



(17A, 20), on this petition for review we have utilized the record as submitted to the ALJ.

Based upon our review of this record, as well as the parties' written and oral arguments to the Board, we adopt the ALJ's findings of fact and we adopt the ALJ's conclusions. We concur with the ALJ's determinations and conclusion that the State failed to establish just cause supports the imposition of Burden's one-day suspension.

### **FINDINGS OF FACT**

The ALJ's findings of fact, as set forth in her proposed decision and order attached as "Appendix A," are fully supported by the record. We adopt the ALJ's factual findings as our own, with the following additions and discussion.

A brief summary of the facts is helpful before turning to the State's disputed findings. Burden requested to take vacation for multiple Saturdays within a 60-day window, including Saturday, October 10, 2020, to attend his daughter's softball games. The request was denied. The vacation request and denial were given days or weeks prior to October 10. On October 10, Burden called and informed the institution that he needed to take enforced leave to care for his daughter. A co-worker saw Burden at the daughter's softball game on October 10 and reported the information to the institution. ISP interviewed Burden regarding the reported information. Burden stated he believed his use of enforced leave was appropriate, that he had to be at the game for his daughter who would otherwise be unsupervised at the game. Burden stated he had no choice but to use enforced leave. ISP concluded Burden misused enforced leave

because his child was not sick and that Burden was insubordinate when he failed to report to his shift after being denied vacation leave.

The State contends the ALJ improperly relied on newly produced and uncorroborated evidence to find Burden did not have proper notice that his use of enforced leave was improper. Specifically, the State argues the ALJ should not have accepted as fact Burden's bare assertion that he previously used enforced leave in a similar childcare situation without discipline. It contends this probative information was not provided during the investigation to be considered by management, but newly introduced at hearing in a self-serving manner without corroboration. The State further argues the ALJ's credibility determination regarding Burden is unsupported because she failed to consider, what the State characterizes as, Burden's differing and inconsistent statements at the time of the investigation compared to what he provided at hearing.

The State further contends the ALJ relied on the same faulty evidence to find the DOC did not conduct a fair and sufficient investigation. It argues the record shows Burden was given an opportunity to present any facts during the investigatory interview that his use of enforced leave was proper. Burden's failure to present facts at the time when he was given the opportunity should not be interpreted as the State's failure to conduct a fair and sufficient investigation.

Upon review, we find each of the ALJ's findings are supported and we agree with the weight the ALJ has given the presented evidence. We think the factual determinations appealed by the State are sufficiently addressed by the ALJ's findings and analysis. In light of the State's arguments on review, however, we

include additional factual findings.

Shift Captain John Martinez was assigned to investigate whether Burden improperly used enforced leave on October 10, 2020. During the investigation and prior to the imposition of discipline, the DOC knew Burden had conversations about his October 10 leave request with the assigned investigator, Martinez, as well as with at least two other captains and the Warden. None of these individuals were interviewed during the investigation. Security Director Doug Bolton, who determined, or was at least involved in the discipline decision, did not know the contents of the conversations Burden had with the captains when he tried to obtain the day off. During the investigatory interview, Burden was never directly asked why he took enforced leave on October 10. Instead, he was asked only three questions about the matter being investigated: whether he previously asked for vacation leave for October 10, whether he was at the sports complex for part of his shift on October 10, and whether he thought his use of enforced leave was proper. Following Burden's explanation on why he thought it was proper to use enforced leave on that day, the investigators did not ask any follow-up questions to clarify or expand on the information given in his response.

As noted by the ALJ, Security Director Doug Bolton testified the institution worked with employees dealing with unexpected childcare situations to determine what leave to use. In our review of the record, we find the DOC does not provide a clear and definitive answer as to what leave would have been proper for Burden to utilize in his situation after his vacation request was denied. Bolton testified other employees have previously called into work when they did not have childcare. The

record does not reveal what type of leave these other employees with childcare issues were allowed to use. When specifically asked for the type of leave employees are allowed to use when childcare issues arise, Bolton testified the employee would communicate with the supervisor and they would work with the employee in terms of how long the employee needs to be off and what leave to utilize. However, the DOC did not provide what acceptable leave option an employee was to utilize in this situation if a vacation request had already been denied.

