

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

LARRY TRIPP, JR.,
Appellant,

and

STATE OF IOWA (DEPARTMENT OF
CORRECTIONS),
Appellee.

CASE NO. 102559

PROPOSED DECISION AND ORDER

Appellant Larry Tripp, Jr., filed a state employee disciplinary action appeal with the Public Employment Relations Board (PERB) on April 4, 2021, pursuant to Iowa Code subsection 8A.415(2)(b) and PERB subrule 621—11.2(2). Tripp was employed by the Iowa Department of Corrections (DOC) as a correctional officer at Iowa State Penitentiary (ISP). He was terminated on February 2, 2021, for engaging in off-duty conduct that led to his arrest for aggravated assault and disorderly conduct, as well as attempting to use his position with the DOC to secure privilege or advantage in his interaction with law enforcement during the same incident. Tripp contends the termination is not supported by just cause.

Pursuant to notice, a closed evidentiary hearing on the merits of the appeal was held on October 22 and October 29, 2021, in Des Moines, Iowa. Tripp was represented by Curtis Dial. The State was represented by Andrew Hayes and Annie Myers. Both parties submitted post-hearing briefs on December 6, 2021.

Based upon the entirety of the record, and having reviewed and considered the parties' arguments, I conclude the State had just cause to terminate Tripp's employment.

1. Findings of Fact

1.1 Applicable DOC Work Rules

Tripp was terminated for violating the following provisions of DOC General Rules of Employee Conduct, AD-PR-11.

IV. PROCEDURES

C. Code of Conduct

2. Employees are charged with the responsibility of complying with IDOC's institution, and Judicial District's Department's work rules, orders, policies and procedures, along with municipal, county, state, and federal laws, and the applicable rules of regulatory agencies that apply to them.

E. Personal Ethics

1. Employees shall conduct themselves in a professional manner that creates and maintains respect for the IDOC and the individuals served.
2. Employees shall avoid any action that might adversely affect the public confidence in the state criminal justice system.
3. Not use their position to secure privilege or advantage.
4. Employees shall obey all federal, state, and local laws and the policies of the IDOC, institutions, or judicial districts.

1.2 Tripp's Employment and Disciplinary History

Tripp began his employment with the DOC in 1993. He was a correctional officer at the Iowa State Penitentiary (ISP) in Fort Madison, Iowa, during his DOC employment. Tripp performed various additional roles, including transport officer for two years, CERT team for four years, and an instructor.

In the two years prior to his termination, Tripp was disciplined for three separate incidents. He received a written reprimand on December 27, 2018, for "actions which led to [his] arrest for OWI on November 14, 2018." The reprimand letter stated his actions were in violation of AD-PR-11, General Rules of Employee

Conduct, E. Personal Ethics, rules 1, 2, and 4, previously recited. Tripp testified he was ultimately not convicted of the OWI charge.

On the same day, December 27, 2018, Tripp was disciplined with a one-day suspension for “actions which led to [his] arrest for domestic battery on December 8, 2018.” The suspension stated his actions were in violation of the same rules referenced in the written reprimand, and additionally, in violation of Code of Conduct, rules C.1 and C.2, requiring employees to comply with DOC regulations and procedures, and municipal, county, state and federal laws. Tripp testified he was ultimately not convicted of the domestic battery charge.

On August 27, 2020, Tripp was disciplined with a three-day suspension for “actions which led to [his] arrest for DUI and driving without a valid driver’s license on Saturday, August 1, 2020.” The suspension noted Tripp’s actions were in violation of the same work rules previously referenced, C.2, E.1, 2, and 4. Additionally, this suspension letter recited a provision of the State of Iowa Employee Handbook that outlines the reasons upon which disciplinary actions may be based, including conduct which adversely affects the employee’s job performance or the agency, conduct unbecoming a public employee, misconduct, or any other just cause. Tripp testified the DUI criminal case is still pending and there is no final disposition in the case yet.

All three disciplinary notices included a provision that further violations of work rules and policies could result in more severe discipline up to and including discharge. Each notice also contained Tripp’s appeal rights for grieving the imposed discipline. Tripp did not grieve any of the prior disciplinary actions.

