

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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| CHRIS CLARK, Appellant, |) | |
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| and |) | |
| |) | CASE NO. 102510 |
| STATE OF IOWA (DEPARTMENT OF CORRECTIONS), |) | |
| Appellee. |) | |

PROPOSED DECISION AND ORDER

Appellant Chris Clark filed a state employee disciplinary action appeal with the Public Employment Relations Board (PERB) on November 8, 2020, pursuant to Iowa Code subsection 8A.415(2)(b) and PERB subrule 621—11.2(2). Clark is employed by the Iowa Department of Corrections (DOC) at the Clarinda Correctional Facility (CCF) as a correctional officer. Clark was disciplined with a three-day suspension on September 3, 2020, for violating DOC work rules. Clark contends the discipline is not supported by just cause.

Pursuant to notice, a closed evidentiary hearing on the merits of the appeal was held virtually on June 17 and June 23, 2021. Clark was represented by Julie Dake Abel. The State was represented by Andrew Hayes. Both parties submitted post-hearing briefs on July 23, 2021.

Based upon the entirety of the record, and having reviewed and considered the parties' arguments, I conclude the State had just cause to discipline Clark with a three-day suspension.

1. Findings of Fact

1.1 Relevant Policy Provisions

Clark was disciplined under DOC policy AD-PR-11, General Rules of Employee Conduct, for an interaction he had with a shift supervisor on July 24, 2020. The discipline letter cited three specific rule provisions Clark allegedly violated. Those provisions state:

H. Professional Demeanor

Employees shall:

1. Treat other employees, offenders, guests, visitors and the public with respect, courtesy and fairness.

5. Not be involved in boisterous or inappropriate discussion and behavior that would disrupt the orderly operation of the institution/facility. Any acts of violence or horseplay are prohibited.

6. Obey a supervisor's lawful orders. Instructions that the employee believes unnecessarily jeopardize health and safety regulations must be immediately reported to an authority higher than the person giving the directive.

Clark was given prior notice of the work rules and understood that violation of those work rules may result in discipline.

1.2 Clark's Employment and Disciplinary History

Clark has been employed as a correctional officer (CO) for the Iowa DOC since July 2005. Prior to his employment with the Iowa DOC, Clark worked as a CO for corrections in Nebraska and Arizona. He also served in the military in both the Army and Navy before his employment in corrections.

Prior to the three-day suspension at issue here, Clark was previously subject to a written reprimand and a one-day suspension. He was disciplined with a one-day suspension in July 2018 for an interaction with a supervisor during which Clark referred to a radio check procedure as "stupid" and twice stated he was

refusing to complete the given directive to follow the procedure. He was found to have violated DOC Policy AD-PR-11 sections requiring professionalism, treating others with respect, and obeying a supervisor's lawful orders. Clark was subsequently disciplined with a written reprimand in September 2018 for violating DOC policy and work rules pertaining to security procedures and alertness on post. While working in the control room, Clark inadvertently opened a cell housing an inmate in disciplinary detention.

At the time of his three-day suspension, Clark worked the 10:00 p.m. to 6 a.m. shift. The shift captain sets the post assignments for all shift officers. The posts include the control room, unit officers, and activities officers. While officers have their regular post assignments, the shift captain may assign officers to any post where coverage is needed. The work duties vary depending on the assigned post, but a CO is trained and expected to handle the duties of any assigned post. Both activities and unit officers are stationed on the units; however, unit officer duties require walking the assigned units every half-hour for required rounds, whereas an activities officer may have to walk the units only a few times a night.

Clark's regular post assignment was an activities officer. However, in July 2020 when the incident at issue occurred, the DOC was dealing with frequent staff shortages caused by the COVID pandemic. The shift captains regularly adjusted the shift assignments to ensure adequate coverage at each post. Clark was assigned to unit officer duties multiple times in July 2020 prior to the incident that resulted in his discipline.