### **CONCLUSIONS OF LAW**

We have considered the State's arguments in our review of the ALJ's conclusions. The ALJ followed well-established case law and correctly examined the totality of circumstances to reach her determination that the State did not establish just cause existed to support Burden's discipline. We agree with the ALJ's determinations as set out in Appendix A and adopt them as our own, with the following additional discussion to specifically address the State's arguments on review.

The State argues the ALJ's decision erroneously expands the meaning and substantive rights granted by Iowa Code section 70A.1(5) and DAS rule 11—63.3, when she concludes that enforced leave language under 63.3(11) could be read to apply to care of dependent children who are not ill but require supervision. It contends the ALJ's decision creates an erroneous precedent which interferes with the State's interpretation and application of the enforced leave provision in future cases. Upon review of the ALJ's decision, we find the State's position is misplaced.

The State's argument fails to recognize that the instant case is a disciplinary

action appeal pursuant to Iowa Code section 8A.415(2), in which PERB's task is to determine whether the discipline imposed in a particular case is supported by just cause. The just cause determination is made on a case-by-case basis considering the totality of the record presented. As part of the just cause analysis, the ALJ correctly considered whether the DOC provided Burden with adequate notice that his use of enforced leave to care for a child who is not sick would subject him to discipline. Her analysis necessarily involved reviewing the enforced leave rule language as well as other facts established by the record. We find the ALJ sufficiently addressed the notice factor of just cause and agree with her conclusion. Contrary to the State's assertion, the ALJ's conclusion that Burden did not have adequate notice of the parameters of 11—63.3(11), under the particular record presented here, does not limit the State's future application and enforcement of the relevant leave provisions. This decision merely upholds existing precedent that just cause requires the employer to provide the employee with notice of the employer's rules and knowledge of conduct that will subject the employee to discipline.

The State also broadly argues the ALJ's conclusions create a problematic and uncertain precedent as to what constitutes reliable evidence in just cause determinations because she relied on, what the State contends, new and uncorroborated facts. If the Board accepts the ALJ's decision, the State argues it sets a precedent that employees' uncorroborated and self-serving assertions never divulged during the investigation is reliable evidence. Upon consideration and review of the evidentiary record before us, we are unpersuaded by the State's

argument.

As an initial matter, the State puts forth varying positions regarding the relevance and importance of Burden's provided reason for ultimately taking enforced leave on October 10. On the one hand, the State maintains that enforced leave can only be used if one's child is sick, as defined by DAS rule 63.3(1), and thus the DOC only needs to establish his child was not sick on October 10. On the other hand, the State also maintains that any evidence Burden presents establishing he had no choice but to use enforced leave to care for a child who was not sick should be disregarded because he did not provide this information during the investigation for management to consider prior to discipline.

More importantly, we think the State's argument regarding the evidentiary standard also improperly attempts to shift its burden of proof of a violation to the employee. As the ALJ noted in her analysis, the DOC's investigation was not adequate or conducted by an impartial investigator. We agree with the ALJ's analysis. The State has to obtain proof of a rule violation prior to the imposition of discipline. Here, the DOC was investigating whether Burden improperly utilized enforced leave on October 10. Yet, in our review of the investigatory interview, Burden is never directly asked to provide the reason he used enforced leave on that date. He is asked whether he thought his use of enforced leave was proper, after being asked whether he previously requested vacation for the day and that he was at the sports complex. The DOC's line of questioning presumed, and the State still maintains, that Burden's earlier vacation requests for the day off establish he knew enforced leave was not the proper form of leave to use. As noted by the ALJ, the

evidence obtained does not prove this knowledge. Burden's earlier vacation request also does not factually establish why he ultimately ended up taking enforced leave on October 10.

The State further argues Burden's reason for taking leave lacks credibility because his vague explanations during the investigation failed to provide any of the information he testified to at hearing. We think this argument similarly attempts to shift the burden of proof to the employee. If the DOC found Burden's statements during the investigation to be vague, as it now contends, it had an obligation to ask follow-up questions to clarify his responses, as well as ask for supporting evidence or witnesses to corroborate his claims, prior to the imposition of discipline. The DOC did not do either. The employer cannot fault an employee for failing to answer questions that were never asked during the investigation. Burden's reason for ultimately taking enforced leave on October 10 was the issue to be investigated. Yet, as the ALJ determined, the DOC's investigation did not obtain material facts pertaining to Burden's reason for using enforced leave.