1.3 Incident Triggering Investigation

Tripp was arrested on December 19, 2020, by the Illinois Department of Natural Resources (DNR) Conservation Police. He notified ISP of his arrest. Randy VanWye, a DOC investigator, also saw a local newspaper publication stating that Tripp was arrested for disorderly conduct and aggravated assault. DOC determined a nexus existed between the off-duty conduct and Tripp's employment as a CO and initiated a formal investigation. The DOC as an organization is tasked with keeping the public safe and expects its employees to act in accordance with that mission even when off-duty. Tripp was placed on administrative leave on December 21.

1.4 Scope of DOC's Investigation

The DOC assigned VanWye to investigate potential violations of DOC policies and work rules. Unlike criminal investigations, the DOC has limited resources when conducting internal administrative investigations. It does not have the same level of authority or access available to law enforcement agencies that conduct criminal investigations. The DOC's investigative authority is further limited when the internal investigation concerns off-duty misconduct. While the DOC can direct its employees to participate in investigations and answer questions, it lacks this authority when members of the public are concerned.

ISP submitted a records request to the Illinois DNR to obtain a copy of all documentation related to Tripp's arrest for review in its internal investigation. The DOC conducted an investigatory interview with Tripp. The DOC did not contact any members of the public identified in the December 19 incident as part of its investigation. The DOC was not prohibited from speaking to the individuals

involved. However, the agency typically does not contact alleged victims or witnesses for concern of interfering with the criminal investigation, or giving the appearance of reinvestigating a matter already investigated by law enforcement.

1.5 Evidence Obtained

ISP conducted an investigatory interview with Tripp on January 12, 2021. The interview was conducted prior to the DOC receiving any documents from the Illinois DNR regarding Tripp's arrest.

Tripp was provided with a written summary of the complaint, which stated the purpose of the interview was to give Tripp an opportunity to explain and answer questions pertaining to his arrest for disorderly conduct and aggravated assault on December 19, 2020. VanWye conducted the interview. Tripp's attorney Curtis Dial and a peer representative were present for the interview.

Tripp provided a copy of the citation tickets he received on the day of the arrest. He could read one of the citations was for disorderly conduct, but stated he could not read the other citation. Tripp asserted he did not recall being advised of the charges he was arrested for, and did not know if the other charge was for aggravated assault as he had not appeared in court yet for the criminal charges.

Tripp was asked to explain what occurred the day of his arrest. He explained he was driving his UTV along properties owned by his family or friends with the purpose of scouting geese to hunt the following day. He intended to drive through a gateway to find a better observation spot. He saw Austin Boyer's truck, an individual he knew and was previously acquainted with, parked by that area. Tripp stated he thought Boyer might be deer hunting in the area and left to scout geese

from a different location in order not to disturb Boyer's hunt. When he was about a mile or two down the road, Tripp received a phone call from Boyer. Tripp stated Boyer was "heated" and "very verbal" over the phone, asking Tripp what he was doing, and why Tripp was trying to intentionally mess up his hunt. He thinks they talked for about 4 minutes. Tripp told Boyer he would just come back and they could talk in person.

Tripp stated he arrived before Boyer and just waited by Boyer's truck as he had not arrived out of the field yet. Tripp initially described the encounter as a discussion. As the interview progressed, Tripp indicated there was profanity exchanged, and that they were "growling at each other a little bit." Tripp stated neither one made a threat against the other during the interaction.

Boyer's vehicle was a full-sized truck with an extended cab, which Tripp guessed was 28-30 feet long. He stated the closest he and Boyer physically got to each other was the length of that truck, as Boyer was standing by the front driver side and Tripp was at the back of the truck on the passenger side. He heard David Rhodes, a homeowner in the area, yelling for Tripp to leave before he called the police. Tripp stated he was confused why Rhodes threatened to call the police as he was never on Rhodes' property. Rhodes worked at ISP before retiring in 2020, and he and Tripp were also acquainted before this incident. Tripp stated he left the area in his UTV after Rhodes threatened to call the police.