1.3 Incident Underlying Discipline

The incident for which Clark was disciplined occurred on July 24, 2020. At the time, the DOC had in place a Master Action Plan (MAP) outlining COVID-related information and prevention measures for DOC institutions. Relevant to this appeal, MAP directed that staff should be educated to stay home if they had a fever and respiratory symptoms to minimize the spread of COVID through infected employees. Part of the MAP procedures included a screening checklist for employees upon arrival and departure from the institution. The screening included a temperature check as well as a screener asking employees about the presence of respiratory symptoms, non-respiratory symptoms and contact with individuals known to have tested positive for COVID.

Upon arrival for his shift on July 24, Clark went through the screening process. He did not have a fever. Clark reported to the screener that he felt “a little queasy” but that he did not think it was COVID. Under the MAP, nausea is a listed non-respiratory symptom. However, the MAP screening questionnaire directed that an employee must present at least two non-respiratory symptoms to be screened out. As such, Clark was allowed to report to duty.

At around 9:45 p.m., the night shift officers including Clark were gathered in the Muster Room preparing for the start of the shift. Correctional Supervisor Brad Keever was passing out shift assignments. Upon receiving his assignment, Clark expressed dissatisfaction with his assignment. He had expected to be assigned to activities officer duties, but Keever assigned him as a unit officer in units 3 and 4 on South Pod. While a factual dispute exists on the specific exchange

between Clark and Keever, the record establishes Clark informed Keever during the exchange he was going home sick and he left before the start of the shift.

The exchange caused Keever to report the incident to his supervisor. Shortly after the incident, around 10:15 p.m. on July 24, Keever reported the exchange to the Associate Warden of Security by email. Keever's message stated:

On the date of 7-24-20 at approximate time being 9:45pm, I CS Keever was passing out the 10-6 schedules in the Muster Room when Officer Chris Clark looked at the schedule and stated to me that he was sick and that he wasn't working South 3/4 and that he was a AO [activities officer] not a unit officer and he was going home 'sick.' He then states that I am tired of this shit I am going home sick. I then tried to explain that due to the call ins and not having any other unit officers assigned to the South Pod, he abruptly interrupted me and said I'm sick.

Clark was out on medical leave from July 24 to August 4. The DOC investigated the July 24 incident upon Clark's return to work.

1.4 Investigation

The DOC assigned two CCF correctional supervisors to conduct the investigation. Between August 5 and August 9, the investigators interviewed Clark, Keever, and seven other employees who were present in the Muster Room for at least a part of the incident.

Clark was interviewed on August 5. The investigators informed Clark the meeting was an investigative interview that may result in discipline. He was provided with a written summary of the complaint, which contained the entirety of Keever's initial email to the Associate Warden of Security. The investigators asked Clark whether he wanted a union representative present for the interview. Clark indicated he did. The investigators informed him a union steward was not on duty at the time, which was about 5:50 a.m., and they would need to reschedule the

interview for a later time when a steward was available. Clark indicated he did not want to reschedule but to proceed forward with the interview. At Clark's request, a correctional officer of his choosing was present during the interview as Clark's peer representative.

Clark told the investigators he did not feel well prior to reporting for work. However, believing that he would be working as an activities officer, Clark thought he could complete his shift as the work did not require much physical activity. When he saw his assignment was as a unit officer on two units, South 3 and 4, Clark concluded he could not handle that work while ill. As such, he informed Keever he was sick and going home. Clark denied swearing during the exchange with Keever. Clark acknowledged that, after he told Keever he was going home sick, he also stated to Keever that he was an activities officer but Keever had him assigned as a unit officer. At that point, Keever asked Clark whether he was refusing to work his assigned post, and Clark reiterated that he was not refusing to work but going home sick. Clark indicated he was upset with Keever for saying he was refusing to work when he had just told him he was sick. Clark maintained to the investigators that he was in fact ill that night. He reported that he had gotten worse after he left the institution and was vomiting by the time he arrived home.

The seven officers interviewed as part of the investigation witnessed at least a part of the exchange between Keever and Clark. Six officers were interviewed on August 6 and one officer on August 8, with all interviews lasting just a few minutes.