Accordingly, we enter the following:

### **ORDER**

The State of Iowa, Department of Corrections, shall rescind and remove the original and all copies of the notification of Kevin Burden's suspension, as well as any other documentation of the suspension from all personnel files maintained concerning Burden. The State shall take all other actions necessary to place Burden in the position he would have been in had the State not issued a suspension on November 6, 2020.



The cost of reporting and of the agency-requested transcript in the amount of \$494.95 is assessed against the Appellee, State of Iowa, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellee in accordance with PERB subrule 621—11.9(3).

This decision constitutes final agency action.

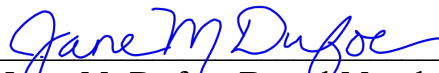
DATED at Des Moines, Iowa this 5th day of July, 2022.

PUBLIC EMPLOYMENT RELATIONS BOARD



---

Erik M. Helland, Chair



---

Jane M. Dufoe, Board Member

Electronically filed.  
Parties served via eFlex.

APPENDIX A

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

---

KEVIN BURDEN, Appellant,	)	CASE NO. 102529
and	)	PROPOSED DECISION AND ORDER
STATE OF IOWA (DEPARTMENT OF CORRECTIONS), Appellee.	)	

---

Appellant, Kevin Burden, filed a state employee disciplinary action appeal with the Public Employment Relations Board (“PERB”) pursuant to Iowa Code section 8A.415(2)(b) and PERB rule 621—11.2. Burden appeals the third-step response of the director of the Iowa Department of Administrative Services (DAS) denying the appeal of his suspension. Burden alleges that just cause does not support his one-day paper suspension. The State denies that Burden’s suspension was not supported by just cause.

I held a closed, evidentiary hearing by video conference on September 16, 2021. Amber Moats represented Burden. Andrew Hayes and Annie Myers represented the State. The parties submitted post-hearing briefs in November 2021.

After a review of the record, I conclude the State has not shown just cause to issue the suspension.

**1. Findings of Fact**

**1.1 State’s Sick Leave and Enforced Leave Rules**

In the case at issue, Burden, a correctional officer for the Department of Corrections (DOC) at the Iowa State Penitentiary (ISP) allegedly used enforced

leave inappropriately in violation of DOC policy and rules. Iowa Administrative Code 11—63.3 describes the appropriate use of sick leave with pay and includes a subrule relating to enforced leave. This rule states in relevant part:

63.3(2) Accrued sick leave may be used during a period when an employee is unable to work because of medically related disabilities; for physical or mental illness; medical, dental or optical examination, surgery or treatment; or when performance of assigned duties would jeopardize the employee’s health or recovery.

. . . .

63.3(3) Sick leave shall not be used as vacation.

. . . .

63.3(11) Employees may also use accrued sick leave, not to exceed a total of 40 hours per fiscal year, for the following purposes:

*a.* When a death occurs in the immediate family;

*b.* For the temporary care of, or necessary attention to, members of the immediate family.

The subrule relating to enforced leave then defines “immediate family” and concludes by stating “This leave [enforced leave] shall be granted at the convenience of the employee whenever possible and consistent with the staffing needs of the appointing authority.”

Doug Bolton, who was the security director for ISP at the time of the incident, stated that enforced leave is “designed to take care of an immediate family member who is sick” and uses the accrued hours in an employee’s sick leave bank. Bolton additionally provided that ISP worked with employees dealing with emergency situations to determine what leave to use.

## 1.2 Burden's Work and Leave History

Burden has worked as a correctional officer at ISP since approximately 2012. He works the day shift from 6:00 a.m. to 2:00 pm. with Thursdays and Fridays off. In recent evaluations prior to October 2020, Burden met or exceeded all measurements.

Burden acknowledged receipt of the State of Iowa Employee Handbook. Based on the record, it is unknown whether the handbook includes the relevant leave policies at issue. Burden did not receive specific training on the leave policies.

Burden does not have a history of abusing sick leave or enforced leave. His past attendance record demonstrates he did not miss any significant periods of work.