When VanWye asked if Tripp had a handgun on him, Tripp stated he did not. Tripp stated he had his holster on him, but he purposely left the gun on his UTV before Boyer came out to avoid an accusation that he used his gun during an

altercation. Tripp stated he believed the gun was on the seat of the UTV. Tripp stated he did not attempt to intimidate Boyer at all, and certainly not with a weapon. Tripp stated his UTV was parked 25 to 30 yards from Boyer's truck where they were talking. Tripp said he might have had a Leatherman tool on him, but not a gun. He stated Boyer had the crossbow in his hand during their discussion, which is what Boyer used during his hunt. Tripp contended that Boyer never got close to his UTV where he could have seen the gun as they remained by Boyer's truck.

During his interview, Tripp sketched a map of the area and marked where individuals were located during the interaction. When asked if a property fence remained between him and Boyer during the interaction, Tripp stated no.

Tripp stated after he left and arrived home, two officers arrived at his home. They asked whether they could talk to him, and Tripp invited them in. Tripp was previously acquainted with one of the officers, Illinois DNR Conservation Police Officer Eric Wheatley.

Tripp stated he was not advised, or at least did not recall being advised, that he was being arrested for aggravated assault. Tripp said the officers did not know what they would cite him for and Tripp did not know what he was going to jail for at the time. He indicated the disorderly conduct was mentioned, but aggravated assault was never mentioned. When VanWye asked Tripp if the officers asked him if he pointed a gun at Boyer, Tripp did not recall if the officers asked that question. Tripp stated he did not receive the citation tickets until he bailed out of jail that

evening. Tripp could read one of the tickets that said disorderly conduct, but could not make out what the other citation ticket stated.

Tripp stated the officers asked him about a specific gun, a .40 caliber, stainless handgun with black grips, if he had this gun on him. Tripp told them this gun was taken during his August 2020 OWI arrest and is still in possession of the county sheriff's office.

The DOC obtained Officer Wheatley's field report, a four-page report, along with a photographic evidence report. The Illinois DNR had more information pertaining to the arrest, including written statements from the alleged victim, Austin Boyer, and a witness to the incident, David Rhodes. The statements were not sent to the DOC in response to the FOIA request, and thus it was unavailable to the agency at the time of Tripp's investigation. From the information available to the agency, the following was gleaned.

Officer Wheatley received a call from Boyer on December 19, 2020, at 3:51 p.m., regarding an incident he just had with Tripp. Before Boyer explained the interaction, the officer noted he "could tell by [Boyer's] voice he was shaken." Boyer reported he and Tripp were just in an argument. Boyer was hunting deer on a field belonging to David Rhodes. Boyer reported Tripp was driving around in his UTV in a field adjacent to where Boyer planned to hunt. Tripp was revving his engine up. After confirming it was Tripp on the UTV, Boyer called Tripp. Boyer asked Tripp what he was doing, explaining he planned to hunt and Tripp's driving may have scared off any deer. Tripp reportedly told Boyer he needed to talk with him anyway and would meet Boyer at his truck.

When Boyer arrived, Tripp was in his UTV and standing by Boyer's truck. Boyer reported that the arguing first started about Tripp driving in the adjacent field. It escalated and "got more heated" when Tripp asked Boyer why they did not hang out anymore. When Boyer told Tripp he did not want to hang out with him because Tripp "drinks too much" and is a "bad influence" on him, Boyer reported that Tripp became enraged and pulled a gun out of his holster located on his right hip. Boyer stated Tripp never pointed the gun at him, but Tripp held the gun pointed at the ground as he was yelling. Boyer reported Tripp then tossed the gun into his UTV and challenged Boyer to a fight. Boyer stated he repeatedly told Tripp to leave and at that point the landowner, Rhodes, came out and yelled for Tripp to leave or he was going to call the police. Tripp got in his UTV and left.

Boyer described the gun as a large caliber, maybe a .40 caliber, with some silver or gray on it. Boyer reported Rhodes told him to stay put because Tripp is known to pull guns on people and they were not sure what Tripp would do. Officer Wheatley spoke to Rhodes on the phone the same day of the incident. Officer Wheatley indicated on this report that Rhodes "relayed much of the same information" as Boyer had reported.