In terms of the exchange between Keever and Clark, the witness statements were consistent based on the parts of the conversation the officers witnessed. As a

whole, the officer interviews corroborated the following material facts. Clark was upset with the post assignment upon receiving it. As Keever was passing out the rest of the assignments, Clark said “this is bullshit” while holding the schedule in his hand. Clark then stated to Keever that he was going home sick. As Keever radioed to the control room to get an additional officer for coverage, Clark told Keever that he is an activities officer but that Keever assigned him to unit officer duties. Keever then asked Clark whether he was refusing to work the assigned post. Clark replied that he was not refusing to work but that he was going home sick. Officers interviewed described the exchange as tense. Clark did not scream or yell but that it was evident from his tone he was not happy with the assignment. Clark quickly gathered his belongings and left. Keever came back into the Muster Room a few minutes after the exchange and said “I apologize for that.”

The July 24 night shift roster shows an additional six officers that were not interviewed as part of the investigation. The record contains no explanation as to why the investigators chose not to interview the other six officers. At hearing, the union called one of those officers to testify. The officer indicated he was present for part of the exchange between Keever and Clark. As he walked into the Muster Room, the officer testified he heard Keever ask Clark whether he was refusing to work and Clark responded that he was not refusing to work but was going home sick as he already stated. The officer provided no testimony to contradict the information gathered from the other seven officers during DOC’s investigation.

1.5 Documentation of Illness

Testimony and evidence received at hearing demonstrates Clark had a medical condition that entitled him to intermittent leave under the Family and Medical Leave Act (FMLA) beginning July 1, 2020. Prior to the July 24 incident, the record shows Clark utilized FMLA leave six times since July 1.

Clark testified he is over 70 years old and suffers from chronic conditions that periodically flare up. The flare-ups sometimes occur rapidly and may leave him incapacitated. After he left for home on July 24, Clark testified his symptoms worsened and his prescribed medication was not helping. He ended up seeking emergency medical care the next day, July 25. Clark was not medically cleared to return to work until August 3, 2020.

1.6 Discipline Decision

The DOC determined discipline was warranted based on the interaction Clark had with Keever after receiving his post assignment. Prior to imposing discipline, the DOC considered Clark's approved FMLA leave and that he used leave following the July 24 incident. The DOC ultimately determined that Clark's illness did not excuse his disrespectful, inappropriate, and insubordinate conduct toward his supervisor regarding a legitimate work assignment.

Given that Clark was previously disciplined in July 2018 with a one-day suspension for similar conduct, the DOC utilized progressive discipline and issued Clark a three-day suspension. Clark was given notice of the suspension on September 3, 2020. The notice of suspension indicated Clark violated AD-PR-11,

Sections H.1, 5, and 6, previously outlined above. The notice referenced Clark's interaction with Keever on July 24, and stated, in part:

. . . During this conversation you indicated your unwillingness to complete your assigned activity for the evening and indicating that you were going home sick. Through conversation with your supervisor you indicated that you were "tired of this shit" as your assignment was that of an Activities Officer and not of a Unit Officer as dictated by that evenings schedule. As your supervisor began to explain the rationale behind your assignment for the evening you abruptly cut the conversation off with him and indicated [that] you were sick for the evening and going home.

Clark appealed the suspension to the Department of Administrative Services (DAS) on September 9, 2020. Clark explained his frustration with the post assignments and argued the post assignments frequently placed him as a unit officer on units housing inmates in quarantine for possible COVID exposure. Clark alleged that, while other officers received preferential post assignments, the shift captain continually disregarded Clark's higher risk of serious complications or death if he were to contract COVID, and assigned him to quarantine units. Clark alleged the shift supervisor was "playing games" and targeting Clark by continually assigning him to the quarantine units.

DAS concluded the DOC had just cause for the issuance of a three-day suspension and denied Clark's grievance. Clark appealed DAS's decision to PERB on November 8, 2020.