This case arose because of Burden's use of enforced leave on October 10, 2020, to care for his dependent children. Burden had used enforced leave prior to October 2020 for similar reasons. In the prior situation, the children's babysitter cancelled an hour and a half before Burden's scheduled work shift at ISP. Burden could not find alternate child care. He called and explained the situation and stated that he needed to use enforced leave. ISP management questioned him a couple of days later to provide specifics about what occurred, and management then approved his leave. Burden received no discipline for the incident.

### 1.3 ISP Staffing Issues

During the times relevant to this appeal, ISP faced staffing issues. Bolton, who was security director at the time and is now the assistant warden, testified that ISP had greater staffing needs in the fall of 2020 due to shortages caused by the COVID-19 pandemic. Based on the facility policy at the time, ISP management denied all employee vacation leaves that were not requested 60 days in advance.

Burden contends ISP management did not realize the “extreme mental and emotional tax” ISP’s staffing issues placed on the correctional officers. The employees worked a lot of overtime. Burden claims that ISP required him to work two to three days overtime per week. Burden’s wife also works at ISP as a nurse. Between the two of them, they have four children. Burden did not have many childcare options during this time because his wife worked at ISP and the children’s grandparents were concerned about contracting COVID.

### 1.4 Burden’s October 2020 Vacation Request

The incident at issue arose due to Burden’s absence from work on October 10, 2020. Burden requested vacation leave multiple times, within the 60-day window prior to October 10. He made this request to multiple captains, including shift captain John Martinez. Burden requested vacation leave to watch his daughter play in a softball game. His requests were denied.

On October 9, 2020, Burden testified his circumstances changed as he found out his ex-wife could not take care of his children on October 10. Burden tried to explain his situation to his supervisor and requested vacation to take

care of his children. His request was again denied. Burden claims he told Martinez that he needed the day off due to a family care situation.

In testimony, Martinez agreed that Burden and he had conversations in the days and weeks leading up to October 10. Martinez, however, testified that Burden asked for time off for a softball game and Burden's reasons for needing the day off never changed.

When Burden explained his situation to ISP management, he was told to do what he had to do. Burden believed he was being told to either leave his kids somewhere alone, call in sick or use enforced leave, or some other avenue. Burden testified he "attempted to do it the right way." As he could not take vacation due to the denial of his request, he chose to use enforced leave to take care of his children. As Burden had previously used enforced leave in a childcare situation, he assumed this was the correct avenue. Burden did not ask about the parameters of using enforced leave prior to using it as he thought he understood the policy based on his previous usage of this type of leave.

#### 1.5 October 10, 2020, Incident

Burden called in to ISP on October 10 and told them he was caring for his kids and needed to use enforced leave for the day. No one told Burden he could not use enforced leave for this situation. This was Burden's first day using enforced leave that year. ISP approved Burden's use of enforced leave for his 8-hour shift.

On the morning of October 10, Burden picked up his kids from their mother's house and got them ready for the day. He brought his daughter to her

softball game around 11:30 a.m. He watched his daughter's softball game with his other children for approximately two and a half hours of his scheduled work shift that day.

The morning of October 13, Brad Peterson, an ISP Treatment Services Director, emailed Bolton and another member of ISP management. In that email, Peterson said that on October 10 while attending his own daughter's softball game, he saw Burden at the sports complex in Fort Madison. Peterson expressed aggravation to see Burden there. He stated that he did not confront Burden, but felt corrective action should be taken. Because of this email, Bolton told Captain Adam Derr to direct an investigation.

#### 1.6 Investigation into October 10, 2020, Incident

Captains Derr and Martinez conducted an investigatory interview with Burden the morning of October 13. Burden had a peer representative present. The State gave Burden a summary of the complaint, which said that Burden had called into work for his scheduled shift using enforced leave, but was seen on that same day at the sports complex.

Martinez asked all the questions during the three-minute interview. Martinez first asked Burden background questions about his work at ISP. Martinez then asked Burden a few questions about October 10. Burden admitted to calling in on October 10 and using enforced leave for his scheduled day of work. Burden admitted he was at the sports complex on October 10 during his scheduled shift.