At about 5:13 p.m., Officer Wheatley and a sheriff's deputy arrived at Tripp's house. Officer Wheatley noted that Tripp seemed to be under the influence of alcohol and had a drink in his hand of an unknown liquid. He noted Tripp acted slightly off balance, seemed carefree and he could smell the odor of alcohol emitting from Tripp's breath about two feet away. When asked about the reported incident, Tripp was adamant that Boyer called him and he returned to the area to talk with

him. He stated the conversation with Boyer never became “heated,” they were just talking. When asked if he pulled out his pistol, Tripp stated no and that he was not wearing a gun when he talked to Boyer. Tripp went further to say Boyer probably meant his Leatherman tool, which was in a sheath on his right hip. With Tripp’s permission, Officer Wheatley looked inside Tripp’s UTV but did not find any guns.

Officer Wheatly told Tripp he would be taken to jail. Tripped “balked” at the mention of going to jail, made statements about him also being in law enforcement for over 20 years, that he was “on the same team” as the officers, and mentioned “collateral duties” he had at ISP. Officer Wheatley again told Tripp he was going to be taken to jail, at which point Tripp mentioned he and Officer Wheatley go back. Officer Wheatley reminded Tripp the last time he was at Tripp’s home was for a similar report that Tripp waved a gun around while yelling at someone. Tripp invited the officers inside the home while he searched for shoes and a coat. When asked about a black and silver/gray pistol, Tripp said he did not own such a firearm but that he had gun safes full of guns. Officer Wheatley stated Tripp was “hemming and hawing around” and attempted to talk his way out of going to jail as he looked around for shoes. Tripp asked if they really had to go to jail, to which Officer Wheatly responded yes. Tripp then said he did not want to have to call a judge, a sheriff, or a deputy, identifying the persons by name, at that time of day, which was 6:06 p.m. Officer Wheatley and the accompanying deputy took Tripp to the county jail.

Once at the jail, Officer Wheatley reported that he completed the citations for aggravated assault and disorderly conduct. He explained to Tripp that he could bond out and told him the amount. At Tripp's request, Officer Wheatly called Tripp's wife regarding the bail information. At this time, Tripp asked Officer Wheatley if he could talk to him. Tripp showed his phone call log for the day. A photo of the log shows Tripp received a call from Boyer at about 3:15 p.m. and he called Boyer back a minute later. Tripp told Officer Wheatley he was just scouting geese in the field nearby so that he could hunt them the following day. He asked Officer Wheatley what would happen if he alleged that Boyer and Rhodes accosted him with a weapon. He advised Tripp it would be his word against two people. Tripp alleged that Rhodes "had it out for him" and "rambled on about all the things he did for [Rhodes] at the prison." Tripp further stated that his cousin was the deputy warden at the prison and Tripp hoped he (Tripp) still had a job after this.

The photo of the pistol from the August 2020 arrest and Tripp's phone log were included as photographic evidence in the report that ISP received.

Officer Wheatley retrieved phone logs to the sheriff's department concerning Tripp. He noted that in March 2020 a complaint was received about Tripp yelling and brandishing a pistol. Office Wheatley was the assisting officer during that incident when they visited Tripp. Tripp denied waving the gun around.

Although the DOC had not received Boyer's and Rhodes' written statements, Officer Wheatley mentioned them in his field report.

Officer Wheatly noted he visited Rhodes on December 20 and asked him to complete a written statement. Officer Wheatly engaged Rhodes in conversation

about his status at ISP. Rhodes stated he was a Major and in charge of all the shift supervisors. He reported Tripp was his subordinate. Officer Wheatley referenced a part of Rhodes' statement that said, "... he put it on the seat." Officer Wheatley clarified the "it" in Rhodes' statement was referring to a pistol.

Officer Wheatley also obtained a written statement from Boyer on December 20. While obtaining the written statement, Officer Wheatley stated in his report that he again asked Boyer about the description of the pistol, and Boyer described it was black and silver/gray. Officer Wheatley had retrieved a photo of a pistol that was recovered from Tripp's truck during Tripp's DUI arrest in August 2020. He showed Boyer the photo. Boyer state the gun looked similar, but did not know if it was the exact same gun. Officer Wheatley asked Boyer if he was shaken about the incident as he had seemed to be on the phone. Boyer relayed to Officer Wheatley there was a 10-15 second period when he was feeling helpless, he did not know what was going to happen and could not do anything about it.

