established it had just cause to terminate Kiner's employment. Consequently, I propose the following:

ORDER

The state employee disciplinary action appeal filed by Paulla Kiner is hereby DISMISSED.

The cost of reporting and of the agency-requested transcript in the amount of \$510.95 are assessed against Appellant Paulla Kiner 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 Kiner’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 27th day of January, 2022.

/s/ Jasmina Sarajlija
Administrative Law Judge

Electronically filed.
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