When Martinez asked Burden whether he believe his use of enforced leave was appropriate, Burden said the following:

In this case, I believe it was. I'd uh previously tried to obtain the day off using vacation with multiple Captains on up and it was denied even though I'd told them specifically I needed to be there for my daughter that day. Beyond that it was continuously denied so it left me no choice but to call in Enforced Leave to be there for my daughter. Now, expanding on that, I wasn't sure whether my ex-wife was gonna be able to make it or not and my wife works here so that would leave my daughter unattended at a softball tournament for ya know a whole day and I found that to be uh irresponsible, so. When I called in I didn't say that she was sick or anything like that, just said that I needed to care for my daughter, so.

Burden's peer representative added that Burden had talked to Martinez and the warden prior to using enforced leave and had not lied about his situation. Neither Martinez nor Derr asked Burden any further questions about Burden's explanation.

Prior to the investigatory interview, Burden talked to at least two supervisors about his situation and attempted to speak to the warden. When he went into the investigatory interview, Burden thought the investigators already knew about his circumstances. Specifically, Burden believed Martinez knew about his situation as Burden talked to Martinez multiple times in the weeks leading up to October 10. Burden thought Martinez knew the reason he used enforced leave was because he could not take vacation, but he had to take care of his children on October 10 as they had no other supervision.

The record contains no additional information about the investigation. Based on the record, no other witnesses were interviewed and no additional evidence was collected.



### 1.7 Discipline-Issuance of 1-day Suspension

The record does not detail what information ISP management had from the investigation or when they received that information prior to making the discipline determination. The record also does not specify who in ISP management made the discipline decision. Presumably, Bolton was involved in the discipline determination, but the record does not clearly provide that fact. Martinez was not involved in determining the appropriate discipline in this case.

On November 6, 2020, ISP management, specifically Bolton, issued Burden a one-day paper suspension. The letter provided that Burden “asked for vacation for [October 10] and this request was denied. Then called in using enforced leave and was seen at Baxter’s Sports complex during your scheduled work hours. This is not proper use of your enforced leave.” In the letter, ISP stated Burden’s conduct violated DOC Policy AD-PR-08 regarding attendance, timekeeping and leave as well as Policy AD-PR-11 regarding the general rules of employee conduct. In the suspension letter ISP stated that a correctional officer’s role is integral to the DOC and “consistent, reliable attendance is required.” Burden signed his receipt of the suspension letter on November 10, 2020.

In the suspension letter, ISP did not cite the particular portions of either policy that was violated. Policy AD-PR-08 is a seven-page policy and AD-PR-11 is an 11-page policy.

### 1.7.1 Policy AD-PR-08 Attendance, Timekeeping and Leave

Based on the suspension letter, it is not clear what provision in Policy AD-PR-08, regarding attendance, timekeeping and leave that ISP alleged Burden violated.

AD-PR-08 provides some information on requesting leave. AD-PR-08 provides in part that “Employees shall report to work as scheduled. All schedule changes must be pre-approved by the employee’s supervisor.” It also states “Employees must request supervisory approval for time away from scheduled work hours and have the appropriate leave balance to utilize for the absence.” In the section on sick leave the policy provides that “Employees shall call their supervisor . . . when he/she knows that he/she is not going to be able to report for duty due to illness.” AD-PR-08 does not include any discussion about an employee’s use of enforced leave.

In testimony, Bolton claimed Burden violated the portion of the policy that requires employees to notify the supervisor when the employee was not going to report to work due to illness. Bolton testified that Burden violated this provision when he used a form of sick leave, *i.e.* enforced leave, for reasons unrelated to personal illness or illness of an immediate family member. Bolton asserted that AD-PR-08 requires an employee to call in to use sick leave for sickness and neither Burden nor his daughter were sick. Bolton essentially contends that enforced leave follows the same policy as regular sick leave since an employee uses hours from his or her accrued sick leave for enforced leave. Bolton also

testified that Burden's situation was not an emergency situation in which ISP would work with an employee to determine the appropriate leave to use.

#### *1.7.2 Policy AD-PR-11 General Rules of Employee Conduct*

ISP also claimed at hearing that Burden's conduct amounted to insubordination in violation of AD-PR-11. Bolton testified ISP viewed Burden's conduct as insubordinate because Burden willfully disregarded instructions of his employer when ISP management denied Burden's vacation request and directed him to report to work. Bolton stated that Burden circumvented ISP's denial of his vacation request by using enforced leave.

Bolton testified that insubordination is an egregious form of conduct because it undermines appropriate authority. The DOC generally treats insubordination more severely because management needs to have trust in the chain of command. Bolton claims greater corrective action was necessary in this case due to Burden's insubordination.