2. Summary of Arguments and Issue Presented

The issue in this case is whether the DOC has just cause to discipline Clark with a three-day suspension. The specific aspects of just cause in contention are whether the DOC conducted a fair and sufficient investigation, obtained sufficient

proof of alleged work rule violations, and treated Clark the same as other similarly situated employees.

The DOC asserts its investigation was fair and sufficient. The investigators interviewed seven correctional officers who were established to be present in the Muster Room during at least part of the exchange. The DOC contends the witnesses corroborate Kever's description of the incident and establish that Clark's conduct was disrespectful, inappropriate, and insubordinate. The DOC maintains that Clark was not disciplined for taking sick leave but for the way he reacted to a legitimate work assignment from his supervisor. Given that Clark was previously disciplined for similar conduct with a one-day suspension, the DOC argues it acted appropriately by utilizing progressive discipline and issuing a three-day paper suspension in an attempt to correct the employee's repeat offense of a similar nature.

Clark argues the DOC did not conduct a fair and thorough investigation. Specifically, Clark argues the DOC failed to interview six correctional officers who were at work on the night shift on July 24. Clark also asserts the investigators should have obtained a statement from each officer even if they were interviewed. Furthermore, Clark argues the DOC failed to prove that he was disrespectful, inappropriate, or insubordinate. Specifically, he asserts the witness interviews are inconsistent, and only two out of the seven witnesses indicated he used profanity. Finally, Clark contends the evidence shows other employees have gotten progressively ill after reporting to work and they were not disciplined as a result.

He maintains that he was in fact sick on July 24, and went home because of his illness, and thus should not be subject to discipline for it.

3. Conclusion of Law and Analysis

Clark 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.

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. Clark’s

suspension letter indicates he was disciplined for disrespectful, inappropriate, and insubordinate conduct toward his shift supervisor on July 24, 2020, in violation of DOC Policy AD-PR-11 work rules.

3.1 Sufficiency and Fairness of Investigation

Just cause requires the employer to conduct a fair and sufficient investigation prior to the imposition of discipline. The record in this case establishes the DOC did not interview all the officers who may have witnessed the incident between Clark and Keever on July 24. At least six officers that were working the night shift on July 24 were not interviewed. One of those officers testified at hearing and confirmed that he witnessed a part of the incident. For the remaining officers, it is unknown whether they witnessed the incident precisely because the DOC never spoke to them as part of the investigation. Thus, it is undisputed on this record that the investigation likely failed to interview all the potential witnesses to the incident.

While the investigation was not as robust as it could have been, the inquiry under just cause is whether the investigation was sufficient. *Boltz and State of Iowa (Dep't of Corrs.)*, 2021 ALJ 102397 at 22. Thus, the failure to interview the remaining six officers must be considered within the totality of the presented record. First, nothing in the record suggests the DOC selectively chose only certain officers to interview in an effort to arrive at a predetermined conclusion. Instead, it appears the decision may have been made based on the availability of officers given that six of the seven officers were interviewed on the same day with the interviews taking a few minutes to conduct. Furthermore, the information that was obtained

from the interviewed officers was consistent on the material aspects of the exchange. Thus, it is likely the investigators found it unnecessary to continue interviewing additional witnesses if they had enough information to corroborate what occurred during the exchange. The testimony of the officer who was not interviewed during the investigation supports this conclusion. The officer did not provide any information contradictory to the information already obtained during the investigation. His testimony similarly did not suggest he was purposely not interviewed to keep out information favorable to Clark.

Clark's argument that the DOC was required to obtain witness statements in addition to interviewing officers is unpersuasive. The seven officers that were interviewed had a full opportunity to relay exactly what they witnessed on July 24. Nothing in the record supports Clark's contention that a witness statement in addition to the interview would have added more information than what was obtained during the interview.

Based on the entirety of the record, the DOC has established it conducted a fair and sufficient investigation into the incident underlying Clark's discipline.