1.6 DOC's Investigative Conclusions

After the DNR report was received¹, VanWye checked the information contained in the report with the responses Tripp provided during his investigatory interview. The accounts provided by Tripp, Boyer, and Rhodes were fairly consistent as to what gave rise to the encounter between Boyer and Tripp, that their discussion became heated, that Rhodes intervened at that time and Tripp left

¹ Following an additional request to Illinois DNR, the DOC received the rest of the information pertaining to Tripp's arrest after the discipline determination. The pertinent documents the DOC did not originally have are the written statements by Boyer and Rhodes, both of which were entered into evidence. The statements are consistent with the information in the initial police report received by the DOC and considered in the investigation.

the area. The only material inconsistency between the information received in the police report and information provided by Tripp during his interview is where and how Tripp's firearm was used during the incident. The critical question was whether Tripp unholstered and presented his firearm during his argument with Boyer.

VanWye presented the available information to DOC executive leadership. Based on the investigation, DOC leadership concluded that Tripp presented his firearm while yelling at Boyer and challenging him to fight. The DOC made a credibility determination. The executive leadership did not have any reason to doubt that Boyer and Tripp argued, the argument became heated, and that Tripp appeared intoxicated as reported by officer. Tripp had two prior arrests involving alcohol. Ultimately, the DOC found the account supported by two witnesses to be more credible. The executive committee also considered the fact that Tripp agreed everything else happened as described except for him presenting a firearm. The DOC found no evidence that Boyer, Rhodes, or Wheatley were confused, mistaken, or conspiring against Tripp. Tripp had an interest in not admitting he unholstered a gun and presented it. For those reasons, the DOC concluded Tripp engaged in off-duty misconduct in violation of DOC work rules.

1.7 Discipline Decision

The executive team, consisting of the ISP Warden, DOC deputy director, DOC Central Office HR and DOC's personnel officer, discussed the appropriate discipline. The executive team reached consensus that termination was the appropriate penalty.

The DOC concluded that Tripp engaged in an argument with Boyer and that he presented a gun and waved it in air during this argument. His actions resulted in serious criminal charges. The DOC noted that it has the responsibility of protecting the public. The DOC determined that off-duty conduct such as the conduct that Tripp engaged in erodes the mission and the public trust in the DOC as an organization. It determined Tripp's actions were serious enough to warrant termination.

The executive team also reviewed Tripp's prior disciplines. The DOC had progressively disciplined Tripp on three prior occasions for the same or similar type of conduct, arrests for off-duty misconduct. Tripp was given multiple opportunities to correct his behavior. Tripp continued to engage in similar off-duty misconduct. The seriousness of his off-duty misconduct had escalated. Unlike his prior arrests, this incident involved a firearm. The DOC ultimately determined that it could not trust a CO to perform his duties and carry out the mission and philosophy of the DOC after he had engaged in misconduct that included presenting and waving a gun around during an argument with a member of the public. The DOC determined it could not justify the risk of keeping Tripp as a CO, and concluded it had no other option but to terminate Tripp's employment.

ISP conducted a *Loudermill* interview with Tripp on February 2, 2021. ISP security director Doug Bolton conducted the interview. Tripp's attorney was present for the interview. Tripp was given an opportunity to provide any additional facts or mitigating circumstances before the institution terminated his employment. Tripp stated he thought the charges would be dismissed. Tripp

indicated he had spoken to Boyer several times after the incident, stated they both thought the incident got blown out of proportion and that Boyer was going to speak to the arresting officer.

Tripp indicated Rhodes was not even present to witness his interaction with Boyer, that he was at his garage which is about 100 yards from the where he was standing with Boyer. Tripp reiterated that he purposely left his gun on his UTV, and purposely parked it far away from Boyer's truck. Tripp indicated the fence was between him and Boyer, but he walked to the back of Boyer's truck as they were talking. Tripp stated he had been with DOC for 27 years in various roles, and reiterated that he could continue to be an asset to the institution.

Following the *Loudermill* interview, the DOC decided to proceed with termination. Tripp was terminated on February 2, 2021. The factual basis for the termination contained in the letter stated: "An investigatory interview was held with you on January 12, 2021, regarding your arrest on December 19, 2020, for disorderly conduct and aggravated assault." The letter recited the work rules previously described above. Testimony received at hearing reiterated that Tripp's discipline was based on his violation of DOC policies and work rules, not for violation of laws that were still pending disposition. The termination letter also contained Tripp's disciplinary history, referencing the written reprimand, one-day suspension and three-day suspension Tripp received following prior off-duty misconduct.