Even knowing insubordination was the basis for the DOC's finding that Burden violated AD-PR-11, it is unclear what particular provision in the general rules of conduct are at issue. The policy does provide that employees shall comply with DOC's work rules and policies.

Burden received a one-day paper suspension in early November. He submitted his grievance form in mid-November, 2020. DAS issued its Step 3 response on December 28, 2020, denying Burden's grievance. Burden filed the instant appeal to PERB in January 2021.

## **2. Summary of Arguments and Issue**

The State argues it had just cause to issue Burden a one-day suspension. The State claims that Burden had proper notice of the rules as he signed acknowledgment of policies and he knew he should have used vacation leave for his situation as shown by his multiple requests for vacation for October 10. The State contends that enforced leave cannot be used for childcare for immediate family members who are not ill, but instead enforced leave can only be used to care for an ill or medically disabled immediate family member. The State argues Burden used the incorrect form of leave in violation of AD-PR-08 and was insubordinate in violation of AD-PR-11.

Burden argues the State did not have just cause to issue any discipline, but even if discipline was necessary, progressive discipline should have been used. Burden contends the State did not give him proper notice that his reason for using enforced leave was improper. Burden claims the investigation was insufficient as it failed to produce evidence of his violation of any rule or policy. Burden also contends that he did not violate the rule or policies cited in the suspension letter. Burden believes he was not treated equally to other employees as others have been allowed to use enforced leave in similar situations.

The issue in this case is whether the State had just cause to issue Burden a one-day suspension.

## **3. Conclusions of Law and Analysis**

Burden filed this 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.

DAS rules provide specific discipline measures and procedures for disciplining employees. Those rules are as follows:

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 of the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

Iowa Administrative Rule 11—60.2(8A). *See also* Iowa Administrative Code 11—60.2(1) (discussing suspension procedures).

The State bears the burden of establishing that just cause supports the discipline imposed. *Stein and State of Iowa (Iowa Workforce Development)*, 2020

PERB 102304 at 16. The term “just cause” when used in section 8A.415(2) and in administrative rule is undefined. *Stockbridge and State of Iowa (Dep’t of Corr.)*, 06-MA-06 at 21 (internal citations omitted). PERB determines whether management has just cause to discipline an employee on a case-by-case basis. *Id.* at 20.

When determining the existence of just cause, PERB examines the totality of the circumstances and rejects “a mechanical, inflexible application of fixed elements.” *Stein*, 2020 PERB 102304 at 15. Although just cause requires examination on a case-by-case basis, the Board has declared the following factors may be relevant to the 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.

*Hoffmann and State of Iowa (Dep’t of Transp.)*, 93-MA-21 at 23; see *Stein*, 2020 PERB 102304 at 15–16. The Board also considers how other similarly situated employees have been treated. *Stein*, 2020 PERB 102304 at 16.

Iowa Code section 8A.413(19)(b) and DAS rule require the State to provide the employee being disciplined with a written statement of the reasons for the

discipline. See *Krieger and State of Iowa (Dep't of Transp.)*, 2020 PERB 102243 at 6; *Hunsaker and State of Iowa (Dep't of Emp't Servs.)*, 90-MA-13 at 46, n.27. PERB has determined the presence or absence of just cause rests on the reasons stated in the disciplinary letter alone. *Krieger*, 2020 PERB 102243 at 6.

The suspension letter ISP issued to Burden provides no clarity to Burden regarding which provisions of the cited policies he allegedly violated. At the hearing and in the post-hearing brief, the State argues Burden had the responsibility to call in to use enforced leave only if his family members were sick and that he was insubordinate in refusing to follow the directive to report to work since his vacation leave request was denied.

The lack of clarity in the suspension letter is problematic, but it is not the only issue in this case. Based on the record, the State has not provided the evidence necessary to demonstrate it had just cause to issue the one-day suspension. The State has not shown Burden had knowledge of the conduct expected of him, and the State has not proven its investigation was sufficient and fair.

### 3.1 Notice of Expected Conduct

The State has not shown it provided Burden with notice of the conduct expected of him. Burden consistently claimed, beginning already in his investigatory interview, that he thought he properly used enforced leave. The investigators did not question him about why he felt his use of enforced leave was appropriate.