3.2 Proof of Violation

Clark's primary contention in this appeal is that the DOC did not obtain adequate proof that he acted in a disrespectful, inappropriate, and insubordinate manner. He denies using profanity and overall disagrees with Keever's description of the incident. As such, Clark maintains that he should not be subject to any discipline.

Determining whether the employer obtained sufficient proof of the employee's guilt requires an examination of all the evidence presented by the record. The DOC obtained corroborating information from at least two witnesses that Clark swore in response to seeing his post assignment for the night. The witnesses indicated Clark said "this is bullshit." Although this profanity is different than what Keever initially reported, that Clark said he was "tired of this shit," it is still corroborated by interviewed officers that he swore in response to his work assignment. Thus, the DOC obtained corroborating information that Clark used disrespectful, inappropriate, and insubordinate language in response to a legitimate work assignment.

Furthermore, multiple officers indicated that it was evident from Clark's tone that he was upset with his post assignment. Others described the exchange between Clark and Keever as tense. While Clark maintains that he kept a respectful tone, the evidence obtained during the investigation indicates that he expressed his frustration and dissatisfaction with the given assignment. Clark himself acknowledged that he told Keever during this exchange that he is an activities officer but that Keever had him assigned as a unit officer. The totality of the evidence shows that Clark openly, in front of multiple correctional officers, questioned a legitimate work assignment given by the shift supervisor. Clark's response was disruptive to the orderly operation of the institution. As such, under the facts presented, the DOC has established that Clark's behavior and interaction with the shift supervisor was disrespectful, inappropriate, and insubordinate.

This conclusion is not altered by Clark's legitimate need to utilize sick leave on the day of the incident. Although Clark contends as such, I do not find that the DOC disciplined Clark for being ill and taking FMLA-approved leave. Had Clark merely informed the shift supervisor that he was ill and needed to leave, nothing in the record suggests he would be disciplined for being disrespectful, inappropriate, or insubordinate. Instead, what the evidence shows is that Clark was disciplined for the conduct he exhibited toward his shift supervisor in response to a legitimate work assignment and he questioned the supervisor's authority to assign him to any post based on staffing needs.

The finding of a policy violation is similarly not altered by Clark's allegation that the shift supervisor targeted him and intentionally placed him on COVID quarantine units that posed a great risk to Clark's health. While I do not minimize Clark's concern for his health given his age and preexisting conditions, he did not address those concerns in a proper manner. Clark had the option to go to the next level of authority, or discuss the matter privately with Keever. He did not utilize either of those options. Instead, he openly questioned a legitimate work assignment in front of other correctional officers, which was disrespectful, inappropriate, and insubordinate.

3.3 Penalty

The DOC has established the imposition of a three-day suspension in this case is appropriate. The DOC utilized progressive discipline when determining the appropriate penalty. Progressive discipline is a system where measures of increasing severity are applied to repeat offenses until the behavior is corrected

or it becomes clear that it cannot be corrected. *Nimry and State of Iowa (Dep't of Nat. Res.)*, 08-MA-09, 08-MA-18, at App. 30. The purpose is to correct the unacceptable behavior of an employee and to convey the seriousness of the behavior while affording the employee an opportunity to improve. *Phillips and State of Iowa (Dep't of Human Servs.)*, 12-MA-05 at App. 16 (internal citations omitted). The three-day suspension built on Clark's July 2018 one-day suspension for his unprofessional, disrespectful, and insubordinate interaction with a supervisor. As the July 24, 2020, incident involved the same or similar conduct and work rule infractions, the DOC appropriately utilized the next level of discipline to convey the seriousness of his continued work rule infractions.

3.4 Conclusion

Under the record presented, and following consideration of the parties' arguments, the DOC established it had just cause to discipline Clark with a three-day suspension. Consequently, I propose the following:

ORDER

The state employee disciplinary action appeal filed by Chris Clark is hereby DISMISSED.

The cost of reporting and of the agency-requested transcript in the amount of \$874.80 are assessed against Appellant Chris Clark 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 Clark'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 20th day of April, 2022.

/s/ Jasmina Sarajlija
Administrative Law Judge

Electronically filed.
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