1.8 Additional Information and Credibility Determination

At issue in this case is whether Tripp presented a weapon and waved it around during his altercation with Boyer. Based on the consistency of the stories throughout the police report, the written statements, and the testimony of Officer Wheatley, Boyer, Rhodes, and Tripp, I find that Boyer's version of the altercation is more credible than Tripp's version of the altercation.

Boyer and Rhodes both claim that Tripp had a weapon with him. Rhodes heard Tripp tell Boyer he put the weapon down and wanted to fight. Boyer consistently stated that Tripp presented a weapon and waved it around before tossing it on the UTV. Boyer also maintained that Tripp never pointed the gun at him and never threatened to shoot him.

Rhodes said he heard Tripp yelling and could clearly hear Tripp "threatening to do harm" to Boyer. Rhodes then started running toward the altercation and heard Tripp tell Boyer that "he put it [the gun] down on the seat and for [Boyer] to put his bow down and let's go at it." When Rhodes got to Boyer and Tripp had left, Boyer told Rhodes that Tripp did grab his gun, but had not pointed it at him. Boyer's account was similar to Rhodes. He said that Tripp was "screaming and not making a lot of sense when he reached to his right hip where he had an unconcealed firearm holstered on his hip." Boyer said Tripp "appeared to be intoxicated and very distraught as he drew his firearm and continued yelling and waving the firearm," which Boyer described as a black and grey/silver handgun. He then said Tripp tossed the gun onto the seat of his UTV and tried to get Boyer to fight him.

Tripp, however, maintained that Boyer was the aggressor. Tripp testified that he understood Boyer was upset because he thought Tripp purposely interfered with his deer hunt, and that is why Tripp purposely parked his UTV about 30 yards from Boyer's truck and left his gun on the seat of the UTV. When talking to Boyer, Tripp stated he was standing around the corner of the fence, but he never stepped on Rhodes' property and he was not close to his UTV where the gun was located.

Boyer and Tripp both testified that they had a conversation after the incident on January 26, 2021. Boyer said that Tripp apologized, but also asked Boyer to help him. Boyer maintains that Tripp asked him to call the DOC and state it was a misunderstanding. Boyer indicated he was not comfortable doing that. Boyer stated the firearm being involved was too much for him not to report, and could not now state it was a misunderstanding. Boyer agreed to call ISP, with the intention of explaining that he has known Tripp a long time and seen the good in him. Boyer wanted to express his hope that Tripp get the help he needs, and that ultimately, he did not want to see Tripp lose everything over the incident. Boyer called ISP at a phone number Tripp provided, left a voicemail identifying himself and that he was calling about Tripp, but never received a call back. He never recanted or expressed an intent to recant any part of his statement.

Tripp testified that Boyer never indicated he was dishonest with law enforcement, but that he would call the institution because he did not want to see Tripp terminated. Boyer never told Tripp he would recant his statement but that he would go out of his way to get the charges dropped. Tripp disagrees with

Boyer's contention about his handling of the gun. He did not have any explanation why Boyer may fabricate that part of the encounter.

Tripp testified he did not have the gun that is described because that gun is in possession of the county sheriff after his prior arrest. Tripp contends he was completely sober, had not drank that day and was not drinking when the officers arrived at his home. Tripp also testified that he told Officer Wheatley he took his gun and left it on the seat of his UTV.

Tripp denied attempting to use his position to gain advantage or privilege in the situation. He testified he likely mentioned to Officer Wheatley that he knew Tripp worked at the prison, but not in an attempt to get privilege or advantage.

Based on the information, I find Boyer's account of the incident more plausible. Boyer was consistent in his statements. Rhodes corroborated Boyer's account of the altercation. The record contains no motive for Boyer to fabricate the incident. Alternately, Tripp has a motive to omit pieces of the altercation. Both Boyer and the officer that went to Tripp's home after the incident indicated that Tripp appeared to be intoxicated. As such, Tripp's recollection of the events would not be as clear as the other witnesses. I find it more credible that Tripp did have a gun that he presented and waved around before placing it on his UTV.