The State argues the Administrative Code subrule regarding enforced leave is contained within the rule regarding sick leave. Therefore, the sick leave provisions also apply to enforced leave. The State claims that is why Burden should have known his daughter needed to be ill in order to utilize enforced leave to take care of her.

Based on my reading of the Iowa Administrative Code and the DOC policies, the DOC's interpretation of the enforced leave subrule is not clearly stated in those provisions.

The Administrative Code provision states:

63.3(11) Employees may also use accrued sick leave, not to exceed a total of 40 hours per fiscal year, for the following purposes:

- a.* When a death occurs in the immediate family;
- b.* For the temporary care of, or necessary attention to, members of the immediate family.

This provision in the Administrative Code does not state the employee's family member needs to be ill. The provision simply states that employees may use up to 40 hours of accrued sick leave for the "care of, or necessary attention to" family members. In a plain reading of this provision it could apply to the care of dependent children that require supervision.

The State claims the sick leave provisions in DOC policies apply to enforced leave as an employee utilizes the sick leave bank when in enforced leave status. The sick leave portion of DOC policy AD-PR-08 states that "Employees shall call their supervisor . . . when he/she knows that he/she is not going to be able to report for duty due to illness." Again, I cannot conclude the provisions



clearly show that an employee's family member needs to be ill in order to use enforced leave. Notably, enforced leave can be used either for the care of a family member or when a death in the immediate family occurs. If an employee is using enforced leave due to the death of a family member, this provision in AD-PR-08 would not apply. In that scenario, the employee is not calling due to anyone's illness. Since this sick leave provision in AD-PR-08 does not apply when using enforced leave for the death of a family member, I cannot conclude it clearly applies in the other scenario when an employee uses enforced leave to care for a family member.

Additionally, the State has not shown the exact materials that were provided to Burden regarding enforced leave. Burden received the employee handbook, but that handbook is not in the record. But even if the State had given Burden materials about enforced leave, Burden would not necessarily have known the DOC required a family member to be sick in order to use enforced leave. The provisions in Iowa Administrative Code and AD-PR-08 are not clear enough to provide Burden with notice that he could only use enforced leave to care for dependent children when they were ill.

The State contends that Burden knew his use of enforced leave was not appropriate as he first requested vacation leave. The record shows Burden requested vacation leave prior to knowing his children did not have supervision on October 10. Additionally, I do not view Burden's interview or testimony that he had no choice but to use enforced leave as an admission that he knew his use of the enforced leave was inappropriate. Instead, Burden's statement could

merely be him expressing his preference to use vacation instead of enforced leave because enforced leave is capped at a maximum of 40 hours per fiscal year.

Burden's previous use of enforced leave bolsters his claim that he used enforced leave appropriately. In a similar situation, in which Burden lacked childcare, he used enforced leave. ISP management asked him at the time about his reason for using enforced leave, and yet no one in ISP management told him his use of enforced leave was inappropriate, and Burden was not disciplined. Bolton also testified that ISP works with employees to determine what leave to use in emergency situations. Based on Burden's previous use of enforced leave and potentially other employees' use of enforced leave in childcare situations, Burden did not have notice that his use of enforced leave on October 10 violated any rules or policies.

The State did not notify Burden of the conduct it expected of him when utilizing enforced leave for care of a family member.

### 3.2 Sufficient and Fair Investigation

The State has also not shown its investigation into Burden's conduct was sufficient or fair. The State's investigation consisted of a short investigatory interview of Burden. The record contains no further details on what Captains Martinez or Derr did in furtherance of the investigation. Based on the record before me, no other staff were interviewed about this incident. Burden talked to many supervisors about his situation, but those supervisors were not interviewed. Burden called in to use enforced leave on October 10, but there is

no record of what was said when he called in and the person he talked to was not interviewed.