2. Summary of Arguments and Issue Presented

The issue in this case is whether the DOC has just cause to terminate Tripp's employment. The specific aspects of just cause in contention in this appeal are whether the DOC had sufficient evidence of the alleged work rule violations and, if a violation was shown, whether progressive discipline should have been utilized.

Tripp denies engaging in conduct that could constitute aggravated assault and disorderly conduct. He has only been charged, not convicted, of the alleged acts, and thus Tripp argues the DOC does not have sufficient evidence that he violated the cited work rules. Tripp also argues DOC's credibility determinations are unsupported. Boyer is the only individual who claims Tripp waved a gun, an assertion Tripp has consistently denied. Tripp further claims Rhodes corroborates Tripp's assertion that his gun was on the seat because Rhodes stated Tripp said it during his encounter with Boyer.

The DOC maintains that the arresting officer's report showed that Tripp engaged in off-duty misconduct that culminated in his arrest. Furthermore, while the DOC skipped one step of progression, it maintains Tripp has been given multiple opportunities to correct his off-duty conduct that led to the other three disciplinary actions, all of which involved arrests. Termination was appropriate because Tripp failed to correct his off-duty conduct and engaged in even more serious behavior that again led to an arrest. The DOC contends it cannot continue to employ a correctional officer who has repeatedly been arrested on criminal charges, failed to correct his behavior, and engaged in even more serious misconduct, and argues termination was the appropriate penalty.

3. Conclusion of Law and Analysis

Tripp 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.

3.1 Evidence of Misconduct

Tripp's core argument in this appeal is that the DOC lacked sufficient proof to conclude he committed aggravated assault, disorderly conduct, or that he used his position as a CO to secure privilege or advantage. Tripp maintains he did not have his gun on him as alleged, and highlights he has not been convicted of the charged crimes.

As an initial matter, Tripp was disciplined for violating DOC policies and work rules, not for violating a law. As such, the status of the criminal charges or lack of a criminal conviction for the alleged conduct is irrelevant to the undersigned's decision. The DOC disciplined Tripp for presenting and waving a gun during a verbal argument with a member of the public in violation of DOC work rules cited in the termination letter. Thus, the relevant inquiry is whether the DOC had sufficient evidence to conclude he engaged in that conduct.

PERB examines the totality of the evidence to determine if the employer had sufficient proof of the alleged misconduct. In prior cases, PERB has found the proof of misconduct of a criminal nature should be clear and convincing. *Eaves and State of Iowa (Dep't of Corrections)*, 03-MA-04, at 15-16. Upon review of the information available to the DOC during its investigation, I conclude sufficient evidence existed, even under the higher standard of proof, to conclude Tripp presented and waved his gun during a verbal altercation with a member of the public.

The record reveals no credibility issues with Boyer, the reporting party. While Tripp claims Boyer was the "aggressor," he only bases this on the undisputed claim

Boyer was upset with Tripp and told him they can talk now, as opposed to after dark, which Tripp had initially proposed. Boyer believed Tripp intentionally interfered with his hunt. He let Tripp know he was upset as soon as he called him on the phone. They both agreed that the topic changed from the hunt to prior issues and personal jabs, which escalated their verbal altercation. Tripp essentially agrees with Boyer on all aspects of the encounter, except for the moment when Boyer claims Tripp presented and waved a gun before he threw it on the seat of his UTV. There is no apparent explanation as to why Boyer would fabricate a material fact. Tripp could not provide any motive for Boyer to falsely claim that Tripp presented a gun.

Boyer's description of the incident is partly corroborated by Rhodes. While Rhodes did not see Tripp holding a gun, he indicated Tripp was telling Boyer he placed the gun on the seat as he kept challenging him to a fight. The statement could certainly be interpreted that Tripp was merely stating to Boyer that the gun was not on him, as Tripp claims he placed the gun on the UTV seat before Boyer came out of the field. However, if the gun was nowhere near Tripp, as Tripp claims it was 30 yards away, it does not seem consistent or necessary for him to mention a weapon that is not even in his proximity. More importantly, Rhodes heard this statement as he ran to the location where Boyer was standing. Rhodes observed Boyer's shaken demeanor. Boyer immediately told Rhodes that Tripp had pulled a gun out. The immediacy of Boyer's assertion about a gun being presented tends to show that Boyer did not have time to concoct a false claim, but was instead

describing what had occurred just moments prior. The evidence presented lacks evidence that even suggests the reporting party is mistaken or dishonest.