In its investigation, the State failed to obtain material facts pertaining to Burden's reason for using enforced leave on October 10. In Burden's investigatory interview, he readily admitted to using enforced leave on October 10. He also admitted to attending a softball game during his scheduled shift that day. When asked whether he felt he used enforced leave appropriately, Burden replied in the affirmative, and then explained that he thought it was irresponsible to leave his child unattended at a softball game. Neither Martinez nor Derr followed up with any questions on why Burden would believe that enforced leave was the appropriate leave in his situation. As such, Burden's prior instance of using enforced leave for childcare was undiscovered. The investigators also did not ask about whether Burden's daughter would actually have been unsupervised that day even though Burden mentions it during the interview. Instead, Martinez testified that based on his conversations with Burden prior to the investigation, he believed Burden was taking vacation for a softball game and that Burden's reason for needing to take leave never changed. The investigators did not ask questions during the interview to ascertain Burden's reason for requesting enforced leave on October 10.

The investigators also did not ask questions regarding Burden's alleged insubordination. Burden stated he asked for vacation leave for October 10. When questioned, he stated he used enforced leave appropriately. Burden and his peer representative also relayed that Burden told multiple people the reason for his

leave. The investigators did not ask Burden further questions and did not interview the people that Burden spoke to in the weeks surrounding October 10. The investigators did not ask questions during the interview or interview other staff about the facts surrounding Burden's alleged insubordination.

Burden's claim the investigation was insufficient to establish his violation of a rule or policy also raises a question of fairness about the investigation. The primary investigator during the interview, Martinez, had knowledge about the incident outside of the context of the investigation. Martinez was not a neutral investigator. Martinez and Burden discussed Burden's request for leave. Burden testified that he thought Martinez and others in management already knew his whole situation because he talked to them about it. Martinez could have been a witness in the investigation. Yet, he was asking the questions, and Burden thought Martinez already knew the answers. Burden may have assumed he did not need to provide additional explanation because of his conversations with Martinez prior to the interview. The conversations between Burden and Martinez are not part of the investigatory record. Thus, the record does not show what information Martinez had at the start of this investigation.

The State has not shown its investigation was sufficient to elicit the necessary facts to determine whether Burden violated a rule or policy as part of the just cause analysis. The State also has not shown its investigation was fair since the primary investigator had knowledge that was not included in the investigatory record. The record does not contain information on whether there

was an investigatory report or what was in it. So it is unknown what facts ISP management used when determining discipline.

### 3.3 Conclusion

The State has the burden to establish just cause for issuing a one-day suspension. In this case, the State failed to show Burden had notice that his use of enforced leave was inappropriate. On its face, the DAS rule and AD-PR-08 do not limit an employee's use of enforced leave to situations in which the employee is caring for sick family members. Burden had previously used enforced leave for a similar reason and his use did not result in corrective action. Burden did not have notice that his October 10 use of enforced leave to care for dependent children was in violation of a rule or policy.

The State has also failed to show Burden acted insubordinately in using enforced leave on October 10. The State claims Burden willfully circumvented ISP's denial of his vacation request by using enforced leave inappropriately. As the State did not demonstrate that Burden knew his use of enforced leave was inappropriate, it failed to show that Burden willfully acted in defiance of management. The State has not shown that Burden was insubordinate.

The State has also failed to show its investigation into Burden's conduct was sufficient to elicit the facts necessary for ISP to make a proper just cause determination in this case. The State failed to establish the investigation was fair and neutral as its primary investigator had knowledge outside the investigatory record. Because of the insufficiency of the investigation and the unfairness of the

investigation, the State cannot demonstrate it had just cause to discipline Burden.

Under these facts, the State failed to prove it had just cause to issue Burden any discipline, much less a one-day suspension.

Consequently, I propose the following:

**ORDER**

The State of Iowa, Department of Corrections, shall rescind and remove the original and all copies of the notification of Kevin Burden's suspension, as well as any other documentation of the suspension from all personnel files maintained concerning Burden. The State shall take all other actions necessary to place Burden in the position he would have been in had the State not issued a suspension on November 6, 2020.

The costs of reporting and of the agency-requested transcript in the amount of \$494.95 are assessed against the Appellee, State of Iowa, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellee in accordance with PERB subrule 621—11.9(3).

The proposed decision and order will become PERB's final agency action on the merits of Burden's appeal pursuant to PERB rule 621—9.1 unless, within 20 days of the date below, a party files a petition for review with the Public Employment Relations Board or the Board determines to review the proposed decision on its own merits.

DATED at Des Moines, Iowa this 4th day of February, 2022.

/s/ Amber DeSmet

Administrative Law Judge

Filed electronically.  
Parties served via eFlex.