For those reasons, the DOC's conclusion that Tripp presented and waved a gun during a verbal altercation is supported by sufficient evidence.

The other conduct underlying Tripp's discipline is that he used his position to secure privilege or advantage. The evidence is sufficient to support this violation.

Tripp acknowledged mentioning that he worked at the prison, but denied he did so in an effort to secure privilege or advantage. Upon review of the field report, the arresting officer noted the specific statements and names Tripp mentioned during his arrest. No evidence was presented to even suggest the arresting officer's report regarding Tripp's statements are inaccurate or false. As such, the field report is sufficiently credible evidence under this record.

Tripp's mention of specific public officials in power, such as a judge, sheriff and deputy, while inappropriate and unprofessional, cannot be said to be an attempt to use his position as a CO to secure privilege or advantage. On this record, his job at ISP is unrelated to his claimed connection to the named individuals. However, the arresting officer also noted Tripp stated he is in law enforcement and that they are "on the same team." This is directly tied to his position as a CO, and is plainly an attempt to avoid arrest, which is in violation of DOC work rules.

3.2 Penalty

Management may discipline employees for off-duty conduct if there is a nexus between the conduct and the employer's legitimate business interests, or a "workplace nexus." Elkouri & Elkouri, *How Arbitration Works* 15-11 (7th ed.

2012); Norman Brand, *Discipline and Discharge in Arbitration* 304 (1998). Workplace nexus can be established if the employer can show the off-duty misconduct harms the employer's business and adversely affects the employee's ability to perform his or her job. Norman Brand, *Discipline and Discharge in Arbitration* 304-05 (1998). Certain employees in the public sector are held to a higher standard of conduct in light of public employer's interest in maintaining the public trust. The occupation of the employee may reinforce the nexus if a link can be shown between the employee's job duties and obligations and the content of the misconduct. *In re West Monona Cmty. Sch. Dist.*, 1989 WL 1747654 (June 13, 1989) at 8. Elkouri & Elkouri, *How Arbitration Works* 15-17 (7th ed. 2012).

In this case, the DOC has established a workplace nexus. The DOC is charged with protecting the public and maintaining safety. Tripp's position, a correctional officer, is integral to that mission. As such, when the established violation involves presenting and waving a gun during a verbal altercation with a member of the public, the DOC has an interest in disciplining employees for such behavior.

The DOC has further established that progressive discipline was inapplicable in this case given the seriousness of the violation and Tripp's prior disciplinary history.

Progressive discipline is a system where measures of increasing severity are applied to repeated offenses until the behavior is corrected or it becomes clear that it cannot be corrected. *E.g., Kelley and State of Iowa (Dep't of Corr.)*,

19 ALJ 102154 at 20 (internal citations omitted). The purpose of progressive discipline 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. *Id.* However, progressive discipline may be inapplicable when the conduct underlying the discipline was a serious offense. *Phillips*, 12-MA-05 at App. 16-17.

Tripp has been disciplined on three prior occasions for off-duty misconduct. He was on notice that further off-duty misconduct may result in termination. Tripp had been given multiple opportunities to correct his behavior. However, the most recent off-duty misconduct was even more serious than prior ones as it now involved the use of a firearm. Additionally, Tripp also attempted to use his position with ISP to avoid arrest. As such, given that the off-duty misconduct became more serious and involved additional rule violations, the DOC was justified in skipping steps of progressive discipline from a three-day suspension to termination in this instance.

For the reasons discussed, I find the State proved termination was an appropriate penalty.

3.3 Conclusion

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

ORDER

The state employee disciplinary action appeal filed by Larry Tripp, Jr., is hereby DISMISSED.

The cost of reporting and of the agency-requested transcript in the amount of \$870.80 are assessed against Appellant Larry Tripp, Jr., 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 Tripp’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 September, 2022.

/s/ Jasmina Sarajlija
Administrative Law Judge

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